THE INDIAN DECISIONS, NEW SERIES.

CALCUTTA, Vol. IX.

THE

INDIAN DECISIONS

(NEW SERIES)

Being a re-print of all the Decisions of the Privy Council on appeals from India and of the various High Courts and other Superior Courts in India reported both in the official and non-official reports from 1875

EDITED BY

THE LAWYER'S COMPANION OFFICE

TRICHINOPOLY AND MADRAS

CALCUTTA, VOL. IX

(1891—1892)

I.L.R., 18 and 19 CALCUTTA

PUBLISHED BY

T. A. VENKASAWMY ROW

AND

T. S. KRISHNASAWMY ROW

Proprietors, The Law Printing House and The Lawyer's Companion Office, Trichinopoly and Madras

1914

[*Copyright Registered.*]

SB
450.70
In282
v.9

PRINTED AT
THE LAW PRINTING HOUSE
MOUNT ROAD, MADRAS.

JUDGES OF THE HIGH COURT OF CALCUTTA DURING 1891-1892.

Chief Justice:

HON'BLE SIR W. COMER PETHERAM, KT.

Puisne Judges:

HON'BLE H. T. PRINSEP.
,, A. WILSON.
,, L. R. TOTTENHAM.
,, J. F. NORRIS.
,, J. Q. PIGOT.
,, J. O'KINEALY.
,, W. MACPHERSON.
,, E. J. TREVELYAN.
,, C. M. GHOSE.
,, H. BEVERLEY.
,, G. D. BANERJI.
,, AMEER ALI, C.I.E.
,, C. H. HILL (*offg.*).
,, R. F. RAMPINI (*offg.*).

Advocate-General:

HON'BLE SIR CHARLES PAUL, K.C.I.E.
,, J. T. WOODROFFE (*offg.*).

Standing Counsel:

MR. A. PHILLIPS.
MR. L. PUGH (*offg.*).

REFERENCE TABLE FOR FINDING THE PAGES OF THIS VOLUME WHERE THE CASES FROM THE ORIGINAL VOLUMES MAY BE FOUND.

Indian Law Reports, Calcutta Series, Vol. XVIII.

Pages of 18 Cal.		Pages of this volume.	Pages of 18 Cal.		Pages of this volume.
1 (P.C.)	...	1	234 ...	...	157
10 (P.C.)	...	7	242 ...	...	161
23 (P.C.)	...	16	247 ...	...	165
31 ...	...	21	252 ...	...	168
39 ...	...	27	255 ...	...	170
43 ...	...	29	259 ...	...	173
45 ...	...	31	264 ...	...	176
49 ...	...	33	271 ...	...	181
69 ...	...	47	290 ...	...	193
75 ...	...	51	296 ...	...	197
80 ...	...	54	302 (P.C.)	...	201
83 ...	...	56	311 (P.C.)	...	207
86 ...	...	58	316 ...	...	210
91 ...	...	61	320 ...	...	213
99 (P.C.)	...	67	322 ...	...	215
108 (P.C.)	...	72	324 ...	...	216
111 (P.C.)	...	74	327 ...	...	219
121 ...	...	81	333 ...	...	223
125 ...	...	84	341 (P.C.)	...	228
129 ...	...	87	349 (P.C.)	...	233
133 ...	...	89	360 (F.B.)	...	240
139 ...	...	93	363 (F.B.)	...	242
144 ...	...	96	368 (F.B.)	...	246
146 ...	...	98	372 ...	...	249
151 (P.C.)	...	101	378 ...	...	253
157 (P.C.)	...	105	382 ...	...	256
164 (P.C.)	...	110	385 ...	...	258
182 ...	...	122	399 ...	...	267
186 ...	...	125	414 (P.C.)	...	276
188 ...	...	126	420 (F.B.)	...	280
199 ...	...	133	422 (F.B.)	...	282
201 (P.C.)	...	134	427 ...	...	285
216 (P.C.)	...	144	443 ...	...	295
224 (P.C.)	...	150	445 ...	...	296
231 ...	...	154	448 (P.C.)	...	299

I L. R., CALCUTTA SERIES, Vol. XVIII—(*Concluded*).

Pages of 18 Cal.	Pages of this volume	Pages of 18 Cal.	Pages of this volume
462 ...	... 308	534 ...	... 357
467 ...	... 311	539 ...	... 360
469 ..	... 313	540 (P.C.)	... 361
473 ...	... 315	545 (P.C)	... 364
477 ...	... 318	549 ...	... 367
481 ...	... 321	556 (F.B.)	... 372
484 (F.B.)	... 323	573 (P.C.)	... 383
496 ...	... 331	616 (P.C.)	... 410
500 ...	... 333	620 (P.C.)	... 413
506 ...	... 337	631 ...	... 421
507 ...	... 339	635 ...	... 423
510 ...	... 341	639 ...	... 426
515 ...	... 344	642 ...	... 428
518 ...	... 346	647 ...	... 432
520 ...	... 347	652 ...	... 435
526 ...	... 352	667 ...	... 444

Indian Law Reports, Calcutta Series, Vol. XIX.

Pages of 19 Cal.	Pages of this volume	Pages of 19 Cal.	Pages of this volume
1 (F.B.)	... 447	139 (F.B.)	... 538
4 ...	... 449	146 ...	... 543
8 ...	... 452	159 (P.C.)	... 552
13 ...	... 455	174 (P.C.)	... 561
17 ...	... 457	182 (F.B.)	... 567
19 ...	... 459	190 ...	... 572
23-N.	... 461	192 ...	... 574
26 ...	... 464	195-N.	... 575
35 ...	... 470	198-N.	... 577
48 ...	... 478	199 ...	... 578
52 ...	.. 481	201 ...	... 579
65 (P.C.)	... 489	203 ...	... 581
79 ...	... 498	223 (P.C.)	... 594
84 ...	... 502	236 (P.C.)	... 603
91 ...	... 507	242 (P.C.)	... 607
105 ...	... 516	249 (P.C.)	... 611
113 ...	... 521	253 (P.C.)	... 614
123 (P.C.)	... 527	267 ...	... 623
127 ...	... 530	272 ...	... 627
132 (F.B.)	... 534	275 ...	... 629

I. L. R., CALCUTTA SERIES, VOL. XIX—(*Concluded*).

Pages of 19 Cal.	Pages of this volume.	Pages of 19 Cal.	Pages of this volume.
286 ...	... 636	584 (P.C.)	... 832
289 (F.B.)	... 638	593 ...	... 838
301 ...	... 646	605 ...	... 846
312 (P.C.)	... 653	610 ...	... 849
322 (P.C.)	... 660	615 ...	... 852
334 ...	... 667	618 (P.C.)	... 854
336 ...	... 668	623 (F.B.)	... 858
341 ...	... 672	627 ...	... 860
345 ...	... 675	629 ...	... 862
355 ...	... 681	634 ...	... 865
358 ...	... 683	641 ...	... 870
361-N.	... 685	643 ...	... 871
368 ...	... 689	646 ...	... 873
372 ...	... 692	651 ...	... 877
380 ...	... 698	656 ...	... 880
392 (F.B.)	... 706	660 (P.C.)	... 883
401 ...	... 712	678 (P.C.)	... 894
412 ...	... 719	683 (P.C.)	... 898
438 (P.C.)	... 736	689 (P.C.)	... 902
444 (P.C.)	... 740	699 ...	... 908
452 (P.C.)	... 746	703 ...	... 911
463 (F.B.)	... 753	730 ...	... 929
469 ...	... 757	735 ...	... 932
482 ...	... 765	742 ...	... 936
485 ...	... 767	747 ...	... 940
487 ...	... 769	750 ...	... 942
489 ...	... 770	755 ...	... 945
499 ...	... 777	760 ...	... 948
504 ...	... 780	765 ...	... 952
507 (P.C.)	... 782	774 ...	... 958
513 (P.C.)	... 786	776 ...	... 960
538 ...	... 802	780 ...	... 962
541 ...	... 804	783 ...	... 965
544 (F.B.)	... 806	787 ...	... 968
572 ...	... 824	790 ...	... 970
582 ...	... 830		

Other Reports.

Law Reports, Indian Appeals, Vol. XVII.

Pages of the Reports.	Pages of this volume.
82 ...	... 1
90 ...	... 67
110 ...	... 7
122 ...	... 16
128 ...	... 101
145 ...	... 150
159 ...	... 134
173 ...	... 74
181 ...	... 144
194 ...	... 105
201 ...	... 110

Law Reports, Indian Appeals, Vol. XVIII.

Pages of the Reports.	Pages of this volume.
1 ...	... 207
9 ...	... 228
27 ...	... 233
59 ...	... 299
73 ...	... 276
78 ...	... 383
121 ...	... 413
132 ...	... 489
144 ...	... 364
158 ...	... 527
165 ...	... 552

Law Report, Indian Appeals, Vol. XIX.

Pages of the Reports.	Pages of this volume.
1 ...	... 611
15 ...	... 594
24 ...	... 607
30 ...	... 603
33 ...	... 561
48 ...	... 614
60 ...	... 660
69 ...	... 653
75 ...	... 854
79 ...	... 736
83 ...	... 740
90 ...	... 782
95 ...	... 832
101 ...	... 746
108 ...	... 786

Law Reports, Indian Appeals, Vol. XIX—*(Concluded)*.

Pages of the Reports.	Pages of this volume.
135 ...	... 894
140 ...	... 883
157 ...	... 902
166 ...	... 898

Rafique and Jackson's P.C. Decisions.

120 ...	... 74
121 ...	... 105
122 ...	... 144
123 ...	... 364
124 ...	... 561
125 ...	... 552
126 ...	... 740

Punjab Record, 1891.

70 ...	... 276

Sarasvatis' P. C. Judgments, Vol. V.

507 ...	... 110
529 ...	... 1
535 ...	... 7
560 ...	... 16
564 ...	... 67
582 ...	... 72
586 ...	... 105
590 ...	... 74
596 ...	... 101
607 ...	... 134
619 ...	... 144
628 ...	... 150
632 ...	... 201
642 ...	... 207
651 ...	... 383
676 ...	... 228
681 ...	... 233

Saraswatis' P. C. Judgments, Vol. VI.

16 ...	... 361
19 ...	... 299
26 ...	... 276
40 ...	... 413

OTHER REPORTS—(*Concluded*).

Pages of the Reports.	Pages of this volume.	Pages of the Reports.	Pages of this volume.
Saraswatis' P. C. Judgments, Vol. VI —(*Continued*).		**Saraswatis' P. C. Judgments, Vol. VI —(*Concluded*).**	
46 ...	... 364	189 ...	... 854
49 ...	... 410	192 ...	... 832
66 ...	... 489	202 ...	... 894
80 ...	... 552	209 ...	... 898
88 ...	... 603	213 ...	... 902
91 ...	... 527	**Indian Jurist, Vol. XV.**	
93 ...	... 561		
98 ...	... 594	34 ...	... 207
109 ...	... 607	93 ...	... 228
113 ...	... 653	153 ...	... 233
119 ...	... 611	155 ...	... 299
133 ...	... 614	284 ...	... 276
140 ...	... 883	403 ...	... 413
150 ...	... 786	471 ...	... 489
164 ...	... 660	472 ...	... 410
171 ...	... 746	542 ...	... 413
177 ...	... 736	617 ...	... 489
180 ...	... 740	749 ...	... 552
185 ...	... 782	750 ...	... 594

INDIAN DECISIONS, NEW SERIES.

CALCUTTA—Vol. IX.

NAMES OF CASES FOUND IN THIS VOLUME.

PAGE

A

Abhai Charan Jana v. Mangal Jana, 19 C 634 ... 865
Aga Ahmed Ispahari v. Judith Emma Crisp, 19 C 242 (P C) = 19 I A 24 = 6 Sar P C J 109 ... 607
Ananda Chandra Bhattacharjee v. Carr Stephen, 19 C 127 ... 530
Ashutosh Banerjee v. Lukhimoni Debya, 19 C 139 ... 538

B

Badal Aurat v. Queen-Empress, 19 C 79 ... 498
Bagal Chunder Mookerjee v. Rameshur Mundul, 18 C 496 ... 331
Baij Nath Singh v. Sukhu Mahton, 18 C 534 ... 357
—— —— Tewari v. Sheo Sahoy Bhagut, 18 C 556 (F B) ... 372
Bamasundari Debi v. Tarasundari Debi, 19 C 65 (P C) = 18 I A 132 = 15 Ind Jur 471 and 617 = 6 Sar P C J 66 ... 489
Behari Lal v. Madho Lal Ahir Gayamal, 19 C 236 (P C) = 19 I A 30 = 6 Sar P C J 88. 603
Behary Lall Pundit v. Kedarnath Mullick, 18 C 469 ... 313
Bepin Behary Chowdhry v. Annoprosad Mullick, 18 C 324 ... 216
Bhoopendro Narain Dutt v. Baroda Prasad Roy Chowdhry, 18 C 500 ... 333
Bidhu Mukhi Dabi v. Bhugwan Chunder Roy Chowdhry, 19 C 643 ... 871
Bireswar Mukerji v. Ardha Chander Roy, 19 C 452 (P C) = 19 I A 101 = 6 Sar P C J 171 746
Bishambar Nath v. Imdad Ali Khan, 18 C 216 (P C) = 17 I A 181 = 5 Sar P C J 619 = Rafique and Jackson's P C No. 122 ... 144
Bolai Chand Ghosal v. Samiruddin Mandal, 19 C 646 ... 873
Brojolall Sen v. Mohendro Nath Sen, 18 C 199 ... 133
Brojo Nath Surma v. Isswar Chundra Dutt, 19 C 482 ... 765
Budha Mal v. Bhawan Das, 18 C 302 (P C) = 5 Sar P C J 632 ... 201
Bunko Behary Gangopadhya v. Nil Madhab Chuttopadhya, 18 C 635 ... 423

C

Chandrabati Koeri v. Harrington, 18 C 349 (P C) = 18 I A 27 = 15 Ind Jur 153 = 5 Sar P C J 686 ... 233
Charu Chunder Pal v. Modu Sunderi Dasi, 18 C 327 ... 219
Chatter Lal v. Thacoor Pershad, 18 C 518 ... 346
Chintamoni Dutt v. Rash Behari Mondul, 19 C 17 ... 457
Chogemul v. Commissioners for the Improvement of the Port of Calcutta, 18 C 427 ... 285
Chowdhry Raghunath Sarun Singh v. Dhodha Roy, 18 C 467 ... 311
Cohen v. Nursing Dass Addy, 19 C 201 ... 579

D

Dakhina Churn Chattopadhya v. Bilash Chander Roy, 18 C 526 ... 352
Debendro Kumar Bundopadhya v. Bhupendro Narain Dutt, 19 C 182 (F B) ... 567
Dhunput Singh v. Saraswati Misrain, 19 C 267 ... 623
Din Doyal Singh v. Gopal Sarun Narain Singh, 18 C 506 ... 337
Dinobhundu Roy v. W. C. Bonerjee, 19 C 774 ... 958

PAGE

Dulhin Golab Koer v. Radha Dulari Koer, 19 C 463 (F B) ... 753
Duncan Brothers & Co. v. Jeetmul Greedharee Lall, 19 C 372 ... 692
Durga Chowdhrani v. Jewahir Singh Chowdhri, 18 C 23 (P C) = 17 I A 122 = 5 Sar P C J 560 ... 16
——— Prasad Bundopadhya v. Brindabun Roy, 19 C 504 ... 780
Durgaram Marwari v. Rajkishore Deo, 18 C 133 ... 89
Dwarka Nath Dass v. Banku Behari Bose, 19 C 651 ... 877
——— Gupto v. Corporation of Calcutta, 18 C 91 ... 61

E

Election of Municipal Commissioners for Ward No. 10, Calcutta, *In the matter of*, 19 C. 198-N ... 577

F

Fadu Jhala v. Gour Mohun Jhala, 19 C 544 (F B) ... 805
Fazl Karim v. Maula Baksh, 18 C 448 (P C) = 18 I A 59 = 15 Ind Jur 155 = 6 Sar P C J 19 ... 299
Ferasat v. Queen-Empress, 19 C 105 ... 516

G

Ganges Steam Tug Company, Ld., *In the matter of the*, 18 C 31 ... 12
Gobardhan Dass v. Jasadamoni Dassi, 18 C 252 ... 168
Gobind Chandra Seal v. Queen-Empress, 19 C. 355 ... 681
Goghun Mollah v. Rameshur Narain Mahta, 18 C 271 ... 181
Golam Abbas v. Mahomed Jafer, 19 C 23-N ... 461
Gomes v. Gomes, 18 C 443 ... 295
Gopi Mohun Roy v. Doybaki Nundun Sen, 19 C 13 ... 455
Gossain Dalmar Puri v. Bepin Behary Mitter, 18 C 520 ... 347
Gudri Koer v. Bhubaneswari Coomar Singh, 19 C 19 ... 495
Gunga Pershad v. Jawahir Singh, 19 C 4 ... 449

H

Hafez Mahomed Ali Khan v. Damodar Pramanick, 18 C 242 ... 161
Haidar Ali v. Tasadduk Rasul Khan, 18 C 1 (P C) = 17 I A 82 = 5 Sar P C J 529 ... 1
Haladhar Shaha v. Rhidoy Sundri, 19 C 593 ... 838
Hanuman Kamat v. Hanuman Mandur, 19 C 123 (P C) = 18 I A 158 = 6 Sar P C J 91 527
Haripria Debi v. Ram Churn Myti, 19 C 541 ... 804
Harripria Debi v. Rukmini Debi, 19 C 438 (P C) = 19 I A 79 = 6 Sar P C J 177 ... 736
Hassan Ali v. Chatterput Singh Dugarh, 19 C 742 ... 936
Hiraman De v. Ram Kumar Ain, 18 C 186 ... 125
Hunter v. Hunter, 18 C 539 ... 360
Huri Dass Kundu v. MacGregor, 18 C 477 ... 318
Hurro Nath Rai Chowdhri v. Randhir Singh, 18 C 311 (P C) = 18 I A 1 = 15 Ind Jur 34 = 5 Sar P C J 642 ... 207
——— Doyal Roy Chowdhry v. Mahomed Gazi Chowdhry, 19 C 699 ... 908
Hurry Behari Bhalat v. Pargun Ahir, 19 C 656 ... 880

I

Indur Chunder Singh v. Radhakishore Ghose, 19 C 507 (P C) = 19 I A 90 = 6 Sar P C J 185 ... 782
Irrawaddy Flotilla Company, The v. Bhagwan Das, 18 C 620 (P C) = 18 I A 121 = 15 Ind Jur 403 and 542 = 6 Sar P C J 40 ... 413
Ismail Solomon Bhamji v. Mahomed Khan, 18 C 296 ... 197

J

Jagan Nath Das v. Bir Bhadra Das, 19 C 776 ... 960
——— Gorai v. Watson & Co., 19 C 341 ... 672

PAGE

Jagatjit Singh v. Sarabjit Singh, 19 C 159 (P C)=18 I A 165=15 Ind Jur 749=6 Sar P C J 80=Rafique and Jackson's P C No. 125 ... 552
Jamuna Parshad v. Ganga Parshad Singh, 19 C 401 ... 712
Jarao Kumari v. Lalonmoni, 18 C 224 (P C)=17 I A 145=5 Sar P C J 628 ... 150
Jasoda Deye v. Kirtibash Das, 18 C 639 ... 426
Jibanti Nath Khan v. Gokool Chunder Chowdry, 19 C 760 ... 948
Jogendro Bhupati Hurrochandra Mahapatra v. Nityanand Man Singh, 18 C 151 (P C)=17 I A 128=5 Sar P C J 596 ... 101
Jogindro Nath v. Sarut Sundari Debi, 18 C 322 ... 215
Jogir Ahir v. Bishen Dayal Singh, 18 C 83 ... 56
Jukni *alias* Parbati v. Queen-Empress, 19 C 627 ... 860

K

Kabilaso Koer v. Raghu Nath Saran Singh, 18 C 481 ... 321
Kachali Hari v. Queen-Empress, 18 C 129 ... 87
Kalachand Kyal v. Shib Chunder Roy, 19 C 392 (F B) ... 706
Kali Kishore Dutt Gupta Mozumdar v. Bhusan Chander, 18 C 201 (P C)=17 I A 159=5 Sar P C J 607 ... 134
Kanchan Modi v. Baij Nath Girgh, 19 C 336 ... 668
Kanti Chunder Pal Chowdhry v. Kissory Mohun Roy, 19 C 361-N ... 685
Karamuddin Hosain v. Niamut Fatehma, 19 C 199 ... 578
Kartick Chunder Ghuttuck v. Saroda Sunduri Debi, 18 C 642 ... 428
Kashi Chundra Deb v. Gopi Krishna Deb, 19 C 48 ... 478
Kazem Ali v. Azim Ali Khan, 18 C 382 ... 256
Khantomoni Dasi v. Bijoy Chand Mahatab Bahadur, 19 C 787 ... 968
Khoo Kwat Siew v. Wooi Taik Hwat, 19 C 223 (P C)=19 I A 15=15 Ind Jur 750=6 Sar P C J 98 ... 594
Kirpal Narain Tewari v. Sukermoni, 19 C 91 ... 507
Kishen Pershad Panday v. Tiluckdhari Lall, 18 C 182 ... 122
Kishory Mohun Roy v. Mahomed Mujaffar Hossein, 18 C 188 .. 126
Kristo Churn Dass v. Radha Churn Kur, 19 C 750 ... 942

L

Lachmeswar Singh v. Manohar Hossain, 19 C 253 (P C)=19 I A 48=6 Sar P C J 133 ... 614
Lala Muddun Gopal Lal v. Khikhinda Koer, 18 C 341 (P C)=18 I A 9=15 Ind Jur 93=5 Sar P C J 676 ... 228
Lalchand v. Queen-Empress, 18 C 549 ... 367
Lalessor Babui v. Janki Bibi, 19 C 615 ... 852
Land Mortgage Bank v. Sudurudeen Ahmed, 19 C 358 ... 683
Ledlie v. Ledlie, 18 C 473 ... 315
Luchmeswar Singh v. Chairman of the Darbhanga Municipality, 18 C 99 (P C)=17 I A 90=5 Sar P C J 564 ... 67
Lukhun Chunder Ash v. Khoda Buksh Mondul, 19 C 272 ... 627

M

Mackenzie v. Haji Syed Mahomed Ali Khan, 19 C 1 (F B) ... 447
Madan Mohun Biswas v. Queen-Empress, 19 C 572 ... 824
Madho Pershad v. Mehrban Singh, 18 C 157 (P C)=17 I A 194=5 Sar P C J 586=Rafique and Jackson's P C No 121 ... 105
Mahamed Arif v. Saraswati Debya, 18 C 259 ... 173
Mahabir Pershad v. Radha Pershad Singh, 18 C 540 (P C)=6 Sar P C J 16 ... 361
———————— Singh v. Hurrihur Pershad Narain Singh, 19 C 626 ... 862
Mahomed Abbas Mondul v. Brojo Sundari Debia, 18 C 360 (F B) ... 240
Makhan Lall Pal v. Bunku Behari Ghose, 19 C 623 (F B) ... 858

PAGE

Maseyk, E. v. Bhagabati Barmanya, 18 C 121 ... 81
Matangini Dasi v. Jogendro Chunder Mullick, 19 C 84 ... 502
Matungini Gupta v. Ram Rutton Roy, 19 C 289 (F B) ... 638
Meer Mahomed Israil Khan v. Sashti Churn Ghose, 19 C 412 ... 719
Miller, A. B. v. Budh Singh Dudhuria, 18 C 43 ... 29
——— v. National Bank of India, 19 C 246 ... 543
Mohima Chunder Biswas v. Tarini Sunker Ghose, 19 C 487 ... 769
Mondakini Dasi v. Adinath Dey, 18 C 69 ... 47
Monindra Nath Mookerjee v. Saraswati Dasi, 18 C 125 ... 84
Moti Sahu v. Chhatridas, 19 C 780 ... 962
Moung Tso Min v. Mah Htah, 19 C 469 ... 757
Mowla Newaz v. Sajidunnissa Bibi, 18 C 378 ... 253
Muhammad Newaz Khan v. Alam Khan, 18 C 414 (P C)=18 I A 73=15 Ind Jur 284=6 Sar P C J 26=70 P R 1891 ... 276
Mutia Chetti v. Subramaniam Chetti, 18 C 616 (P C)=15 Ind Jur 472=6 Sar P C J 49 ... 410
Mutty Lall Ghose, *In the matter of*, 19 C 192 ... 578

N

Nagendra Nath Mullick v. Mathura Mohun Pashi, 18 C 368 (F B) ... 246
Nam Narain Singh v. Raghu Nath Sahai, 19 C 678 (P C)=19 I A 135=6 Sar P C J 202 ... 894
Nana Kumar Roy v. Golam Chunder Dey, 18 C 422 (F B) ... 282
Natabar Parne v. Kubir Parne, 18 C 80 ... 54
Neckram Dobay v. Bank of Bengal, 19 C 322 (P C)=19 I A 60=6 Sar P C J 164 ... 660
Nistariny Dabya v. Brahmomoyi Dabya, 18 C 45 .. 31
Nityahari Roy v. Dunne, 18 C 652 ... 435
Nizam of Hyderabad v. Jacob, 19 C 52 ... 481
Norendronath Bose v. Abinash Chunder Roy, 18 C 445 ... 299
Norendro Nath Roy Chowdhry v. Srinath Sandel, 19 C 641 ... 870
Nur Ali Dubash v. Abdul Ali, 19 C 765 ... 952

O

Omrao Begum v. Secretary of State for India in Council, 19 C. 584 (P C)=19 I A 95 =6 Sar P C J 192 ... 832
Orr v. Narenda Nath Sen, 19 C 368 ... 689

P

Panchanan Banerji v. Raj Kumar Guha, 19 C 610 ... 849
Partab Bahadur Singh v. Chitpal Singh, 19 C 172 (P C)=19 I A 33=6 Sar P C J 93 =Rafique and Jackson's P C No. 124 ... 561
Peacock v. Baijnath, 18 C 573 (P C)=18 I A 78=5 Sar P C J 651 ... 383
Peari Mohun Mukerji v. Baroda Churn Chuckerbutti, 19 C 485 ... 767
Peary Mohun Aich v. Ananda Charan Biswas, 18 C 631 ... 421
——— Mookerjee v. Kumaris Chunder Sirkar, 19 C 790 ... 970
Pergash Lal v. Akhowri Balgobind Sahoy, 19 C 735 ... 932
Petu Ghorai v. Ram Khelawan Lal Bhakut, 18 C 667 ... 444
Piran v. Abdool Karim, 19 C 203 ... 581
Poona Lall v. Kanhaya Lall Bhaia Gyawal, 19 C 730 ... 929
Prem Sukh Chunder v. Indro Nath Banerjee, 18 C 420 (F B) ... 280
Preonath Karkar v. Surja Coomar Goswami, 19 C 26 ... 464
Prosunno Kumar Sanyal v. Kalidas Sanyal, 19 C 683 (P C)=19 I A 166=6 Sar P C J 209 ... 898
Protap Chandra Misser v. Brojo Nath Misser, 19 C 275 ... 629
Puran Chand v. Roy Radha Kishen, 19 C 132 (F B) ... 534

PAGE

Q

Queen-Empress v. Baburam Kansari, 19 C 190 ... 572
———— v. Haradhan, 19 C 380 ... 698
———— v. Hurree Mohun Mythee, 18 C 49 ... 33
———— v. A. M. Jacob, 19 C 113 ... 521
———— v. Jogendro Chunder Bose, 19 C 35 ... 470
———— v. Manirudddin Mundul, 18 C 75 ... 51
———— v. Nayamuddin, 18 C 484 (F B) ... 323
———— v. Trailakya Nath Baral, 18 C 39 ... 27

R

Radha Kishen Lall v. Radha Pershad Singh, 18 C 515 ... 344
——— Pershad Singh v. Torab Ali, 18 C 108 (P C) = 5 Sar P C J 582 ... 72
Rajendra Lall Mittra, *In the matter of*, 19 C 195-N ... 575
——— - Narain Bagchi v. Watson & Co., 18 C 510 ... 341
Raj Kumar Roy v. Gobind Chander Roy, 19 C 660 (P C) = 19 I A 140 = 6 Sar P C J 140 883
Rajnarain Mitra v. Ananta Lal Mondul, 19 C 703 ... 911
Ram Chunder Chuckerbutty v. Giridhur Dutt, 19 C 754 ... 945
—— Churn Singh v. Dhaturi Singh, 18 C 146 ... 98
—— Kumari, *In the matter of*, 18 C 264 ... 176
—— Narain Nursing Doss v. Ram Chunder Jankee Loll, 18 C 86 ... 58
Ramratan Sukal v. Nandu, 19 C 249 (P C) = 19 I A 1 = 6 Sar P C J 119 ... 611
Ran Bijai Bahadur Singh v. Jagatpal Singh, 18 C 111 (P C) = 17 I A 173 = 5 Sar P C. J 590 = Rafique and Jackson's P C No. 120 ... 74
Raniganj Coal Association, Ltd v. Judoonath Ghose, 19 C 489 ... 770
Rasamaya Dher Chowdhry v. Abul Fata Mahomed Ishak, 18 C 399 ... 267
Reference under Stamp Act I of 1879, S. 46, 19 C. 499 ... 777
Roghu Nath Pershad v. Harlal Sadhu, 18 C 320 ... 213
Romon Kissen Sett v. Hurrololl Set, 19 C 334 ... 667

S

Sahib Mirza v. Umda Khanum, 19 C 444 (P C) = 19 I A 83 = 6 Sar P C J 180 = Rafique and Jackson's P C No. 126 .. 740
Saroda Prosunno Pal v. Sham Lall Pal, 19 C 618 (P C) = 19 I A 75 = 6 Sar P C J ... 189 ... 854
Secretary of State for India in Council v. Fazal Ali, 18 C 234 ... 157
———— v. Budhu Nath Poddar, 19 C 538 ... 802
———— v. Dubijoy Singh, 19 C 312 (P C) = 19 I A ... 69 = 6 Sar P C J 113 ... 653
Sham Kuar v. Mohanunda Sahoy, 19 C 301 ... 646
Shashi Kumar Dey v. Shashi Kumar Dey, 19 C 345 ... 675
Shekaat Hosain v. Sasi Kar, 19 C 783 ... 965
Sheoraj Nandan Singh v. Gopal Suran Narain Singh, 18 C 290 ... 193
Sheo Sahay Panday v. Ram Rachia Roy, 18 C 333 ... 223
Shoshee Bhusan Bannerjee, *In the goods of*, 19 C 582 ... 830
Shooshee Bhusan Rudro v. Gobind Chunder Roy, 18 C 231 ... 154
Siva Pershad Maity v. Nundo Lallkar Mahapatra, 18 C 139 ... 93
Sriram Samanta v. Kalidas Dey, 18 C 316 ... 210
Surendra Nandan v. Sailaja Kant Das Mahapatra, 18 C 385 ... 258
Surendro Keshab Roy v. Doorgasoondary Dosee, 19 C 513 (P C) = 19 I A 108 = 6 Sar P C J 150 ... 786
——— Prosad Bhuttacharji v. Kedar Nath Bhuttacharji, 19 C 8 ... 452
Suresh Chunder Banerjee v. Ambica Churn Mookerjee, 18 C 507 ... 339
Surnomoyi Debia v. Grish Chander Moitra, 18 C 363 (F B) ... 242

PAGE

T

Thakur Magundeo v. Thakur Mahadeo Singh, 18 C 647 ... 432
Tikum Singh v. Sheo Ram Singh, 19 C 286 ... 636

U

Ugrah Lall v Radha Pershad Singh, 18 C 255 ... 170
Umes Chunder Sircar v. Zahur Fatima, 18 C 164 (P C) = 17 I A 201 = 5 Sar P C J 507 ... 110

W

Wajid Khan v. Ewaz Alikhan, 18 C 545 (P C) = 18 I A 144 = 6 Sar P C J 46 = Rafique and Jackson's P C No. 123 ... 364
Wajihan *alias* Alijan v. Biswanath Pershad, 18 C 462 ... 308
Wallis & Co. v. Bailey, 18 C 372 ... 249
Watson & Co. v. Ramchund Dutt, 18 C 10 (P C) = 17 I A 110 = 5 Sar P C J 535 ... 7
Watts & Co. v. Blackett, 18 C 144 ... 96
Wilson, J., *In the matter of the petition of*, 18 C 247 ... 165

Y

Yakutun-nissa Bibee v. Kishoree Mohun Roy, 19 C 747 .. 940
Yeo Swee Choon v. Chartered Bank of India, Australia and China, Rangoon, 19 C 605 ... 846

Z

Zakeri Begum v. Sakina Begum, 19 C 689 (P C) = 19 I A 157 = 6 Sar P C J 213 ... 902

THE
INDIAN DECISIONS
NEW SERIES.
CALCUTTA—VOL. IX.

I.L.R., 18 CALCUTTA.

18 C. 1 (P.C.)=17 I.A. 82=5 Sar. P.C.J. 529.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, Sir B. Peacock and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

1890
MARCH 15.

PRIVY COUNCIL.

18 C. 1 (P.C.)= 17 I.A. 82= 5 Sar. P.C.J. 529.

HAIDAR ALI AND ANOTHER (*Plaintiffs*) *v.* TASADDUK RASUL KHAN AND OTHERS (*Defendants*).
[13th and 14th February and 15th March, 1890.]

Oudh Estates' Act, I of 1869, *ss.* 2, 13, 20, 22 (6)—*Will of talukdar—Registration of will—Succession to talukdari—Son of deceased elder brother preferred to younger brother.*

A written statement by a talukdar made in 1860 in reply to inquiries by the Government, issued in the districts under circular orders regarding the succession of talukdars, may come within the definition of a talukdar's will in s. 2 of the Oudh Estates' Act, I of 1869. The statement was described by the talukdar in a letter to the authorities, in 1877, as "the will which has been submitted to the Lucknow district, through the tahsil of Kursi, on 6th April 1860." *Held*, that this showed that he intended the statement of 1862 to be his will, and that the statement, as was held with regard to a similar one in *Hurpurshad* v. *Sheo Dyal* (1), was a will within the definition in the above section.

The talukdar declared in a subsequent will, of 19th August 1879, that no document purporting to be a will, the context whereof was repugnant to the will of the latter year, should be admitted as a will. But the instrument of 1860 was not repugnant to the will of 1879. Also the latter document was not registered in accordance with s. 20 of the Oudh Estates' Act, 1869, and, being inoperative as to the talukdari estate, it could not revoke the will of 1860, which, also, was not rendered inoperative by any of the provisions of the Act.

[2] *Held*, that by the true construction of s. 22, sub-s. 6, brothers take in the same manner as sons are directed to take by the preceding sub-sections; and that the descendants of a deceased elder brother are preferred as heirs to the younger surviving brother.

[**F.**, 9 Ind. Cas. 76 (79); 20 Ind. Cas. 429 (432); **Expl.**, 22 Ind. Cas. 577=16 O.C. 290 (309) (**F.B.**); **R.**, 32 A. 599 (**P.C.**)=7 A.L.J. 1122 (1125)=12 Bom. L.R. 1015=12 C.L.J. 303=14 C.W.N. 1010=7 Ind. Cas. 724=20 M.L.J. 917=8 M.L.T. 273 =13 O.C. 316; 8 O.C. 45 (51); 36 C. 149 (156)=13 C.W.N. 291.]

---

(1) 3 I.A. 259.

1890
MARCH 15.

PRIVY COUNCIL.

18 C. 1 (P.C.)= 17 I.A. 82= 5 Sar. P.C.J. 529.

APPEAL from a decree (8th June 1885) of the Judicial Commissioner, affirming a decree (19th November 1883) of the District Judge of Lucknow, which dismissed appellant's suit.

This suit related to the right to succeed to the estate of Raja Farzand Ali, deceased on 30th November 1880, who held the taluk of Jehangirabad, in the Lucknow district, under a sanad containing a condition of descent to the nearest male heir by primogeniture, in the event of the talukdar's dying intestate, and without having adopted a son. Raja Farzand Ali, whose name was entered in the second of the lists of talukdars, prepared under s. 8 of the Oudh Estates' Act, 1869, was the youngest of the five sons of Lutf Ali, among whom were Haidar Ali, the plaintiff, and Mardan Ali, the deceased father of Tasadduk Rasul, Faida Rusul, and Nawab Ali (the latter now represented by his son Naushad Ali), who were defendants. Raja Farzand Ali acquired the taluk in consequence of his having married, in 1852, Abbas Bandi, the daughter of Raja Razzuk Bakhsh, talukdar of Jehangirabad, under the Oudh dynasty which ended in 1856. The taluk of Jehangirabad was given by Razzuk to his daughter, and on 7th February 1854 a royal firman confirmed this gift, and conferred the title of Raja on Farzand Ali, the daughter's husband. Abbas Bandi died in 1855, leaving one daughter, the present respondent Zebun-nissa. After the death of Abbas Bandi, her father Razzuk, on the 3rd October 1855, executed a hibbanama assigning the taluk and other property to Farzand Ali and his infant daughter Zebun-nissa. Farzand Ali was in possession when the taluk came under the general confiscation of 1858. However, the summary settlement was made with him and he remained in possession. Some time elapsed before he received his sanad from the British Government, and the date of it was not shown. However, the second letter of the Government, appended to the Oudh Estates' Act, 1869, forwarding to the Chief Commissioner a form of sanad, was dated 19th October 1859. Before issuing sanads, the Chief Commissioner, on the 11th [3] November 1859 and the 18th January 1860, sent a circular order to each district to ascertain whether the talukdars desired that their taluks should descend according to the "gaddidari" rule, or whether the ordinary rule of descent should prevail. In reply Farzand Ali, on 6th April 1860, sent the statement which is set forth in their Lordships' judgment, the effect of which constituted one of the principle matters in contest in this suit, another being as to the construction of sub-s. 6 of s. 22 of the Oudh Estates' Act, 1869, whether the same principle of representation introduced by the earlier sub-sections of s. 22 as to sons should be understood to prevail as to sub-s. 6.

Farzand Ali left no issue except his daughter Zebun-nissa, who was given by him in marriage to his nephew Tasadduk Rasul, son of Mardan Ali (third of the five sons of Lutf Ali, and now decease)d. Haidar Ali on the 27th March 1882 brought this suit, claiming to succeed to the taluk; also claiming, in accordance with s. 14 of the Oudh Estates' Act, 1869, to succeed to all the immoveables which Farzand Ali had acquired from other talukdars, and to heirlooms under the 7th section. Disputing the genuineness and validity of any will, including that of 1879, he claimed, under the Hanifa, or Sunni, Mahomedan law, his one-fourth share of the estate and assets.

The first defendant, Tasadduk, and the fifth, Naushad Ali, son of Nawab Ali (another of the five brothers, now deceased), filed written statements to the same effect, setting forth the acquirement of the taluk from Razzuk, and the circumstances under which Farzand Ali became

the sanad-holder. They relied on the wills of 6th April 1860 and of 19th August 1879, and the treatment of Tasadduk as a son by the testator. They also alleged that by the custom of the Shaik Kidwai tribe, to which Razzuk and Farzand Ali belonged, a daughter, or an adopted son, was preferred in the succession to an elder brother of the deceased. The other defendants supported this defence.

Both the Courts below concurred in holding that the statement of 6th April 1860 was genuine and testamentary. But the first Court held that it had been revoked by the later will executed on the 19th August 1879, which the Court held to have been sufficiently registered to pass all the talukdari estate. The [4] Judicial Commissioner was of a different opinion as to this last matter. He held that the will was not registered, citing *Abdul Razzak* v. *Amir Haidar* (1). As regards the adoption of Tasadduk, he stated his views as follows:—

"The key to the whole case is to be found in the facts that, from the first, Raja Farzand Ali Khan, while insisting on his own legal position as sanad-holder, invested with full power to dispose of the taluk as he pleased, nevertheless uniformly recognized the equitable claim of his daughter to succeed after him to the estate of her grandfather, and did all that in him lay to secure the property to her and her issue. At the same time, not unmindful of the interests of his own family, he decided on giving her in marriage to Tasadduk Rasul, his brother's son.

"I think that the evidence on record sufficiently establishes that Tasadduk Rasul was brought up and educated from his boyhood by the Raja with this end in view. The arrangement itself was a very natural one for Farzand Ali to make in 1860, and it is practically that to which he sought to give effect by the will of 1879."

As to the will of 6th April 1860 the Judicial Commissioner found that it was genuine—in fact, that it was not revoked by anything except the will of 1879; and that this will being invalid, the earlier will remained in force. He concurred with the District Judge in finding that the custom whereby a daughter takes the property of her deceased father in preference to his brother had been proved.

On this appeal,

Mr. *R. V. Doyne* and Mr. *H. Cowell*, for the appellant, argued that the document of the 6th April 1860 was not a will, but merely a reply to the question of the Government whether Farzand Ali desired that the rule of primogeniture should be applied to his taluk or not. If it should be held to be a will, then, in more than one way, revocation had taken place. His subsequent conduct, the words used when he applied for a sanad, and the effect of the later will of 19th August 1879, had to be considered. Although the later will might be invalid to dispose of the talukdari estate, with regard to s. 13 of the Oudh Estates' Act, 1869, revocation of an earlier will might be effected by it though unregistered. Moreover, if the reply of 1860 received effect as a will, it did not relate to estates acquired after its execution, [5] but only to the original taluk of Jehangirabad. Again, the Oudh Estates' Act, 1869, which rendered inoperative wills not executed as it required, deprived the document of 1860 of effect as a will. At all events, as to the non-talukdari estate, there was no sufficient proof of the alleged custom superseding the Mahomedan law. That custom was not proved by the wajib-ul-araiz relating to other villages than those on the talukdari estate in question;

(1) 10 C. 976.

1890 MARCH 15. — PRIVY COUNCIL. — 18 C. 1 (P.C.) = 17 I.A. 82 = 5 Sar. P.C.J. 529.

and such entries were not to be implicitly relied on ; see *Uman Parshad* v. *Gandharp Singh* (1). Therefore, Haidar Ali was, in any view of the case as regards the testamentary character of the statement of 1860, entitled to succeed to his share of all the property, other than talukdari, in excess of that one-third share which Farzand Ali could by Mahomedan law have validly bequeathed. In connection with the statement of 6th April 1860, they referred to *Hurpurshad* v. *Sheo Dyal* (2).

Mr. *T. H. Cowie*, Q. C., Mr. *J. Graham*, Q.C., and Mr. *J. H. A. Branson*, for the respondents, Tasadduk Rasul and Zebun-nissa, were not called upon.

Mr. *J. D. Mayne*, for the respondent Naushad Ali Khan, argued that the bequests to this respondent under the will of August 1879, and a codicil thereto, were in any case valid, as relating to property other than talukdari. Besides, the custom deprived the appellant of any claim which he otherwise might have had under the ordinary law. The plaintiff had not shown any preferential title under ss. 4 and 22 of the Oudh Estates' Act, 1869. There was nothing to show the application of either s. 14 or 15. By the true construction of s. 22, sub-s. 6, brothers were entitled, and the principle of representation, found in the earlier clauses as to sons, must also be understood to apply to brother's sons. Therefore, the descendants of Haidar Ali's elder brother, Mardan Ali, would exclude the appellant.

Mr. *R. V. Doyne* replied.

JUDGMENT.

Their Lordships' judgment was delivered on 15th March by

SIR R. COUCH.—The plaintiff and appellant Haidar Ali is the elder brother of Raja Farzand Ali Khan, talukdar of [6] Jehangirabad, who died without leaving issue. He held a sanad for the estate of Jehangirabad, and his name was entered in list No. 2, prepared according to Act I of 1869. He left four kinds of property:—

1. The talukdari estate conferred by the sanad.
2. Landed property acquired by him from other talukdars.
3. Immoveable property acquired from persons other than talukdars.
4. Moveable property, money, and debts.

The plaintiff Haidar Ali claimed to be the Raja's sole heir and successor, and entitled to the first and second classes of property, and to so much of the fourth as might be held to be heirlooms under the provisions of ss. 14 and 22 of Act I of 1869, and to a fourth share, according to Mahomedan law, of the third class of property and of the fourth, exclusive of heirlooms. The other plaintiff and appellant is a purchaser of part of Haidar Ali's interest. The defendants, the respondents, were in possession, and had obtained mutation of names in their favour in the Revenue Department. Their grounds of defence will be conveniently noticed as the case with regard to each class of property is considered.

As to the first class, the defence of Tasadduk, who was in possession of it, was founded on a document, dated the 6th April 1860, and a formal will of the Raja, dated the 19th August 1879. The first of these is a statement by Raja Farzand Ali in reply to inquiries by the Government under circular orders regarding the succession of talukdars. It is as follows:—

"I am Raja Farzand Ali Khan Bahadur, talukdar of Jehangirabad, &c. Whereas the Government has been pleased to confer upon me the

(1) 14 I.A. 134 = 15 C. 20. (2) 3 I.A. 259.

1890
MARCH 15.
PRIVY COUNCIL.
18 C. 1 (P.C.) = 17 I.A. 82 = 5 Sar. P.C.J. 529.

proprietary rights in this estate, to be enjoyed from generation to generation, I do hereby request that after my death my estate may be maintained intact and without partition according to Raj Gaddi custom, and that, owing to my not having a male issue, Zebun-nissa, who is my daughter by Rani Abbas Bandi, daughter of Raja Razzuk Baksh, shall be considered entitled to succession and inheritance. But as I have taken Tasadduk Rasul from my brother Mardan Ali Khan, and have commenced to bring him up and educate him as my son, if he finishes his education [7] during my lifetime and is married to Zebun-nissa, he shall after me succeed to my estate as my adopted son."

The Raja made other replies about the same time, the taluk being in three districts, in which no reference was made to his daughter or Tasadduk Rasul, and it was contended that the reply of the 6th April was not intended more than the others to be testamentary; but in a letter from the Raja to the Deputy Commissioner, dated the 20th June 1877, in reply to questions that had been asked, he said in reply to the fourth question, which was to give the name and title of any boy who might be his successor, whether his begotten or adopted son. "The reply to this question refers to the will which has been submitted to the Lucknow district through the tahsil of Kursi on 6th April 1860." This shows that he intended that to be his will. Their Lordships are of opinion, following the judgment of this Board in *Hurpurshad* v. *Sheo Dyal* (1), that it is a will within the definition in s. 2 of Act I of 1869. It is therefore a complete answer to the plaintiff's claim to Jehangirabad.

It was contended that it was revoked by the will of the 19th August 1879, the Raja having in that said that no document of any sort purporting to be a will or petition, the context whereof is wholly or partly repugnant to it, should be deemed to be admissible. But it is not repugnant. In this the Raja says that having adopted Tasadduk Rasul Khan as his son, he has appointed him his successor, and he is to be the owner of his entire property estate and raj, as a raja and talukdar, and as he is married to his daughter the estate shall successively "descend to devolve" on the descendants of the daughter. Also the will of 1879 was not registered in accordance with s. 20 of Act I of 1869, and consequently as regards the talukdari estate is invalid. It cannot, therefore, operate as a subsequent will to revoke the will of 1860, nor was that will revoked by the Act of 1869 as was also contended.

There is, however, another defence to this part of the claim, which also applies to the second class of property if it was acquired according to s. 14 of the Act. The pedigree, which is admitted by all parties to be correct, shows that Haidar Ali was not the eldest brother of Farzand. There were two elder brothers, [8] Sahib Ali and Mardan Ali who died before Farzand, both leaving sons, and the sons of Sahib were not parties to the suit. Tasadduk is a son of Mardan Ali, and Nawab Ali, who died pending the appeal, the father of the respondent Naushad Ali, was his eldest son.

The plaintiff claims, as the elder brother of Farzand, to be his sole heir and successor under s. 22 of Act I of 1869. The section begins by saying that if a talukdar or grantee whose name shall be inserted in the 2nd, 3rd, or 5th of the lists mentioned in s. 8, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows; and then there are eleven sub-sections forming a scheme of descent. The

(1) 3 I.A. 259.

1890 March 15. — Privy Council. — 18 C. 1 (P.C.) = 17 I.A. 82 = 5 Sar. P.C.J. 529.

plaintiff claims under sub-s. 6; but in construing that the whole of the sub-section should be looked at. The first says the estate shall descend to the eldest son of the talukdar and his male lineal descendants. The second says that if such eldest son shall have died in the lifetime of the talukdar, leaving male lineal descendants, the estate shall descend to his eldest and every other son successively, according to their respective seniorities and their respective male lineal descendants. The third says that if such eldest son shall have died in his father's lifetime without leaving male lineal descendants, the estate is to descend to the second and every other son of the talukdar successively according to their respective seniorities and their respective male lineal descendants. That male lineal descendants here are intended to include the descendants of a son dying in his father's lifetime is apparent from sub-s. 4; that is, "Or in default of such son or descendants," then to such son of a daughter as has been treated by the talukdar in all respects as his own son and to the male lineal descendants of such son. The estate is to go to the daughter's son only in default of male lineal descendants of a second or other son. In sub-s. 4 male lineal descendants of a daughter's son must have the same meaning as in sub-s. 3, for by sub-s. 5 the estate is to descend to a person adopted by the talukdar only in default of such son or descendants, *viz.*, a daughter's son or his male lineal descendants. The 6th section says, in default of an adopted son the estate is to descend to the eldest and every other brother of the talukdar successively according to their respective seniority and their respective male lineal [9] descendants. The words here should, in their Lordships' opinion, be held to have the same meaning as they have in sub-ss. 3 and 4. In sub-s. 7 the words are, "in default of any such brother" to the widow, omitting "descendants"; but their Lordships cannot think it was intended by this omission to postpone the succession of male lineal descendants of brothers who died in the talukdar's lifetime till after the persons mentioned in sub-ss. 7, 8, 9, and 10, and only to allow such male lineal descendants to succeed under sub-s. 11 according to the ordinary law to which the talukdar is subject. It is the reasonable construction that the brothers were intended to take in the same manner as sons. It therefore appears to their Lordships that the plaintiff has no title to Jehangirabad or to the property which, by virtue of s. 14, was subject to the same rules of succession.

This also disposes of the suit as regards the second class of property, which the plaintiff claimed under the same title as the first class. It was objected by Mr. Mayne, on behalf of Naushad Ali, who claimed to be entitled to it under a codicil of the 1st November 1879, that the property was not proved to have been acquired according to s. 14. The question does not appear to have been raised in the lower Courts. Apparently it was assumed to be so acquired, possibly because it was known it could be proved by official documents, of which the Court was bound to take judicial notice. There is indeed some evidence of it in the record where there is what is called a list of villages held by Naushad Ali Khan, out of the villages purchased by Raja Farzand Ali Khan from sanad-holding talukdars. The validity of the codicil was in issue, but there is no finding upon that in either of the lower Courts. It would, however, be invalid as regards property acquired under s. 14, for want of registration. But if this property is not within s. 14, it is in the same condition as to succession as the property in classes 3 and 4. Haidar Ali claimed one-fourth of these classes, excluding heirlooms, as one of the heirs of Farzand Ali, according to the Mahomedan law, and alleged that the defendants did not acquire

any rights to it under the will of the 1st November 1879. This will has been found by both the lower Courts to be genuine, and it excludes Haidar Ali. It is therefore an answer to his claim as heir.

1890 MARCH 15. — PRIVY COUNCIL. — 18 C. 1 (P.C.) = 17 I.A. 82 = 5 Sar. P.C.J. 529.

[10] But the defendants also relied upon a custom of the Shaikh Kidwai tribe, to which the Rajas Razzuk Bakhsh and Farzand Ali Khan belonged, that sons, adopted sons, and daughters succeed in preference to, and in exclusion of, other heirs, by which the plaintiffs' claim in opposition to Zebun-nissa, the daughter, must fail. It was not disputed that the Rajas belonged to that tribe. Both the lower Courts have found that there is such a custom among the Shaikh Kidwais, and their Lordships see no reason in this case for departing from the settled practice of this Committee where there are concurrent judgments of the Courts below upon a question of fact. There is therefore a good defence to the whole of the plaintiffs' claim, and the suit has been properly dismissed. Their Lordships will humbly advise Her Majesty the affirm the decree of the Judicial Commissioner which dismissed the appeal to him from the decree of the District Judge dismissing the suit, and to dismiss this appeal. The appellants will pay the costs of it.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondents, Tasadduk Rasul Khan and Mussamat Zebun-nissa: Messrs. *Watkins & Lattey.*

Solicitor for the respondent, Naushad Ali Khan: *The Solicitor, India Office.*

C.B.

---

18 C. 10 (P.C.) = 17 I.A. 110 = 5 Sar. P.C.J. 535.

PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Sir B. Peacock and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

WATSON AND COMPANY (*Defendants*) *v.* RAMCHUND DUTT AND OTHERS (*Plaintiffs*). [14th, 15th, 18th and 20th February and 25th April, 1890.]

Co-sharers—Suits concerning the joint property as between tenants in common—Refusal of decree for possession, for damages, or for an injunction—Resistance of one co-sharer to another's entering, not in denial of his title, but to prevent his interfering with cultivation by the former—Money compensation.

Land being held by two persons in common, one of whom was in actual occupation of part, cultivating it as if it had been his separate property; the other attempted to enter upon the same land, in order to carry on operations thereon inconsistent with the work already being carried on by the [11] former, who resisted and prevented this attempted entry. *Held* that the resistance being made by the co-sharer in occupation simply with the object of protecting himself in the profitable use of the land, in good husbandry, and not in denial of the other's title, such resistance was no ground for proceedings on the part of the other, to obtain a decree for joint possession or for damages: nor would granting an injunction be the proper remedy.

As the Courts in Bengal, in cases where no specific rule exists, are to act according to "justice, equity and good conscience," so, on its being found that, where land was held in common between the parties, one of them was in the act of cultivating a part of the land which was not actually used by the other, it would

1890 APRIL 25.

PRIVY COUNCIL.

18 C. 10 (P.C.) = 17 I.A. 110 = 5 Sar. P.C.J. 535.

not have been consistent with this rule to restrain the former from proceeding with his proper cultivation: but money compensation, at a proper rate, in respect of the exclusive use by, and benefit to, the one who, though possessing in common, was carrying on cultivation for himself, not unsuitable in itself, was awarded between the parties.

Title made by her transfer of her inheritance, through the daughter and heiress of a deceased member of a joint family of brothers, under the Dayabhaga, although her father had executed deeds dedicating his share of the family property to trustees, for the worship of the family deity; this dedication having been inoperative, because it was neither his, nor his brothers', intention that the deeds should be acted upon, and he had never divested himself of his share.

[**Diss.**, 73 P.R. 1902=59 P.L.R. 1902; **F.**, 21 C. 340; 14 A.W.N. 127; 4 C.L.J. 254 (256); 11 C.L.J. 189=5 Ind. Cas. 171; **Rel. on.**, 14 M. L. T. 346=25 M.L.J. 352=21 Ind. Cas. 314 (315); **Appl.**, 19 C.L.J. 113=22 Ind. Cas. 66; **Appr.**, 4 C.W.N. 788 (789); 4 N.L.R. 120 (126); **R.**, 27 A. 153=A.W.N (1904) 199; 28 A. 161=A.W.N. (1905) 233 (234); 34 A. 150 (154)=8 A.L.J. 1312=13 Ind. Cas. 79; 28 C. 142 (144); 21 M. 153 (159, 165); 14 C.P.L.R. 76 (79); 15 C.W.N. 188=7 Ind. Cas. 124; 5 Ind. Cas. 431=6 N.L.R. 12; 11 Ind. Cas. 687=7 N.L.R. 82; 18 C.W.N. 328 (330)=21 Ind. Cas. 621 (622); **Expl.**, 28 C. 223 (227): 5 C.L.J. 267 (268); **D.**, 19 C. 253=19 I.A. 48 (**P.C.**)=6 Sar. P. C. J. 133; 26 C. 553; 32 C. 837=1 C.L.J. 437 (453); 5 N.L.R. 105 (106); 33 C. 1201=9 C.W.N. 87; 16 C.W.N. 251=11 Ind. Cas. 637.]

APPEAL from a decree (15th February 1887) of the High Court (1) modifying, on the appeal and cross-appeal of the parties, a decree (4th January 1886) of the District Judge of Midnapore.

This suit was brought by two brothers Gungaram and Ramchund Dutt on 29th February 1884, as the plaint stated, "for recovery of possession of a 14-annas share of khas lands by virtue of ijmali title, together with damages and for a permanent injunction restraining the defendants, Messrs. Watson and Company, from cultivating indigo."

Of the lands to which this suit related, part of an extensive zemindari named Silda, in the Midnapore district, the plaintiffs had as to a portion become putnidars in 1869; and they held another portion as mokarraridars, under a maurasi grant made in 1879. Watson and Company having obtained leases from the plaintiffs, which ended in 1883, as well as transfers from others owning interests, had reclaimed part of the land, settling [12] cultivators, and themselves cultivated indigo on the khas or untenanted part. In August 1883 the plaintiff Ramchund Dutt gave notice of the approaching end of the lease on the 14th September following, and demanded joint possession of 14 annas of Silda, inclusive of the 4,128 bighas on which Watson and Company were growing indigo.

Gungaram having died in 1884, his sons Umeshchunder, Bepinbehari, and Notobur were substituted for him in the suit. Pudmalochun, another brother, had died in 1879, leaving an only daughter Bamasunderi, who was not joined, because the plaintiffs' case was that Pudmalochun had, by two deeds of religious endowment, dedicated his share of the joint family property to the worship of the family deity; and had appointed as shebait of that worship, first himself, and then the plaintiff Gungaram; and on the death of Gungaram the plaintiff Ramchund Dutt to succeed him, and had thereby deprived his daughter Bamasunderi of all heritable right therein, except as to maintenance.

On the objection as to want of parties by Watson and Company, who made title in the suit, as to part of Silda, through Bamasunderi, who on 21st June 1884, after the commencement of this suit, granted a durputni to Bholanath Dhur, who on 5th November 1884 granted a

(1) 15 C. 214.

1890 April 25. — Privy Council. — 18 C. 10 (P.C.) = 17 I.A. 110 = 5 Sar. P.C.J. 535.

seputni to Watson and Company, Bamasunderi was made a defendant; and issues were recorded on the questions arising between her and her uncle Ramchund, as to her right to her father's estate.

The plaintiffs' claim was in effect as follows: that as putnidars they, and their deceased brother Pudmalochun, had been jointly entitled to 12 annas of Silda, and as maurasi mokarraridars to other 2 annas of the same; that Pudmalochun by the two deeds of endowment, dated 24th July and 12th December 1887, had dedicated his one-third share of the putni interest in 12 annas of Silda, appointing himself shebait for life, and his brothers after him, and to this interest Ramchund had succeeded; that Watson and Company had been, while Pudmalochun lived, tenants to him and his brothers the plaintiffs, and after his death to the plaintiffs alone, of those 14 annas for a term of years which expired on the 14th September 1883, and were tenants of the remaining 2 annas of Silda for an unexpired term under a lease granted by one Rani Durg Kumari; [13] and that on the expiration of the first mentioned term the defendants Watson and Company, though only then entitled to a one-eighth of the entire joint estate, continued to hold exclusive possession of, and cultivated with indigo, 6,894 bighas of the khas, or untenanted, lands of the zemindari. As to the 2 annas of Silda which the plaintiffs claimed as maurasi mokarraridars, and which they acquired on the 20th January 1879, which were not included in the deeds, the plaintiffs contended successfully before the High Court that, as the grant for those 2 annas had been made in the name of Ramchund Dutt alone, his brother Pudmalochun took no interest therein.

The defendants admitted the fact of the two deeds of endowment having been executed, but contended that they had never been acted upon; so that Pudmalochun's interest, having remained the same as before, down to his death, and then passed by inheritance to his daughter, Watson and Company had received from her a good title, through Bholanath Dhur, as to the whole of Pudmalochun's interest in the 12 annas putni. Also as to the 2 annasof maurasi mokarrari interest acquired by Ramchand Dutt on the 20th January 1879, on Pudmalochun's death, his one-third share of those 2 annas descended to his daughter, and the plaintiffs had no right to it. Also that Watson and Company were entitled to a further one-anna share of Silda, under a lease for seven years dated 30th April 1883, granted to them by Ram Taruck Ghose, who was lessee of a longer term under the zemindar of Silda. It was submitted that the plaintiffs were not entitled as joint-proprietors to damages or to an injunction restraining Watson and Company from carrying on the cultivation of indigo on the khas lands; the allowance of such claims on the part of the plaintiffs would lead to cross-claims with regard to other land of which the plaintiffs were in possession.

Issues were fixed as to the areas, boundaries, and extent of the plaintiffs' interest in Silda; whether they were entitled to khas possession, to an injunction, or to damages, with further issues as to the deeds of dedication and their effect.

The Courts below concurred in holding that the khas land under cultivation by Watson and Company was in area 4,128 bighas; and as to this no question was now raised. In other respects the [14] Courts had differed. The District Judge decided that the plaintiffs' interest in the lands in suit, or in the 14 annas of the khas lands, was two-thirds and no more. He arrived at this by holding that, though the terms of the deeds of dedication were apt for constituting a valid endowment, yet

1890 APRIL 25. — PRIVY COUNCIL. — 18 C. 10 (P.C.) = 17 I.A. 110 = 5 Sar. P.C.J. 535.

the evidence showed that Pudmalochun did not mean to create a valid endowment as against his daughter, and did not divest himself of the property, continuing to hold jointly, as before, with his brothers; so that the dedication had been ignored, and was inoperative.

A Division Bench (WILSON and O'KINEALY, JJ.) on the appeal of the plaintiffs, the cross-appeal of Watson and Company, and the cross-objections of Bamasunderi Dasi, held that the manner of dealing with the dedicated share had not had the effect of invalidating the endowment (1). They held that, under its terms, Gungaram, on the death of Pudmalochun, and Ramchund, on the death of Gungaram, were entitled to possession as shebaits, and that the plaintiffs were therefore entitled to possession of the three-third parts, or whole, of the 12-annas putni interest. As to the 2-annas mokarrari interest, the High Court was of opinion that Pudmalochun, by dedicating his property, made himself separate in estate from his brothers; and had thereby put an end to the ordinary presumption of Hindu law that property acquired by one member of a joint-family was acquired for the benefit of all; and that there was no evidence to show that he was jointly interested in this. As to one-anna of Silda, claimed by Watson and Company under their sub-lease from Ram Taruck Ghose, the High Court, in this agreeing with the District Court (though not for the same reason), rejected the claim on the ground that the original lease from the zemindar had not been produced, but only a copy.

The High Court then considered to what remedy the plaintiffs were entitled, and they determined that acts had been done amounting to an actual ouster, as between the plaintiffs and the defendants, their co-sharers: although it might very well be that mere cultivation by one co-tenant was not necessarily an ouster. The evidence as to actual ouster, absolute and complete, was then considered by the Judges.

[15] They declined to issue an injunction restraining Watson and Company absolutely from growing indigo upon these or any particular lands, provided that they could (and it was for them to find out how they could) grow it without excluding the plaintiffs from their equal rights as co-sharers. But they granted an injunction restraining the defendants from excluding by any means the plaintiffs from their enjoyment of ijmali possession of the lands in suit in the form given in *Lloyd* v. *Bibi Sogra* (2).

On this appeal by Messrs. Watson and Company,

Sir *Horace Davey*, Q.C., and Mr. *R. V Doyne*, for the appellants, argued that, on the case presented, the plaintiffs had no interest in more than two-thirds of a 14-annas share of Silda, Watson and Company having a right to the share, which had been Pudmalochun's, of the 12 annas, of the putni estate.

The deeds of dedication had never been acted upon, and had no effect to divest Pudmalochun of his interest. The defendants derived title from him as to his share through his daughter's transfer to Bholanath, and from him to them. On this point the judgment of the first Court was correct, and the High Court had been wrong in reversing it. As to the 2-annas share of Silda, granted to the Dutts in maurasi mokarrari after the above instruments had been executed, there was nothing in what hâd taken place to prevent their then joint-brother Pudmalochun taking his share of the 2-annas joint estate; so that his share, one-third of the latter, descended to his daughter, as well as the

(1) 15 C. 214 (217.).

(2) 25 W.R. 313.

1890 APRIL 25. — PRIVY COUNCIL. — 18 C. 10 (P.C.) = 17 I.A. 110 = 5 Sar. P.C.J. 535.

share in the 12-annas putni, and had been lawfully transferred to Watson and Company. As to the 1-anna share which Ram Taruck Ghose sub-leased to Watson and Company, the plaintiffs had no interest therein. On the question of law, they contended that, as jointly interested parties, the plaintiffs were not entitled to claim damages, or to claim an injunction restraining Watson and Company from cultivating indigo on the area of the khas land, found by the Courts below to be 4,128 bighas. There had been prevention on the part of Watson and Company of interference by others with their cultivation, but no actual ouster of the plaintiffs, such as to affect the latter's title. As different parts of Silda were in the hands of both, and of either party, it was not [16] competent to either to claim that there should be either eviction or an injunction. It was against the policy of the law to entertain claims or cross-claims for damages or for injunctions between tenants in common. The only remedy open to the plaintiffs was to demand a partition. But this was not the remedy decreed. An injunction was never granted between tenants in common ; and there was no authority for the grant of one as made by the High Court. The opposition of Watson and Company had not been founded on any objection to the right or title to the land, but only to the plaintiffs' interference with their cultivation.

Mr. *J. B. Finlay*, Q.C., and Mr. *J. H. A. Branson*, for the respondents, after going through the evidence as to the extent of the respondents' interest in the land, and as to the area held by them, contended that the acts of the defendants amounted to actual ouster of the plaintiffs from the land on which indigo had been grown. As in the English system, so under the Indian law, this gave rise to a right of suit. Under the English law, upon ouster of a co-tenant by a tenant in common, an action, either of ejectment or of trespass, would lie ; and where either of these actions could be maintained, there was a case for an injunction. In reference to the English law on the point, they referred to Co. Litt., "Tenants in common," ss. 322 and 323. The claim to exclusive possession of part for a special cultivation had resulted in a deprivation by the defendants, Watson and Company, of the plaintiffs in regard to their right of joint use and enjoyment. On the question whether they had any right to exclusive enjoyment, reference was made to *Stalkartt* v. *Gopal Panday* (1) ; *Lowndes* v. *Bettle* (2) ; *Wawn* v. *Horn* (3) [*Crowdee* v. *Bhekdari Singh* (4) was referred to by SIR R. COUCH.] Also *Lloyd* v. *Bibi Sogra* (5) ; *Curtis* v. *Price* (6) ; *Bessey* v. *Windham* (7) ; *Goodson* v. *Rickardson* (8). Since 1856 there had been a recognition of the right to an injunction in such a case as this ; *Jankee Singh* v. *Bukhooree Singh* (9) and *Rajendro Lall Gossami* v. *Shamachurn Lahori* (10) were [17] cited. Reference was made to the Specific Relief Act, 1877, s. 10. [SIR B. PEACOCK, in regard to the deeds of dedication, referred to the judgment in *Hunooman Persaud Pandey* v. *Mundraj Koonweree* (11), and their Lordships' observations as to the heir not being barred by an unreal charge. He also intimated that the rule as to rights of persons holding land in common in Bengal was hardly to be found in the analogy of English cases, but might be derived from the direction in Bengal Regulation VII of 1832, s. 9, *viz.*, that, where there should be no

(1) 12 B.L.R. 197.
(2) 10 Jur. N. S. 226.
(3) 3 M. & W. 333; and 5 M. & W. 564.
(4) 8 B. L. R. Ap. 45.
(5) 25 W. R. 313.
(6) 12 Ves. 89, 103.
(7) 6 Q. B. 166.
(8) L. R. 9 Ch. Ap. 221.
(9) S. D. A. (1856) 761.
(10) 5 C. 188.
(11) 6 M. I. A. 411, *et. seq.*

1890 APRIL 25. specific rule, the case must be decided according to justice, equity, and good conscience.]

PRIVY COUNCIL.

18 C. 10 (P.C.) = 17 I.A. 110 = 5 Sar. P.C.J. 535.

Mr. *R. V. Doyne* replied.

JUDGMENT.

Afterwards, on April 25th, the judgment of their Lordships was delivered by

SIR B. PEACOCK.—Gungaram Dutt, Ramchund Dutt, and Pudmalochun Dutt were brothers, and constituted a Hindu family joint in estate. They also carried on business as money lenders.

In the year 1877 Pudmalochun executed two deeds of endowment, or *nirdes patras*, one on the 24th of July, and the other on the 12th of December. On the former of those dates the three brothers were entitled to a 12-annas share or twelve-sixteenths of pergunnah Silda in zillah Midnapore, which they held under three putni bynama patras ; the first for a four-annas share dated the 29th Srabun 1268, and registered on the 20th of August 1861 ; the second dated the 3rd Cheyt 1276 Amli, corresponding with the 14th of March 1869, for a six-annas share ; and the third dated 13th Kartick 1283, for a two-annas share.

The property was subject to the ordinary law of Bengal, according to which upon the death of any one of the brothers the share of the joint property to which at the time of his death he might be entitled would descend to his heirs. Pudmalochun had no son ; but in 1877, at the time of the execution of the deed of the 24th July, he had a wife, a daughter Bamasunderi Dasi, one of the appellants, and a grandson, the only son of that daughter. His wife died in his lifetime, between the dates of the two deeds. He himself died on the 26th of October 1879, and upon his death [18] his daughter was his heiress. The Watsons, appellants, claim through her. It is contended on behalf of the respondents that Pudmalochun divested himself of his one-third of the 12-anna share held in putni by the deeds of endowment executed by him.

It is not necessary to review the evidence in detail. It was carefully considered by the District Judge. It seems clear that from the time of the execution of the deed of the 24th of July 1877 until after the death of Pudmalochun, a period of about three years and three months, no change took place in the accounts or in the management of or dealing with the business or estates, or the proceeds thereof. Mortgages were executed, in which Pudmalochun joined, and everything appears to have gone on in the same manner as if the deeds had never been executed, except that the family idol was removed from the house of Gungaram to that of Pudmalochun. No act was done by Pudmalochun or his brothers in which he was described as shebait.

Their Lordships concur generally with the District Judge in his findings of fact, and they are of opinion that it was not the intention of Pudmalochun or of his brothers that the deeds should be acted upon, or that Pudmalochun should thereby divest himself of his share of the property. The deeds were merely fictitious, or benami.

In arriving at that conclusion their Lordships agree with the District Judge that the deed of the 24th of July did not profess to postpone any of its avowed objects until the death of Pudmalochun, or to any period subsequent to the execution of the document, except in so far as it related to the allowance to Bamasunderi or her son Upendra Nath. They cannot concur with the High Court that the provisions relating to that allowance

were the chief provisions of the deed, or that the deed purported on the face of it to postpone the gift, so far as it related to religious objects, to any future period.

1890 APRIL 25.

PRIVY COUNCIL.

18 C. 10 (P.C.) = 17 I.A. 110 = 5 Sar. P.C.J. 535.

It was strongly urged on behalf of the plaintiffs, on the argument of the appeal, that the receipt by Bamasunderi, after her father's death, of three monthly payments of the allowance provided for her by the deed was inconsistent with the fact that the deeds were not intended to take effect; but their Lordships do not attach much importance to those receipts. Bamasunderi was a [19] widow, maintained by and residing in one of the houses which formed part of the estate; she had apparently no means for embarking in litigation; she was then, so far as it appears, living on friendly terms with her uncles, and if she had not at that time received the allowance which on the face of the deeds was provided for her, she probably would have received nothing.

After the execution of the deeds of endowment, and during the life-time of Pudmalochun, a maurasi istimrari mokarrari pottah of another two-annas share of Silda was granted to Ramchund in consideration of the sum of Rs. 25,000.

It having been considered that Pudmalochun did not by the deeds of endowment divest himself of any part of the joint family property, the mokarrari pottah must be assumed to have been purchased with funds of the joint family, and to have enured for the benefit of the three brothers.

From the facts above stated it appears that at the time of his death, Pudmalochun was entitled to a one-third undivided share of a 14-annas or fourteen-sixteenths share of Silda, of which twelve-sixteenths were held by the three brothers in putni, and two-sixteenths under the mokarrari pottah; that the other two brothers were entitled to the other two-thirds thereof; and that the interest of Pudmalochun descended upon his death to his daughter Bamasunderi. Out of her interest in the putnis Bamasunderi, on the 6th Assin 1292, after the commencement of the suit, granted a durputni to Bholanath Dhur, who on the 5th of November 1884 granted a seputni to the Watson defendants.

Their Lordships are of opinion that at the date of suit the interest of the plaintiffs in the lands in suit was only two undivided third parts of an undivided share of 14 annas or of fourteen-sixteenths of Silda; that Bamasunderi was at that time entitled to the other undivided third part thereof.

At the time of the death of Pudma the Watsons held the 14-annas share which belonged to the three brothers Dutt under leases, in respect whereof they paid rent to the Dutt brothers, and which leases expired on 31st Bhadro 1290 Amli, corresponding with the 14th of September 1883. After the expiration of the leases the Watsons, who were entitled to the remaining two-annas undivided share of Silda under an ijara pottah from Rani [20] Doorga Kumari Debi, of the 6th Bysack 1290 Amli, corresponding with the 17th of April 1883, continued in possession of that portion of Silda which comes under the head of khas, and to cultivate and sow it with indigo as they had done during the continuance of the leases. Their Lordships cannot, upon the evidence, say that that was such an improper course of cultivation or use of the land as to render an injunction the proper remedy.

The plaintiffs endeavoured to sow oil-seeds, and to prevent the Watson defendants from continuing the cultivation in which they were engaged; the Watson defendants persisted in the cultivation which they had commenced; quarrels and even riots ensued, and the plaintiffs

1890 APRIL 25. — PRIVY COUNCIL. — 18 C. 10 (P.C.) = 17 I.A. 110 = 5 Sar. P.C.J. 535.

commenced the suit in which appeals have been preferred. They prayed to be put into ijmali possession of their 14-anna share, to have damages awarded to them at the rate of 8 annas per bigha on 6,894 bighas, and similar damages until they should be put into possession; also for a permanent injunction prohibiting the defendants from sowing indigo, and from allowing anybody else to do so without the consent of the plaintiffs, and from throwing any obstacles in the way of the plaintiffs' holding ijmali possession.

The 6th issue laid down for trial was, "What is the extent of the plaintiffs' interest in the land in suit ?" Upon this the District Judge held that the plaintiffs were entitled to two-thirds of the 14-anna share of the khas lands of Silda specified in the decree, and to get joint possession of the same with the Watson defendants. The High Court, on the contrary, having arrived at the conclusion that the deeds of endowment were intended to take effect, that Pudma thereby divested himself of his interest in the property, and that no part of it descended to his daughter Bamasunderi, held that the plaintiffs were entitled to the whole of the 14-anna share.

The decree of the District Judge, after reciting the claim, and specifying the lands included in the 6, 894 bighas, proceeded, amongst other things, as follows :—

"That a decree be passed in the following manner :—That by reducing the quality of land claimed, *viz.*, 6,894 bighas, to 4,128 bighas, the plaintiffs' right is established to a two-thirds share of the 14-annas, and the plaintiffs are entitled to get [21] joint possession of the same with defendants No. 1 (that is, the Watsons); and that on payment of excess court-fees proportioned to the excess of amount found due over the valuation of the plaint, calculated at the rate of 8 annas per bigha of the decreed lands from the beginning of 1291 Amli until the date of possession, the plaintiffs shall get two-thirds of a 14-annas share in accordance with the decision of the 6th issue. The Court further directs that an order of injunction be issued to the defendants No.1, prohibiting them from either themselves or through others sowing indigo on those khas lands of Silda on which indigo is being now grown."

The High Court modified that decree, and ordered that, instead of a two-thirds share of 14 annas of the khas lands of Silda, the plaintiffs were entitled to get joint possession with defendants (the Watsons) of the entire 14-annas of the said lands; they increased the amount of compensation accordingly, and varied the injunction granted by the District Judge.

Their Lordships are of opinion that the judgment and decree of the High Court are erroneous and ought to be reversed, with costs, and that the decree of the District Judge ought to be modified and partly reversed. It was contended on the part of the plaintiffs, respondents, that the acts of the Watsons amounted to what in England is called an actual ouster, and that the plaintiffs were entitled to a decree ordering them to be put into ijmali possession with the defendants, but it appears to their Lordships that the plaintiffs have not established a right to have such a decree; and for the same reason they think that so much of the decree of the District Court as declares that they are entitled to get joint possession ought to be reversed. It seems to their Lordships that if there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another

1890 APRIL 25. — PRIVY COUNCIL. — 18 C. 10 (P.C.) = 17 I.A. 110 = 5 Sar. P.C.J. 535.

tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a [22] decree for joint possession. Their Lordships are further of opinion that the decree of the District Judge, so far as it orders an injunction to be issued, ought to be reversed. It appears to their Lordships that, in a case like the present, an injunction is not the proper remedy. In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross-injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle and greatly deteriorated in value. In Bengal the Courts of Justice, in cases where no specific rule exists, are to act according to justice, equity and good conscience, and if, in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital.

Upon the whole, their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and to order the plaintiffs, respondents, to pay the costs incurred by the defendants in that Court. And further to declare that the plaintiffs, respondents, are entitled to only two-thirds of 14 annas, or of fourteen-sixteenths of the khas land, or, in other words, to two-thirds of seven-eighths of the 4,128 bighas, the quantity of the khas lands as determined by the decree of the District Judge: also to reverse the decree of the District Judge so far as it declares that the plaintiffs are entitled to get joint possession with defendants No. 1; and also so far as it directs that an order of injunction be issued; also to reverse that portion of the decree which orders "that, on payment of excess Court fees proportioned to the excess of the amount found due over the valuation of the plaint, [23] calculated at the rate of eight annas per bigha of the decreed lands from the beginning of 1291 Amli until the date of possession, the plaintiffs shall get two-thirds of 14-annas share, in accordance with the decision of the 6th issue," and in lieu thereof to order and declare that the plaintiffs do recover from the defendants No. 1 a sum of money calculated at the rate of two-thirds of seven annas per bigha a year for 4,128 bighas, as compensation in respect of the exclusive use and benefit by the defendants No. 1 of 4,128 bighas, from the beginning of the year 1291 Amli to the 4th of January 1886, the date of the said decree; also to affirm the decree of the District Judge so far as it relates to costs.

It may be right to mention, with reference to that portion of the decree above recommended which relates to compensation, that the rate of eight annas per bigha was not disputed by the Watson appellants, and

1890 APRIL 25. — PRIVY COUNCIL. — 18 C. 10 (P.C.) = 15 I.A. 110 = 5 Sar. P.C.J. 535.

that the High Court were not prepared to dissent from the finding of the District Judge in fixing the area of the khas lands at 4,128 bighas.

The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *Freshfield & Williams.*

Solicitor for the respondents: Mr. *E. Kimber.*

C. B.

---

18 C. 23 (P.C.) = 17 I.A. 122 = 5 Sar. P.C.J. 560.

PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of the Central Provinces.*]

DURGA CHOWDHRANI (*Plaintiff*) *v.* JEWAHIR SINGH CHOWDHRI (*Defendant*). [11th March and 25th April, 1890.]

Second appeal—Civil Procedure Code, s. 584—Grounds of second appeal.

Under the Code no second appeal will lie, except on the grounds specified in s. 584. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of [24] the finding. *Ananga-manjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (1) and *Pertab Chunder Ghose* v. *Mohendra Purkait* (2) referred to and followed. *Futtehma Begum* v. *Mohamed Ausur* (3) and *Nivath Singh* v. *Bhikki Singh* (4) overruled.

[F., 20 C. 93 (100) (P.C.) = 19 I. A. 228 = 6 Sar. P.C.J. 247 ; 5 C.L.J. 55 (58) ; 13 C.L.J. 418 (421) = 15 C.W.N. 752 = 10 Ind. Cas. 325 (327) ; L.B.R. (1893-1900) 543 (544) ; L.B.R. (1893—1900) 568 (573) ; **Appl.**, 29 B. 1 (P.C.) = 1 A.L.J. 637 (641) = 6 Bom. L. R. 717 = 8 C. W N. 865 = 31 I. A 154 = 8 Sar. P C. J. 720 ; **Appr.**, 2 N. L. R. 98 (101); **Cited**, 11 C. W. N. 230 (234) = 9 C.L J. 415 ; **R.**, 15 A. 123 (127) ; 20 B. 699 (703) ; 25 B. 202 (206); 27 B. 452 (463); 21 C 504 (512); 24 C. 825 ; 25 C. 146; 31 C. 503 = 8 C.W.N. 425 (432) ; 5 Bom. L. R. 174 (176) ; 5 Bom L R. 225 (228) ; 9 Bom. L.R. 393 (398) ; 4 C.L.J. 198 (202) ; 2 C.W.N. 649 ; 17 C.W. N. 37 = 15 Ind. Cas. 515 ; 13 Ind. Cas. 686.]

APPEAL from a decree (30th July 1886) of the Judicial Commissioner, passed on second appeal, and affirming a decree (1st May 1886) of the Commissioner of the Nerbudda Division, who had reversed a decree (28th September 1885) of the Assistant Commissioner of Nursingpur.

This appeal involved a question as to the right construction of s. 584, Civil Procedure Code. The suit was brought to establish the appellant's right in some villages which had belonged to her late husband, but were now in the possession of his brother, the respondent. The widow's right depended on her establishing that a partition of the family property had taken place. This question was decided in favour of the appellant by the Assistant Commissioner, who found that there was a partition in Sambat 1914, corresponding to 1857, and that separate possession of the shares commenced in that year. Finding that the plaintiff was in possession, he made a declaratory decree as to her right.

---

(1) 14 I.A. 101 = 14 C. 740.
(2) 16 I.A. 233 = 17 C. 291.
(3) 9 C. 309.
(4) 7 A. 649.

The Commissioner on appeal reversed this decree. He found that the plaintiff was out of possession; also that partition had not been made out; and held that she was not entitled to a declaratory decree. **1890 APRIL 25.**

On a second appeal the Judicial Commissioner considered whether there was any evidence upon which the Commissioner might have come to the conclusion that no partition had taken place. He was of opinion that there was evidence in support of the finding of the appellate Court below. and that only a question of fact had been raised before him. He dismissed the appeal on grounds expressed as follows:— **PRIVY COUNCIL.** **18 C. 23 (P.C.)= 17 I.A. 122= 5 Sar. P.C.J. 560.**

"The lower appellate Court decides that there was no partition, but it does not give fully the grounds on which this decision is based. However, I do not consider, after hearing the careful argument of the learned **[25]** Advocate for the appellant, that this finding is open to second appeal. It is a finding of fact, and if there is evidence to support it, I do not think that it is open to a Court of second appeal to rehear the case and re-consider the evidence. I might perhaps come to a different conclusion from that arrived at by the Court of first appeal, but that clearly would not justify my interference with the finding."

On the application under s. 602, the Judicial Commissioner said:—

"Under the circumstances I have felt considerable doubt as to whether I should give the certificate asked for. There is, I think, great weight in the respondent's contention that the appeal does not involve a question of law. By the words 'the appeal must involve some substantial question of law,' I understand that by the appeal the appellate Court must be asked to decide a question of law which substantially or materially affects the decision in the case. In the present case it may be said that the appeal does not so involve a question of law. It does not appear to allege that the decree of this Court is based on an error of law, but it assumes the existence of certain facts on which the judgment of this Court does not proceed, and on this assumption contends that the judgment is wrong.

"On the other hand, however, it may be said that the grounds of appeal amount to this that, considering the judgment of the Court of first appeal, this Court was wrong in holding that it was bound by the findings of fact arrived at by that Court. Viewed in this light the appeal does involve a question of law, namely, whether this Court was right in holding that the findings of fact had been legally arrived at by the Court of first appeal, and were binding on the Court of second appeal. It is to be observed also that there are not concurrent findings of facts by two Courts. The two Courts which had to decide the facts of the case disagreed. I think, therefore, though with some hesitation, that I may grant the certificate that the case is a fit one for appeal to Her Majesty in Council.

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. D. Mayne*, for the appellant, contended that it was open to the Judicial Commissioner to consider the question of partition, as "error or defect in the decision of the case upon the merits" had taken place following upon what might be termed "substantial error or defect in the procedure." The case might be brought within sub-s. (*c*) of s. 584. They referred to *Luchman Singh* v. *Puna* (1), *Nivath Singh* v. *Bhikki Singh* (2), *Futtehma Begum* v. *Mohamed* **[26]** *Ausur* (3), *Assanullah* v. *Hafiz Mahomed Ali* (4). [SIR R. COUCH referred to *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (5).]

(1) 16 I. A. 125=16 C. 753. (2) 7 A. 649. (3) 9 C. 309.
(4) 10 C. 932. (5) 14 I.A. 101=14 C. 740.

1890 APRIL 25. — PRIVY COUNCIL. — 18 C. 23 (P.C.)= 17 I.A. 122= Sar. P.C.J. 560.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the respondent, were not called upon.

JUDGMENT.

Their Lordships' judgment was delivered on 25th April by

LORD MACNAGHTEN:—This is an appeal against a decree of the Judicial Commissioner of the Central Provinces, passed on second appeal, affirming a decree of the Commissioner of the Nerbudda Division, which had reversed a decree of the Assistant Commissioner of Nursingpur.

The appeal comes before this Board with the usual certificate from the Judicial Commissioner to the effect that it involves a substantial question of law.

The Judicial Commissioner on second appeal had no jurisdiction to rehear the case on the merits. The only grounds on which a second appeal can be brought are stated in s. 584 of the Civil Procedure Code, Act XIV of 1882. They are these: –

"(*a*) The decision being contrary to some specified law, or usage having the force of law.

"(*b*) The decision having failed to determine some material issue of law, or usage having the force of law.

"(*c*) A substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits."

In the sub-s. (*a*) the word "specified" obviously means specified in the memorandum or grounds of appeal.

At the outset of the argument their Lordships are informed that, according to Indian authorities, the appeal might be supported under sub-s. (*c*), if it did not fall within sub-s. (*a*), but they were told that it was impossible to state the point intended to be raised without going into the facts of the case.

[27] The facts are few and simple. The appellant, who was plaintiff in the lower Court, is the widow of the younger son of one Beni Singh, who died in 1878. The suit was brought to establish her right to certain villages which had been in her husband's possession and registered in his name, but which after his death in 1883 were registered in the name of his elder brother, the respondent Jewahir Singh. The appellant's right as heiress to her husband depended upon her establishing that a partition of the family property had taken place in the year 1857. It was not disputed that Beni Singh did make a division of the family property in 1857 between himself and his two sons. The appellant contended that this division was an absolute partition. The respondent maintained that it was merely a convenient arrangement for the purposes of management.

In support of the appellant's case witnesses were produced who deposed to conversations alleged to have taken place at the time of the division of the property. A copy of a petition was put in, purporting to proceed from Beni Singh, but not signed by him, which was filed in the Revenue Court in October 1864, and which contained this sentence,—"It is now five or six years since I divided the villages between my sons." Moreover, it was proved that the father and the two sons kept separate accounts with the same native banker, and lived separately.

On the other hand, it appeared that in 1864, at a settlement, when the investigation into proprietary rights was made, neither the respondent

1890 APRIL 25. PRIVY COUNCIL. 18 C. 23 (P.C.) = 17 I.A. 122 = 5 Sar. P.C.J. 560.

nor the appellant's husband set up any claim to any part of the property. Beni Singh claimed to be solely entitled, and the Settlement Officer awarded to him, and to him alone, proprietary rights in the whole estate. From 1864 to 1878, when Beni Singh died, the estate was entered in the Collector's register as Beni Singh's property.

The Assistant Commissioner found in favour of the appellant that the property was partitioned in 1857. From this finding the respondent appealed, relying mainly upon the following grounds of appeal :—

"3. That the property being ancestral, and there being no deed of partition to prove that a partition was effected in Sambat 1914, [28] *i.e.*, about 1857, A.D., the Court ought to have held that no partition was effected.

"4. That the oral evidence produced by the plaintiff to prove partition is utterly worthless and unreliable.

"5. That the entry of Beni Singh's name as sole proprietor of the villages in the settlement records, and his name appearing in the jammabandis till his death, conclusively disprove the statement of the plaintiff that a complete partition of the villages was effected in Sambat 1914.

"6. That Beni Singh not having mentioned anything about the partition alleged by the plaintiff at the time of the settlement, and his subsequently bringing rent suits in his own name and signing the rent receipts of the tenant, disproved the partition alleged by the plaintiff.

"7. That the lower Court ought to have rejected the copy of a petition, dated the 12th of October 1864, filed by the plaintiff, and alleged by her to have been presented to the Settlement Superintendent as being not proved, and therefore not admissible in evidence.

* * * *

"10. That the lower Court was wrong in holding that the defendant, living separately and having separate dealing, established partition."

The judgment of the Commissioner, so far as material for the present purpose, was as follows :—

"The facts of the case are stated in the lower Court's judgment. On the pleas, which were very fully argued on both sides, I find as follows—

* * * *

"*Plea* 3.—This plea also is, I think, sound. I agree with appellant's pleader that the burden of proving partition fell on plaintiff, and that plaintiff quite failed to prove it. The settlement proceedings alone, in my opinion, disprove it, while oral evidence as to an event 29 years old is of little weight, and there is absolutely no documentary evidence.

"This disposes of pleas 4, 5, 6.

"*Plea* 7.—I agree in this plea. The document was not trustworthy, and there was no trustworthy evidence about it.

* * * *

[29] "*Plea* 10.—This plea is also sound, and in accordance with common custom."

Having stated the facts of which a summary has been given, and having read the Commissioner's judgment, the learned Counsel for the appellant proceeded to argue that it was open to the Judicial Commissioner, and therefore open to their Lordships, to review the Commissioner's finding, on the ground that his decision involved or amounted to a substantial error or defect in procedure.

1890
APRIL 25.
——
PRIVY
COUNCIL.
——
18 C. 23
(P.C.) =
17 I.A. 122 =
5 Sar. P.C.J.
560.

In support of this view Counsel referred to several authorities in India, of which the most important are *Futtehma Begum* v. *Mohamed Ausur* (1) and *Nivath Singh* v. *Bhikki Singh* (2). In the former case the judgment of the Court contains the following passage :—

"It is not the ordinary course of procedure for this Court to interfere in second appeal with any findings of fact which have been arrived at by the lower appellate Court; but we are well within the scope of the authorities in holding that where the lower appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere accidental mistake, but totally to misconceive the case, this Court may interfere."

These observations were cited with approval in the Allahabad case, where the Full Bench (*diss.* PETHERAM, C.J.) apparently came to the conclusion that an erroneous finding of fact under similar circumstances might be treated as an error or defect in procedure within the meaning of s. 584.

The learned Counsel for the appellant contended that these rulings covered the present case. The lower appellate Court, it was said, had clearly misapprehended the effect of the settlement proceedings in 1864; undue weight had been attached to the registration in Beni Singh's sole name; the oral evidence had been wholly discarded; sufficient weight had not been given to the important statement in Beni Singh's petition or to the separate **[30]** dealings of his two sons; the Court had thus been led to misconceive the case entirely, and to find for the defendant when the finding should have been for the plaintiff.

It would be an unprofitable task to inquire how far this contention is well founded, because their Lordships cannot accept the rulings of the High Courts of Calcutta and Allahabad as a correct statement of the law. Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in s. 584. No Court in India or elsewhere has power to add to or enlarge those grounds. It is always dangerous to paraphrase an enactment, and not the less so if the enactment is perhaps not altogether happily expressed. Their Lordships therefore will not attempt to translate into other words the language of s. 584. It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding; *Anangamanjari Chowdrani* v. *Tripura Sundari Chowdrani* (3), *Pertab Chunder Ghose* v. *Mohendra Purkait* (4).

Their Lordships are unable to dispose of the case without expressing their regret that the Commissioner should have dealt with the matters before him in so meagre a fashion. They have no reason to doubt that all the evidence was fully and duly considered by him, but they cannot help thinking that a judgment more carefully expressed might have prevented an idle appeal.

---

(1) 9 C. 309. (2) 7 A. 649.
(3) 14 I.A. 101 = 14 C. 740. (4) 16 I.A. 233 = 17 C. 291.

Their Lordships must also express regret that the Judicial Commissioner having rightly treated the case as one depending entirely on issues of fact which he had no jurisdiction to review should yet have felt himself constrained by authority to give a certificate to the effect that a substantial question of law was involved in the appeal.

1890 APRIL 25. — PRIVY COUNCIL. — 18 C. 23 (P.C.) = 17 I.A. 122 = 5 Sar. P.C.J. 560.

[31] Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*
Solicitors for the respondent : Messrs. *T. L. Wilson & Co.*

C. B.

---

18 C. 31.

APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Wilson, and Mr. Justice Pigot.

IN THE MATTER OF THE INDIAN COMPANIES ACT, 1882 AND IN THE MATTER OF THE GANGES STEAM TUG COMPANY, LIMITED EX PARTE THE DELHI AND LONDON BANK, LIMITED.*
[2nd July, 1890.]

Company—Voluntary liquidation—Liquidator, borrowing powers of—Assets—Principal and Agent—Election—Subrogation—Indian Companies Act (VI of 1882), ss. 144 *(f)*, 177 *(g)*.

Case in which it was held that a liquidator of a company being voluntarily wound up had power to borrow for the purposes of the winding up, including the working of steamers and docks, on the credit of the assets of the company, without security written or otherwise, and that the loan in question was within his powers and was in fact made to the company, though the liquidator also made himself personally liable.

Per PETHERAM, C.J.—*Held*, that a person contracting with an agent may look directly to the principal unless by the terms of the contract he has agreed not to do so, whether he was or was not aware when he made the contract that the person with whom he was dealing was an agent only. *Calder* v. *Dobell* (1), referred to.

Per WILSON and PIGOT, JJ.—*Held*, that the realised assets of a company divided among the share-holders in pursuance of a resolution are assets within the meaning of s. 144 *(f)* of the Indian Companies Act.

Per PIGOT, J.—*Held*, that if it were necessary to hold so, the principle of *Baroness Wenlock* v. *River Dee Company* (2) would apply to the case.

[R., 11 C. L. J. 236 (239) = 14 C.W.N. 414 = 5 Ind. Cas. 110.]

THIS was an appeal from an order of Norris, J., dismissing the claim of the Delhi and London Bank, Limited, to rank as a [32] creditor against the Ganges Steam Tug Company, Limited, then in voluntary liquidation, in respect of the sum of Rs. 11,614-7-6.

The Ganges Steam Tug Companies was incorporated as a Limited Liability Company on or about the 28th August 1883, under the provisions of the Indian Companies Act, 1882, and carried on business by one

---

* Original Civil Appeal No. 36 of 1889, against the decree of Mr. Justice Norris, dated the 9th of September, 1889.

(1) L. R. 6 C.P. 486. (2) L. R. 19 Q. B. D. 155.

1890 JULY 2. — APPEAL FROM ORIGINAL CIVIL. — 18 C. 31.

Ramkissen, its Managing Agent and Treasurer, up to the 30th November 1885, as owners of steam tugs and lessees of two docks situate at Howrah known as the Commercial and East India Docks.

At an extraordinary general meeting of the Company, held on the 30th November 1885, it was duly resolved to wind up the company voluntarily under the provisions of the Indian Companies Act, 1882, and Ramkissen was appointed liquidator; and at a like meeting held on the 18th December 1885, the above resolution was confirmed. By another resolution duly passed by the shareholders on the 24th December 1885, it was (*inter alia*) directed that the fleet of the company should be sold by public auction, and that Ramkissen as liquidator should carry on the working of the Commercial and East India docks for the purpose of the winding up, and should work the steamers *Pilot* and *Columbus* until they were disposed of. The resolution is set out fully below in the judgment of Mr. Justice Wilson.

On the 21st December 1887 Ramkissen addressed the following letter to the Manager of the Delhi and London Bank:—

"23, STRAND ROAD,
Calcutta, the 21st December, 1887.

"THOS. LONGMUIR, ESQ.,
Manager, Delhi and London Bank.

"DEAR SIR,

Will you be so good as to let me know if you will allow me to overdraw to the extent of Rs. 10,000 on account of the Ganges Steam Tug Company, Limited. It will only be for a short time, and I shall be personally responsible for the same. An early reply will oblige.

Yours faithfully,
RAMKISSEN."

[33] To this letter the Manager replied as follows:—

"THE DELHI AND LONDON BANK, LIMITED.
Calcutta, 21st December, 1887.

"BABOO RAMKISSEN, 23, Strand.

"DEAR SIR,

In reply to your letter of date I shall be happy to allow you to overdraw on account of the Ganges Steam Tug Company, Limited, to the extent of Rs. 10,000, and it is understood that you will be personally responsible for the debt.

Yours faithfully,
(Sd.) D. KING,
Deputy Manager."

In pursuance of this agreement Ramkissen drew as liquidator upon the Bank for the amount claimed. The payments were made by cheques and were admittedly made in respect of business carried on by Ramkissen as liquidator. The account with the Bank through which the money advanced was passed was described as an "account current with Ramkissen, Liquidator, Ganges Steam Tug Company, Limited (in current deposit account)," so that it might be doubtful whether the account was the account of the liquidator or of the company.

1890
JULY 2.
APPEAL FROM ORIGINAL CIVIL.
18 C. 31.

The Bank claimed payment of the sum of Rs. 11,614-7-6 on account of principal and interest calculated up to the 5th June 1889, and it was stated in an affidavit made by the Manager that they held no security or satisfaction for the debt except the personal guarantee of Ramkissen, who had meanwhile absconded. The Bank claimed payment of the debt as part of the expenses of liquidation and in priority to the general creditors of the company.

Mr. Elias Meyer, the liquidator representing those interested in the company, in his affidavit stated that Ramkissen had ample funds at his disposal to enable him to carry on the business of the company and that no power to pledge the credit of the company was ever given to him; that Ramkissen had expended these funds in a careless and reckless manner; that the loan was to Ramkissen in his individual capacity, upon his personal guarantee **[34]** to repay the same; that the Bank did not give credit to the company, but allowed them to overdraw their account on the personal guarantee of Ramkissen; that at the time of such overdrawal the Bank held valuable securities of Ramkissen, more than sufficient to cover the debt; and that the company had a large claim against their late liquidator on account of the reckless and negligent manner in which he had carried on the business of the company and expended the company's moneys.

NORRIS, J., held that the Bank gave credit to Ramkissen personally, and that there was no reason for the introduction of the equity referred to in *Baroness Wenlock* v. *River Dee Company* (1) by which the lender of money borrowed by a company *ultra vires* is entitled to be subrogated to the rights of creditors of the company paid out of such money, and to recover from the company the amount of their debts or liabilities so paid off, which doctrine had been relied on on behalf of the Bank. The Bank appealed.

The case originally came on for hearing before PETHERAM, C.J. and PIGOT, J., who directed that the case should be reargued.

Mr. *Evans* (with him Mr. *Gasper*), for the appellants.

Mr. *Pugh* (with him Mr. *Garsh*), for the respondents.

Mr. *Evans*.—The real question is, to whom was the money lent; whose credit determined the loan? It was a loan to be repaid by the company. The doctrine of subrogation is applicable to the case—*Baroness Wenlock* v. *River Dee Company* (1). Ramkissen was a surety for the principal debtors; Contract Act, (IX of 1872), s. 126. The Bank are entitled to stand in the place of the creditors, and on that footing to be paid the amount of the advances out of the assets of the company. Section 173 of the Indian Companies Act (VI of 1882) provides for the cases in which a company may be wound up voluntarily. The section is identical with s. 129 of the English Act (25 and 26 Vict., c. 89). The consequences, which ensue from a voluntary winding up, are mentioned in s. 177 of the Indian Companies Act, which corresponds with s. 133 of the English Act. Section 144 (*b*) and (*f*) of the Indian Companies Act, corresponding with s. 95 of the English Act, **[35]** empowers the Official Liquidator to carry on the business of the company so far as may be necessary for the beneficial winding up of the same, and to raise money upon the security of the assets of the company. The case of *Dutton* v. *Marsh* (2) will be relied upon by the other side, but

(1) L. R. 19 Q. B. D. 155.
(2) L.R. 6 Q.B. 361.

1890 JULY 2. — APPEAL FROM ORIGINAL CIVIL. — 18 C. 31.

the present case is different as being a case of winding up. All obligations properly incurred by the liquidator must be satisfied and paid up in full; *In re Oak Pits Colliery Co.* (1), *In re Watson Kipling and Co.* (2), *In re National Arms and Ammunition Co.*(3). If the money was borrowed *ultra vires*, then the doctrine of subrogation applies; *Baroness Wenlock* v. *River Dee Company* (4).

Mr. *Pugh.*—The cases last cited are distinguishable from the present, and the *Baroness Wenlock's* case (4) does not apply except where there is privity between the person who lends and the person who borrows and the equity arises, which is not the case here. *Dutton* v. *Marsh* (5) is in the respondents' favour. The liquidator had power to summon a general meeting under s. 183 of the Indian Companies Act (VI of 1882). He employed a banker for his own convenience. The account was earmarked, so that it could be kept separate. [WILSON, J.—If this were Ramkissen's account and he had authority to borrow, it would be a case of money lent to an undisclosed principal. Section 231 of the Contract Act (IX of 1872) embodies the English law as settled in the case of *Calder* v. *Dobell* (6).] The materials in this case are insufficient, and the Bank should have brought a suit.

Mr. *Evans* in reply referred to Lindley on Companies, 5th edition, Book II, Chap. 5. pp. 235-38.

The Court (PETHERAM, C. J., WILSON and PIGOT, JJ.) delivered the following:—

JUDGMENTS.

PETHERAM, C.J.—I am of opinion that this appeal must be allowed, and the appellants' claim against the company admitted. I agree with the learned Judge that Ramkissen was, upon the **[36]** face of the account, the customer of the Bank; but I think that whatever was the form of the account, or by whatever machinery the loan was carried out, it has been proved that the account was in fact the account of the company, and that the advance was made to them.

This is not the ordinary case of a liquidator whose only duty is to collect the assets of an insolvent company and to distribute them, but of the liquidator of apparently a solvent company who was to carry on the business for the company for an indefinite term, and for that purpose required and kept a banking account in his own name, but which was used only for the company's business.

It is a well-established law that a person who has made a contract with an agent may, if and when he pleases, look directly to the principal unless by the terms of the contract he has agreed not to do so; and that, whether he was or was not aware, when he made the contract, that the person with whom he was dealing was an agent only. *Calder* v. *Dobell* (6).

In the present case I think that the Bank have shown that the real borrowers of their money were the company, and that the claim must be admitted.

The appellants will get the costs in all the Courts.

WILSON, J.—Two questions arise on this appeal: first, what power had the liquidator to borrow so as to charge the company; secondly, was the loan in question within these powers? By s. 144 of the Indian Companies Act (VI of 1882) the liquidator of a company which is being

(1) L.R. 21 Ch. D. 322.
(2) L.R. 23 Ch. D. 500 (507).
(3) L.R. 28 Ch. D. 474 (481).
(4) L.R. 19 Q.B.D. 155.
(5) L. R. 6 Q. B. 361.
(6) L.R, 6 C.P. 486.

wound up by the Court has power, with the sanction of the Court, amongst other things "to raise, upon the security of the assets of the company, from time to time, any requisite sum or sums of money (cl. *f*)." The forms of orders made under the corresponding section to this in the English Act, collected in Palmer's Precedents, 4th ed., p. 707, show that the borrowing need not be on mortgage or pledge or charge of specific property, but may be on the security of the assets generally. The liquidator of a company being voluntarily wound up—and that is the case with the company before us—may, by s. 177, sub-s. (*g*), without **[37]** the sanction of the Court, exercise all powers by this Act given to the Official Liquidator, including of course the power of borrowing.

1890 JULY 2. — APPEAL FROM ORIGINAL CIVIL. — 18 C. 31.

In the present case the right of the liquidator to borrow is strengthened by the facts of the case. The resolution for the voluntary winding up of the company was passed on the 30th November 1885. That resolution was confirmed on the 18th December 1885, and the first liquidator appointed. At another meeting on the 24th December 1885, the share-holders came to the following resolutions:—

"The *Columbus*, *Pilot*, and the Docks should continue working until they are disposed of.

"The meeting considers that the liquidator should arrange terms as to commission with Messrs. Mackenzie, Lyall & Co. If this firm agrees to undertake the sale without charging any commission in the event of the steamers and docks, together with machinery, stores, &c., not being sold, the same should be put up for sale by public auction at an upset price to be fixed by the liquidator. Sale to take place within a month from the first advertisement: liquidator to be at liberty in the meantime to accept offers for private sale of the same.

"Having regard to the facts that there is now in the hands of the liquidator a sum of about Rs. 1,75,000 in cash and in 4 per cent. Government securities, this meeting considers that the liquidator should sell off the Government securities and declare a dividend of 25 per cent. or Rs. 25 per share, having regard to the fact that the declaration of dividend will leave a sufficient balance in the hands of the liquidator to pay off the whole of the debts of the company."

From these resolutions it would seem that the share-holders directed the liquidator to continue working two steamers and some docks, and provided him with no working capital to work with, leaving apparently no alternative, in case the current receipts should at any time be insufficient to carry on with, except borrowing. This is strong evidence to show that they authorised him to borrow. I think it clear, then, that the liquidator had power to borrow for the purposes of the winding up, including the working of the steamers and the docks, on the credit of the assets of the company.

The second question is, did he do so. He certainly borrowed the sum in question. He borrowed it for the purposes of the company and applied it to those purposes. Did he borrow on the **[38]** credit of the assets of the company? His letter of the 21st December 1887 to the manager of the claimant Bank was—

"Will you be so good as to let me know if you will allow me to overdraw to the extent of Rs. 10,000 on account of the Ganges Steam Tug Company, Limited? It will only be for a short time, and I will be personally responsible for the same." And the answer was—"I shall be happy to allow you to overdraw on account of the Ganges Steam Tug Company, Limited, to the extent of Rs. 10,000, and it is understood that you will be

1890 JULY 2. — APPEAL FROM ORIGINAL CIVIL. — 18 C. 31.

personally responsible for the debt." I think this was a borrowing on the credit of the company so far as the liquidator could charge it, that is, on the credit of the assets, though the liquidator also made himself personally liable; and I do not think any difficulty arises from the fact that the money advanced was passed through an account with the Bank, the heading of which is ambiguous, so that it might be doubted whether it was primarily the account of the Company or of the liquidator: it was certainly an account of the moneys of the company.

That there were at the time of the loan assets of the company liable to be charged, and that there are such still, is, I think, clear, for the 25 per cent. divided amongst the share-holders under the resolution of the 24th December 1885, is part of the assets and available to satisfy creditors.

I think the appeal should be allowed and the claim admitted with costs in both Courts.

PIGOT, J.—I am of opinion, as I was at the close of the first argument in this case, that this appeal should be allowed and the claim admitted.

As to the question whether the loan was in fact made to the company, and that both the Bank and the liquidator so intended, I have been throughout unable to see how any doubt could exist upon it. The letters seem to me to show that it was, and was intended by both parties to be, such a loan, fortified by the personal liability of Ramkissen.

No question arises as to the fact that the money was borrowed and was applied to pay debts incurred in the working of the business of the company, the carrying on which by the liquidator was expressly authorized by the company: nor is there anything [39] to show that the business, so far as it was carried on by the liquidator, was not carried on legitimately for the purposes of the winding up.

A question was raised in the first argument (not, I think, in the second) as to the power of a liquidator to pledge, as security for a loan contracted by him, not merely realised assets of the company, but even the liability of members of the Company for calls; such liability being, it was argued, assets of the company within the meaning of the section.

The facts of the present case do not give rise to such a question; for the realised assets of the company, divided among the share-holders in pursuance of the resolution referred to by him, stand on a different footing from the liability to calls on shares in the company, and are in any case, I think, assets within the meaning of the section.

It is not necessary to determine the question whether the principle of *Baroness Wenlock's* case applies to the present. But I may say that, had it been necessary, I should myself have been prepared to hold that that case did apply.

Appeal allowed.

Attorneys for the appellants: Messrs. *Morgan & Co.*

Attorneys for the respondents: Messrs. *Gregory & Jones.*

A. A. C.

18 C. 39.

1890
JULY 30.
REFERENCE FROM THE BOARD OF REVENUE.
18 C. 39.

REFERENCE FROM THE BOARD OF REVENUE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, and Mr. Justice O'Kinealy.

IN THE MATTER OF QUEEN-EMPRESS *v.* TRAILAKYA NATH BARAL.* [30th July, 1890].

Stamp Act (*I of* 1879). ss. 3 (10), 61—*Instruments "duly stamped"*—*Rule* 5 (*b*) *of the rules made by the Governor-General in Council under Notification No.* 1288, *of* 3rd *March* 1882.

The absence of the certificate required by rule 5 (*b*) of the rules, dated 3rd March 1882, issued by the Governor-General in Council under [40] ss. 9, 15, 17, 32, 51, and 56 of the Indian Stamp Act (I of 1879) does not make the document in question "not duly stamped" within the intention of the Stamp Act.

The non-compliance by the treasury officer or the stamp vendor with the direction to give such a certificate is not an act for which the person purchasing the stamp from him can be punished, by the invalidation of the stamp innocently bought by him, or under s. 61 of the Indian Stamp Act.

THIS was a reference to the High Court by the Board of Revenue under s. 46 of the Indian Stamp Act (I of 1879) in the following terms:—

"A deed of conveyance was written on two impressed sheets—one of Rs. 200 and the other of Rs. 90. On the consideration set forth, Rs. 27,345, the proper stamp duty was Rs. 275, and as Rs. 290 had been paid, the deed, it will appear, was more than sufficiently stamped. Nevertheless the Collector of Maldah, before whom it was presented, impounded it on the ground that it did not bear the treasury officer's endorsement as laid down in rule 5 (*b*) of the rules issued by the Governor-General in Council under Notification No. 1288, dated 3rd March 1882, (p. 82 of the Board's Stamp Manual, 1889), certifying that the number of sheets used was the smallest available, and that therefore the deed was 'not duly stamped' within the meaning of s. 3 (10) of the Act. The Collector further called upon the executant to pay Rs. 275 as stamp duty and Rs. 5 as penalty, and on the latter's failure to do so, ordered his prosecution under s. 61. The Deputy Magistrate, who tried the case, convicted the accused and sentenced him to a fine of Rs. 10.

"The Collector, being dissatisfied with this decision, referred the case for the orders of the Board, through the Commissioner, contending that the Magistrate trying the case was bound to include in the fine the amount of stamp duty due, *viz.*, Rs. 275. Both the Commissioner and the Board did not concur in this view, and the Board expressed an opinion that it was probably incorrect to treat the deed as not 'duly stamped' under s. 3 (10) of the Indian Stamp Act, 1879, referring to a decision of the Madras High Court (Full Bench) reported in the Indian Law Reports, Madras series, vol. VIII, p. 532. The Collector in reply asks that the question whether the document is to be held to be 'duly [41] stamped' or not may be referred to the High Court under s. 46, and the Commissioner supports the request. Hence the present reference.

"The case before the Madras High Court was very analogous to this case, though the point at issue was not precisely the same, and the Board, for the reasons set forth by the majority of the Judges in that case, are

---

* Reference from the Board of Revenue under s. 46 of the Indian Stamp Act, made by K. G. Gupta, Esq., Secretary, Revenue Board, dated the 7th of July 1890.

1890 JULY 30. — REFERENCE FROM THE BOARD OF REVENUE. — 18 C. 39.

of opinion that this document ought to be held to be duly stamped. The precise point on which the Board asks for a ruling is whether the absence of the certificate required by rule 5 (*b*) of the rules issued by the Governor-General in Council in the notification of the 3rd March 1882 makes the document in question 'not duly stamped' under the Indian Stamp Act of 1879."

Rule 5 (*b*) is as follows:—

"When the amount of duty chargeable in respect of any instrument exceeds one hundred rupees, or a treasury officer or stamp vendor has certified under cl. (*a*) that he is unable to furnish a single stamp of the required value, the number of sheets used for indicating the payment of duty shall not exceed the number which the treasury officer or the stamp vendor certifies in either case to be the smallest number which he can furnish so as to make up the required amount."

The Advocate-General (Sir *Charles Paul*) appeared for the Government upon the reference.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and PIGOT and O' KINEALY, JJ.) was delivered by—

PIGOT, J. (PETHARAM, C.J., and O'KINEALY, J., concurring)—We think that the question put to us at the end of the 4th paragraph of this reference must be answered in the negative, and that the absence of the certificate required by rule 5 (*b*) of the rules issued by the Governor-General in Council does not make the document in question "not duly stamped" within the intention of the Stamp Act. It is not necessary for us to express an opinion as to the exact scope of the direction contained in that rule. Whether or not it is a purely administrative order, directory as addressed to the treasury officer or to the stamp vendor, or whether it be also intended for the protection from inconvenience, or what not, of the person applying for the stamps, in neither case can it, in our judgment, be held that the non-compliance by the treasury officer or the stamp vendor with the **[42]** direction to give such a certificate is an act for which the person purchasing the stamp from him can be punished by the invalidation of the stamps innocently bought by him. So long as the proper stamp is obtained and paid for by him, as was the case in this instance, he is, we think, unaffected by the operation of that rule. We are not aware, nor probably does the matter come strictly before us, of the exigencies which, in the opinion of the Collector under some rule issued, as he supposes, probably correctly, by the Board of Revenue, rendered it his duty to institute this astonishing prosecution directed against a person who had done all required of him by law, and even paid Rs. 15 more than the stamp required from him by law.

We would earnestly invite attention to the question whether the rules and directions issued by the Board of Revenue are, in truth, of such a stringent nature as to compel the Collector, who of course did, as he understood it, his duty, and no more, to institute this prosecution under the impression that he was bound to do so. If so, it seems obvious that such rules should be corrected.

As to the prosecution, we have already intimated our opinion—an opinion in which the learned Advocate-General, as might be expected from him, cordially joins—that the matter ought to be sent to the Criminal Bench for their consideration in case the learned Judges sitting on it should think proper to take notice of the case. If so, perhaps the

1890 JULY 30.

REFERENCE FROM THE BOARD OF REVENUE.

18 C. 39.

stigma of a criminal conviction under such circumstances may not be allowed to remain upon Trailakya Nath Baral, the subject of that prosecution.

On the matter coming before the Criminal Bench, the Court (PETHERAM, C.J., and RAMPINI, J.) delivered the following :—

JUDGMENT.

We think that for the reasons given in the judgment of this Court, dated the 30th July last, the document executed by the accused was duly stamped, and that therefore the accused has not committed any offence punishable under s. 61, Act I of 1879. We accordingly set aside his conviction and the sentence inflicted upon him. The fine, if paid, must be returned to him.

A. A. C. *Conviction quashed.*

---

18 C. 43.

[43] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Rampini.

A. B. MILLER, OFFICIAL ASSIGNEE AND ASSIGNEE OF THE ESTATE OF SHIBODAS MOHURI (*Defendant*) *v.* BUDH SINGH DUDHURIA (*Plaintiff*).* [11th August 1890.]

Parties—Insolvent Act (11 & 12 *Vict. c.* 21)—*Official Assignee made a party defendant.*

In a suit in the mofussil the defendant having been adjudicated an insolvent under the Indian Insolvent Act (11 & 12 Vict., c. 21), the Official Assignee was placed upon the record as a defendant and judgment was entered against him for the sum claimed to be paid out of the insolvent's estate.

Held, that the Official Assignee was not a proper party, there being nothing in the Insolvent Act which enables a suit of this kind to be continued against the Official Assignee.

[Diss., 31 C. 667 (673) ; R., 22 C. 259 (265, 267) ; 25 M. 406 (421) ; 15 Ind. Cas. 288 (290).]

THIS was a suit to recover from the defendant Shibodas Mohuri the sum of Rs. 12,100, due to the plaintiff's firm at Azimgunge with interest thereon. The plaint was filed on the 4th March 1889. The defendant Shibodas Mohuri was adjudicated an insolvent by the Court for the Relief of Insolvent Debtors on the 27th February 1889, and by an order of that date the estate and effects of the insolvent were vested in the Official Assignee, so that the suit was instituted subsequently to the date on which Shibodas Mohuri was adjudicated an insolvent. On the 5th April 1889 the Official Assignee was made a defendant at the instance of the plaintiff, and on the 21st May 1889 the Official Assignee filed a written statement contending that no suit would lie against him for any claim accruing prior to the date of the insolvency ; that the plaintiff must rank *pari passu* with the other creditors of the insolvent for dividend, and was not entitled to claim any preference over them ; that the plaintiff should prove in the Insolvent Court for his claim, and that the suit should be dismissed with costs. Shibodas Mohuri took no part in the proceedings.

---

* Appeal from original decree No. 219 of 1889, against the decree of Baboo Raj Chunder Sanyal, Subordinate Judge of Moorshedabad dated the 29th of June 1889.

1890 AUG. 11.

APPELLATE CIVIL.

18 C. 43.

Upon the question of jurisdiction, the Subordinate Judge held that the insolvent's schedule not having been filed before the [44] institution of the suit or up to that date, s. 49 of the Insolvency Act did not apply, and the Court had therefore jurisdiction to try the case. He found that the sum claimed was due to the plaintiff from Shibodas Mohuri, and passed a decree against the Official Assignee for the amount due with interest and costs of suit.

The Official Assignee appealed to the High Court.

Mr. *Woodroffe*, Mr. *Sale* and Mr. *Temple*, for the appellant.

Baboo *Srinath Dass*, for the respondent.

JUDGMENT.

The judgment of the High Court (PETHERAM, C. J., and RAMPINI, J.) was delivered by

PETHERAM, C. J.—This was a suit brought by the plaintiff against a person called Shibodas Mohuri to recover a sum of Rs. 12,100 and interest. Shortly before the suit was brought, proceedings had been taken against this man under the Insolvency Act, and his estate was vested in Mr. Miller, the Official Assignee. Upon that an application was made to the Subordinate Judge to substitute Mr. Miller as a defendant in place of the original defendant, the actual debtor, and that application was acceded to and Mr. Miller was placed upon the record. The case then went to trial. The Subordinate Judge tried the case, and came to the conclusion that the original debtor did owe the money, and he gave judgment against Mr. Miller for the sum claimed to be paid out of the insolvent's estate.

The first order putting Mr. Miller's name on the record was, in our opinion, wrong. There is nothing in the Insolvency Act which enables a suit of this kind to be continued against the Official Assignee when the defendant has become insolvent, and this is not the case of the assignment of any interest, within the meaning of s. 372 of the Code of Civil Procedure, such as would enable the plaintiff to proceed against the Assignee. We think, therefore, that the Subordinate Judge was wrong in placing Mr. Miller's name on the record; but his name having been wrongly placed there, we think that the judgment against him in this form must be wrong, and the reason is that such a judgment would work manifest injustice and prevent the beneficial operation of the Insolvency sections of the Act, because a judgment of this kind, as against Mr. Miller, comes to this, that [45] he is to pay the money out of the estate in his hands, and that this man, the plaintiff, is entitled to get the whole of his claim, and that it is to be paid in full if the whole estate of the insolvent is sufficient to pay him. This is clearly wrong, and consequently this appeal must be allowed, and the judgment of the Subordinate Judge and the order substituting Mr. Miller's name on the record must be set aside, and the case remitted to the Subordinate Judge for retrial as against the original defendant. The plaintiff must pay the cost of this appeal.

Appeal allowed.

A. A. C.

18 C. 45.

1890 JULY 11. APPELLATE CIVIL. 18 C. 45.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

NISTARINY DABYA, MINOR, BY HER GUARDIAN SARASATY DABYA (*Petitioner*) *v.* BRAHMOMOYI DABYA (*Opposite party*).*
[11th July, 1890].

Probate—Revocation of Probate—"Just cause" for revocation—Probate and Administration Act (*V of* 1881), s. 50.

The mere absence of a special citation in proceedings in which probate of a will is granted is not, where the person to whom a citation has not been issued is otherwise aware of the proceedings, a "just cause" for revocation of probate as making the proceedings substantially defective within the meaning of s. 50 of the Probate Act, even where such person is a minor.

[R., 14 C.W.N. 1068=7 Ind. Cas. 740 (742); 10 C.L.J. 263 (274); D., 2 C.W.N. 100 (106).]

THIS was an application for revocation of probate. The will in respect of which probate was granted was said to have been executed by one Gopal Chandra Das, who died some time in July 1887, leaving him surviving his widow, Nistariny Dabya, a minor, who is the petitioner in this case and is now represented by her mother, Sarasaty, and his mother Brahmomoyi, who was appointed executrix under the will. Brahmomoyi applied for probate in October 1887. The usual citations were issued; and thereupon one Kali Prasad Tripati, paternal uncle of Nistariny, entered a caveat, representing that the minor, Nistariny, was living under his care, and was the heiress-at-law of Gopal Chandra, and that the alleged will was a forgery. Evidence was gone into on both sides, and the District [46] Judge refused probate, holding that the will was not proved. On appeal by Brahmomoyi, the High Court, on the 25th of June 1888, reversed the Judge's decision, and ordered probate to be granted.

The present application was made on the 23rd of March 1889 for revocation of probate, on the ground that the grant had been obtained by Brahmomoyi fraudulently and in collusion with Kali Prasad Tripati. The only evidence adduced in support of this allegation of fraud and collusion was that of Sarasaty, the mother of Nistariny. She admitted, however, that Kali Prasad was not on bad terms with her daughter, and that she was living in the same house with him.

The District Judge considered the allegation of fraud and collusion unfounded, and rejected the application. Against that decision the petitioner appealed to the High Court.

Dr. *Rash Behari Ghose* and Baboo *Boidya Nath Dutt*, for the appellant.

Dr. *Troylokya Nath Mitter*, for the respondent.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was (omitting the facts which were stated as above) as follows:—

JUDGMENT.

It is very properly conceded before us that the allegation of fraud and collusion has not been substantiated, and the only point pressed upon us

* Appeal from original decree No. 166 of 1889, against the decree of J. Pratt, Esq., Judge of Midnapore, dated the 8th of April 1889.

1890 JULY 11. — APPELLATE CIVIL. — 18 C. 45.

is that the appellant is entitled to ask the executrix, Brahmomoyi, to prove the will in solemn form in her presence, as she neither appeared nor had she been specially cited to appear in the previous proceedings, and that there was just cause for revocation of probate within the meaning of s. 50 of the Probate Act, the absence of special citation making the proceedings substantially defective.

We do not think this contention is sound. The authorities cited in its support do not bear it out. In *Komal Lochun Dutt* v. *Nilruttun Mundle* (1) the only point decided was that the grant of probate could not be contested by a regular suit, and that if the probate was wrongly granted, the proper course was to apply for its revocation according to the procedure laid down in the Succession Act. Some of the observations made in the judgment no doubt show that under certain circumstances the grant of probate after a will is proved in solemn form may still be called **[47]** in question, but the learned Judges do not say, nor were they called upon to say, what those circumstances are. In the case of *Kamona Soondury Dassee* v. *Hurroo Lall Saha* (2), the only points raised (in addition to that relating to the genuineness of the will) were that the Court below had no local jurisdiction to revoke the probate, and that the petitioner had no sufficient interest in the property of the alleged testator to entitle him to apply for revocation of probate. And though in the judgment it is observed that when a will is propounded which alters the devolution of property, the District Judge should, in the exercise of the discretion vested in him as to the mode of issuing citations, direct special citations to be served on every one immediately affected by the will, the issue of special citations is not held to be imperative, so as to make the proceedings substantially defective merely by reason of its absence. In *Brinda Chowdhrani* v. *Radhica Chowdhrani* (3) the learned Judges observed :—" If it appeared that the applicant had had notice, or had been aware of the former proceedings before the grant of probate issued and had abstained then from coming forward, this would constitute a ground for refusing to allow her to intervene [see *Ratcliffe* v. *Barnes* (4) and *In re Pitambar Girdhar* (5)], unless perhaps it were made out that the circumstances leading her to believe that the will was not genuine had not come to her knowledge until after the grant of probate." In those observations we entirely agree ; but they do not under the circumstances of this case presently to be noticed at all support the appellant's contention on the contrary, they support the opposite side.

While we deem it certainly desirable that when a will is propounded which alters the devolution of property, the District Judge should, in the exercise of the discretion vested in him by s. 69 of the Probate Act (V of 1881) as to the mode of issuing citations, direct special citations to persons whose rights are immediately affected by the will, we do not think the absence of such special citation would of itself be sufficient to entitle a party to require a will to be proved in his presence after it has once been proved in solemn form, if he was aware of the proceedings. The contention **[48]** that the appellant is entitled to ask the other side to prove the will in her presence solely on the ground that she was not cited to appear, and she did not appear in the previous proceedings, was precisely the contention raised in *Newell* v. *Week* (6). But the contention was overruled, as there was no authority for it, and Sir John Nicholl observed :—

(1) 4 C. 360. (2) 8 C. 570. (3) 11 C. 492.
(4) 2. Sw. & T. 486. (5) 5 B. 638. (6) 2 Phill. 224.

1890 JULY 11. — APPELLATE CIVIL. — 18 C. 45.

"The process of citing parties is a convenient one for all suitors, because when that is done you need not prove actual privity; the law presumes actual privity after legal process—the *lis pendens* is sufficient notice that persons should appear and protect their own interests, but if you can prove actual privity, the legal process in point of solid justice and sound reason is superfluous, though *ex abundante cautela*, it may still be convenient to resort to it and have it upon record." The same view is affirmed in *Ratcliffe* v. *Barnes* (1), in *Wycherly* v. *Andrews* (2), in the case of *Brinda Chowdhrani* v. *Radhika Chowdhrani* (3) referred to above, and also in the case of *In re Pitamber Girdhar* (4).

It was strongly urged that as the applicant for revocation of probate is a minor, nothing short of special citation or actual appearance at the previous proceedings was sufficient to conclude her, as privity could not otherwise be presumed in such a case. Let us examine what the facts are. Kali Prasad Tripati, paternal uncle of the minor, clearly had notice of the proceedings. It is admitted by the minor's mother, who now represents her as her guardian, that he is not on bad terms with the minor, and that the minor has been living in the same house with him. Kali Prasad had no interest whatever in opposing the grant of probate otherwise than as representing the minor. He did oppose the grant of probate, expressly representing that the minor was living under his care and was the heiress-at-law of the alleged testator, and his opposition was successful in the first Court, though the appellate Court took a different view of the case. And both the Courts regarded him as acting on behalf of the minor. These being the facts of the case and the allegation of fraud and collusion between Kali Prasad and the opposite side being now given up, the only conclusion that we can come to is that the persons under whose care the minor has [49] been living, and who are interested on her behalf, were fully aware of the previous proceedings, and that the party who entered appearance and opposed the grant, though nominally appearing on his own behalf, did really appear on behalf of the minor.

We do not therefore think that any just ground has been made out for reopening the proceedings, and this appeal must consequently be dismissed with costs.

Appeal dismissed.

J. V. W.

---

18 C. 49.

ORIGINAL CRIMINAL.

Before Mr. Justice Wilson.

QUEEN-EMPRESS *v.* HURREE MOHUN MYTHEE.*
[25th and 26th July 1890.]

Child-wife—Culpable homicide not amounting to murder—Causing death by a rash and negligent act—Rashness and negligence—Penal Code, ss. 304, 304-*A*, 325 *and* 338.

The prisoner, a fully developed adult man, was charged with causing the death of his wife, a girl aged about 11 years and 3 months, who had not attained puberty. The death was caused by hæmorrhage from a rupture of the vagina caused by the prisoner having sexual intercourse with the girl. For the defence it was alleged

---

* Original Criminal Case, 3rd Sessions, 1890.

(1) 2 Sw. & T. 486.
(2) L. R. 2 P. & D. 327.
(3) 11 C. 492.
(4) 5 B. 638.

1890
JULY 26.

ORIGINAL
CRIMINAL.

18 C. 49.

that he had had sexual intercourse with the girl on several previous occasions without injury to her, and there were circumstances in the case which showed that this was possible, and even not improbable, though the medical evidence was to the effect that, if such intercourse had previously taken place, the penetration was probably not so complete or with so much sexual vigour as on the occasion when the injury was caused. The medical evidence was further to the effect that the girl had not attained puberty, and was immature and wholly unfit for sexual intercourse; that under such circumstances sexual intercourse between the prisoner and the girl was likely to be dangerous to her, and to cause injuries more or less serious according to the degree of penetration effected. The prisoner was charged with (*a*) culpable homicide not amounting to murder under s. 304 of the Penal Code; (*b*) causing death by doing a rash and negligent act under s. 304A; (*c*) voluntarily causing grievous hurt under s. 325; and (*d*) causing grievous hurt by doing an act so rashly or negligently as to endanger human life or the personal safety of others under s. 338.

[50] *Held*, that, in such a case, when the girl is a wife and above the age of 10 years, and when therefore the law of rape does not apply, it by no means follows that the law regards the wife as a thing made over to be the absolute property of her husband, or as a person outside the protection of the criminal law; that no hard-and-fast rule can be laid down that sexual intercourse with a girl under a certain age must be regarded as dangerous and punishable, or over that age as safe and right, but that each case must be judged according to its own individual circumstances; that in such a case the jury have to consider and say, whether under the particular circumstances of the case, having regard to the physical condition of the girl, and to the intention, the knowledge, the degree of rashness or negligence with which the accused is shown to have acted on the occasion in question, he has brought himself within any of the provisions of the criminal law.

Held further, that if the jury were of opinion (*a*) that the act of the prisoner caused the death of the girl, that is to say, that the act of cohabitation on the part of the prisoner had the effect of rupturing the vagina and so causing the hœmorrhage which led to her death; (*b*) that the act of cohabitation between a fully developed man like prisoner and an immature girl like his wife was in itself a thing likely to lead to dangerous consequences; (*c*) that that act was one of such a character as to indicate a reckless indifference to the welfare of the girl or a want of reasonable consideration about what the prisoner was doing, one which the husband of the girl, if he had had a reasonable regard to her welfare, and had exercised reasonable thought as to the act he contemplated doing, would have abstained from doing, they would be justified in finding that the prisoner caused the death of the girl by a rash and negligent act.

Under no system of law with which Courts have to do in this country, whether Hindu or Mahomedan, or that framed under British rule, has it ever been the law that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her.

THE prisoner, a fully developed adult man, was charged in an indictment containing four counts, *viz.*, with —

(1) culpable homicide not amounting to murder (s. 304, Penal Code);
(2) causing death by doing a rash and negligent act (s. 304A);
(3) voluntarily causing grievous hurt (s. 325); and
(4) causing grievous hurt by doing an act so rashly or negligently as to endanger human life or the personal safety of others (s. 338).

[51] The charges arose out of the death of one Phulmoni Dossee, a girl aged about 11 years and 3 months, who was married to the prisoner on the 11th May 1890 and who died on the 16th June. From the evidence of Dr. Cobb, the Officiating Police Surgeon, who made the *post mortem* examination, the death was caused by hæmorrhage from a laceration in the upper part of the vagina to the right of the neck of the uterus, measuring 1½ inches long and 1 inch broad, and it was the case for the prosecution that this laceration had been caused by the prisoner having sexual intercourse with the girl on the night of the 15th June.

1890 JULY 26. — ORIGINAL CRIMINAL. — 18 C. 49.

The case was tried before a special jury consisting of six Hindus, two Europeans, and one Mahomedan.

The Officiating Standing Counsel (Mr. *L. P. Pugh*), and Mr. *Hyde*, for the prosecution.

Mr. *M. L. Dutta*, for the defence.

The evidence for the prosecution was to the following effect:—

The mother of the deceased, in whose house the occurrence took place, deposed to the fact that the prisoner and the deceased were Oorya Kyaists, and that it was not the custom of their caste for husbands to cohabit with their wives before the latter had attained the age of puberty. She stated that her daughter at the time of the marriage and of the occurrence had not attained puberty; that after the marriage her daughter had gone to the prisoner's house, where she remained, according to the usual custom, for about 7 days, and on the expiry of that period had been brought back to her house; that on another occasion, two days after the first, she had, as was customary, gone to the prisoner's house for one day, being brought back at night; that the prisoner had once before the night of the occurrence visited at her house, where he remained for three days; that he then slept in the boitakhana downstairs in the outer apartments, and that the deceased slept in her room with her; that on the night of the 15th June, on which day the prisoner had come to her house, she retired to rest about 11 P.M., the deceased and her two little sisters being at that time asleep in the verandah just outside her room, and the prisoner occupying the room next her's; that about midnight she was awoke by cries from the deceased, and on getting up found her on the bed in the prisoner's room, [52] bathed in blood, with the prisoner standing close beside her. She further stated that on the other female inmates of the house being called, the grandmother of the deceased abused the prisoner for what he had done, and that he made no reply; that the deceased, except asking for water, never spoke from the time she entered the room; that a doctor was sent for and he came in the morning, but made no internal examination of the deceased, who died the same day about 3 P.M.

The evidence was corroborated by other relations of the deceased and inmates of the house, and her age was proved by the mother and also by the production of the register of births from the thanna, which contained an entry, made at the instance of the father of the deceased on the 10th March 1879, to the effect that a daughter had been born to him on the 2nd March. The father having died about four years before the occurrence, evidence was given by the mother and other relatives to prove that the deceased was the daughter referred to in that entry.

The medical evidence in the case consisted of the statement of four gentlemen—Dr. Annoda Prasad Das, who had been called in to see the deceased on the morning of the 16th June, Dr. Cobb, the Police Surgeon, who made the *post-mortem* examination, and Dr. Macleod and Dr. Joubert, who were present in Court when the rest of the evidence was given, and who were called as experts.

Their statements were as follows:—

Dr. Annoda Prosad Das.—" I am a medical practitioner. I was called to attend Phulmoni on the morning of the 16th June. I went between 6 and 7 A.M. I had been informed at 2 A.M. When I went I saw Phulmoni; she was almost dying. She was pulseless. Her breathing was hurried. I examined the vagina externally. I found clots of blood were hanging from the orifice. If I had examined internally, I should have disturbed those clots, and I did not think it expedient. There

1890 July 26. — Original Criminal. — 18 C. 49.

was blood on the inner parts of the thighs and on the mattress on which she was lying. I prescribed for her treatment. Accused was not there then. I did not see Phulmoni again. In the evening, about 3 P.M., accused came to me, but Phulmoni was dead. I had no conversation. I only asked how this accident occurred, and he said it was by means of sexual intercourse. In my judgment the girl was between 11 and 12. I can form no judgment from external examination, whether she had attained puberty. Hair is one of the signs of attainment of puberty, not of commencement. This was not present."

[53] *Cross-examined.*—" She was a well-developed girl. I have known instances among Hindus of girls of 12 becoming mothers. I can say 2 in 10."

Re-examined.—" I mean that 2 in 10, that is, 20 per cent. of Hindu women are mothers at 12. I have never known a single instance under 12. I mean to say that 20 per cent. become mothers between 12 and 13. Never one before 12. Nor have I ever known an instance of becoming a mother before the age of puberty."

Dr. Cobb, Police Surgeon (after stating his qualifications, and that he had made the *post-mortem* examination of the body of Phulmoni on the 17th June, continued).—" I refer to my notes made at the time. I came to the conclusion that she was between 11 and 12. The body was well-nourished. I found a blood-stained cloth tied round the waist and between the legs. I came to the conclusion she had not attained puberty. The uterus and ovaries were undeveloped, and she had not menstruated. The growth of hair on the part is one of the signs of puberty. I saw no sign of any. On examining the part, I observed a blood clot protruding from the vulva, but no laceration or other mark of injury on the outside. There was no swelling. I opened up the vagina and found the blood clot filled the vaginal canal, *i.e.*, the whole capacity of the vagina in its length and breadth. It formed a sort of cast. It was coagulated and had become firm. The length of the clot was 3 inches, the diameter 1½. The walls of the vagina in their natural condition, with no substance in them, are closed and in contact. The vagina is lined by a mucus membrane with muscular and elastic fibres outside it. I suppose if the muscular fibres were ruptured, the muscular action would cease. The length of the vagina itself was a very little less than 3 inches. In the upper part of the vagina, on the right of the neck of the womb, was a tear about 1½ inches long and 1 inch broad, a tear of the vagina wall. From this tear blood had been effused into the connective issues of the right side of the pelvis. There were no signs of inflammation of the bowels or peritoneum. Copious bleeding is likely to retard inflammation. There are a great many blood vessels in the part. The vagina was dilated to about a calibre of 1½ inches. It was kept so dilated by the clot of blood. There are two sets of fibres, circular and longitudinal. The tear might do away with the circular action on that part. I found the mucus membrane of the vagina smooth. I should expect to find the hymen and other folds. They are formed by the doubling of the mucus membrane. The tear was beyond the hymen. The membrane is naturally loose and falls in folds. The membrane being kept dilated by the clot of blood for the whole length and whole extent in breadth would not, while it was so dilated, wholly remove the folds, unless they had been previously obliterated. From what I saw I think hæmorrhage was the cause of death, hæmorrhage from the tear of the vagina. Such a tear might [54] be caused by a full-grown man having connection with the girl.

From the appearances I should conclude that was how it was caused. The average length of the male organ under such circumstances is 4 or 5 inches. That is the probable length in his case. In consequence of the distention, the walls of the vagina were thin. Such a tear would be a very likely thing to happen from a grown man having connection with such a girl. There was only one continuous clot. There was an effusion of blood in the broad ligament, which is a ligament at each side of the womb, altogether inside beyond the vagina."

Cross-examined.—"The breasts of Phulmoni were beginning to be prominent. This beginning of prominence is not a sign of puberty; when they are more or less developed, it is. I am of opinion, that Phulmoni had had several previous acts of intercourse. In my opinion great force was not used."

Question.—"If in your opinion this man had had several previous acts of intercourse with the girl without any ill-consequence resulting therefrom, would he have foreseen, in the present instance, that rupture would be the result?"

Answer.—"I cannot say. I examined the accused. His male organ appeared to me of natural size. I found no marks or abrasions on it. I examined him a day or two after the *post mortem* of the 17th. If this were the first intercourse there might or might not be marks on the male organ; I do not think it likely there would be. I think it more likely that the appearance of the vagina was due to previous acts of connection than to artificial dilatation."

Re-examined.—"I base the opinion I have just given upon the absence of folds. I had also other reasons. The principal was that there were no marks of injury at the entrance of the vagina. In the folds I include the hymen and the fourchette, which were absent. The fourchette is the technical name for one of the folds. The hymen is the principal fold at the entrance. It had disappeared altogether. That would naturally disappear at the first intercourse. I have heard of rare cases where the hymen is completely absent. By former intercourse I mean there had been penetration within the hymen. I do not think if the male organ had previously penetrated as far as on the present occasion, the same result would necessarily have followed. If this had been the first connection, I should have expected injuries at the orifice. The dilatation might have been caused by artificial means, the hand, or any other substance. It is impossible to say whether it was so caused. Great force was not necessary for penetration, because the walls were so thin and the vagina so short. Any marks on the man might have disappeared before I examined him."

To the Court.—"In an adult the anterior wall of the vagina is about 4 inches and the posterior 5 to 6."

[55] *Dr. Macleod* (after stating his qualifications).—"I entirely agree with Dr. Cobb as to the cause of death. From the appearance described by Dr. Cobb, I should conclude that death was caused by intercourse between a full-grown man and an immature female. The injuries caused by such an act would depend on the degree of penetration. There might be external injuries, or internal, or both. External injuries might consist of bruising or laceration of the lips of the vulva, laceration of the fourchette and perineum. The fourchette is the fold bounding the sexual opening posteriorly, the first fold. The perineum is the piece of skin between that and the rectum. The most probable injury would be rupture of the hymen and the adjacent mucus membrane. Those are the probable

1890 JULY 26. — ORIGINAL CRIMINAL. — 18 C. 49.

external injuries. The internal are laceration of the vagina or partial detachment of the uterus from the vagina. The last, the detachment of the uterus, is rare. All the others are probable consequences of connection with an immature girl. To account for the absence of external injuries, there must have been previous dilatation. This might result from one of four causes: (1) imperfect development of the hymen, (2) previous disease causing destruction of the hymen, (3) previous acts of sexual intercourse, (4) mechanical dilatation, I mean by the hand or any substance like sponge, pith, or tangle. Having regard to what Dr. Cobb has said of the thinness of the walls of the vagina, the shortness of the vagina, and what happened on this occasion, I think there had not before been complete or not so complete penetration, or, if as complete, with less sexual vigour. With equal penetration and equal vigour I should have expected the same result. The consequences I have described are those I should have expected to occur to a greater or less extent, not necessarily all together, but some or all of them. What are technically called rugæ or wrinkles are inside the hymen altogether. The hymen and fourchette are incomplete membranous diaphragms. The extinction of the folds depends on the elongation and extension of the vagina. These are more marked in some than in others, but in all cases their obliteration depends upon elongation and distention. The laceration or rupture gives evidence of hyperdistention, which would account for their absence, just as the passage of a child's head through an adult vagina produces the same effect. Once there has been over-distention it remains smooth. I agree with Dr. Cobb as to the girl being immature. She was unfit for sexual intercourse. I have no doubt about it whatever."

Cross-examined—"I did not see the deceased. I was not present at the *post-mortem*. Menstruation is not an invariable sign of sexual maturity."

Re-examined.—"It happens that menstruation comes before maturity, and it happens that maturity comes before menstruation. There are sexual, physical, and mental signs of maturity. The principal sexual sign is menstruation as a regular monthly function. Sexual maturity before [56] menstruation is very rare. In this case I am satisfied the girl was not mature.

Dr. Joubert.—"I have had 18 years' experience in India, 26 in the profession. I have made the treatment of deceases of women a special study. I am Fellow of the Obstetrical and Gynæcological Societies. I have heard the evidence given. In my opinion the girl was immature. I have no doubt of it. According to the signs spoken to by Dr. Cobb, she was hardly commencing puberty, excepting the partial development of the breast. By attaining puberty I do not mean a sudden event, but a process spread over months or years. The commencement of menstruation is one of the steps. It is usually one of the early steps, though it may be delayed. In my view puberty is not generally attained upon menstruation, but subsequently. I think the girl was unfit for sexual intercourse I have no doubt of this. I agree with Dr. Macleod as to what are the likely and probable consequences of intercourse between a grown-up man and such a girl. As to the absence of the hymen and fourchette, that would in an immature child indicate previous dilatation. I think it would be difficult to say whether caused by previous intercourse or by artificial means. As to the other folds, I do not attach the same meaning to their disappearance as Dr. Macleod and Dr. Cobb. The vagina interior to the hymen is a passage capable of very great distention, necessarily

so, to allow the passage of the head in child-birth without injury. I think the obliteration of these internal folds in this case was due to the formation and presence of the firm hard clot of blood found by Dr. Cobb. I understand it to have been bottle—shaped, narrow when it emerged from the vagina and large above. It first formed below and blocked the outlet and gradually increased in size by the hæmorrhage going on from the rent at the top of the vagina. Where it had fully distended the vagina, obliterating the internal folds, hæmorrhage went on outside the vagina, infiltrating the loose tissue at the right of the uterus, as described by Dr. Cobb. I think there cannot before have been penetration to the same extent as on this occasion. The reason is in the rent found by Dr. Cobb, having regard to the length of the vagina, and the usual length of the male organ. The pain caused by the damage found would probably be considerable. The degree of pain in intercourse between a grown-up man and such a girl would be considerable."

1890 JULY 26. — ORIGINAL CRIMINAL. — 18 C. 49.

Cross-examined.—"The man might not be aware in this case that he was causing more pain than would always be caused by connection between an adult man and an immature girl. I have not met any case in my own practice of rupture of the vagina from intercourse of an adult female with an adult male. There are such cases on record."

Re-examined.—"I have not got up any statistics of the point. Such cases are very rare."

[57] The prisoner at the close of the case for the prosecution, in reply to the Court, made a long statement in which he alleged that he had cohabited with his wife on numerous occasions before the night of the 15th June; that he went to sleep alone that night and awoke about 3 A.M. and found his wife beside him and the bed wet with blood, and that he concluded this was due to natural causes and his wife having been suddenly taken unwell. No evidence was called for the defence.

Mr. *Pugh* in opening the case to the jury pointed out that because the act charged did not constitute the offence of rape under the Penal Code by reason of the wife being over the age of 10, it did not follow that it was not an offence punishable under other sections of the Code. Sexual intercourse with a wife before she had attained puberty was unlawful under the Hindu and Mahomedan law, and was unknown to the English law; and although there had been no reported cases since the Penal Code came into force, there were similar cases decided by the Nizamat Adalut in which convictions had been upheld. He then referred to Chevers, pp. 688 *et seq.*, Taylor's Medical Jurisprudence, p. 427, and the case of *Suka Mahomed* (1), and opened the facts of the case. It could not be relied on by the defence that it was the custom of the country, as it was clearly unlawful; and if it were unlawful, the accused must be held to be responsible for the consequences of his act. In that view of the case the offence would come under s. 304 according as the jury found the knowledge or intention of the accused, but in any event it would constitute the offence of hurt; and if they did not consider the accused guilty of the offence of causing grievous hurt, it was open to them to convict of voluntarily causing hurt. With reference to the charges under ss. 304A and 338, he pointed out that these sections dealt with offences committed by doing a lawful act in a rash and negligent manner, and referred to the definition of rashness and negligence given in the case of *The Queen* v. *Nidamarti Nagabushanam* (2), and contended that, if not an unlawful act, it must be held to be an offence within those sections.

(1) Nazamat Adalut, 1858, p. 200.

(2) 7 M. H. C. 119.

1890 JULY 26. — ORIGINAL CRIMINAL. — 18 C. 49.

[58] In summing up the case to the jury at the close of the evidence, Mr. *Pugh* submitted that there could be no doubt on the evidence as to how the death of the deceased was caused; and that whether there had been previous sexual intercourse or not, the medical evidence clearly justified the jury in convicting of voluntarily causing hurt if they did not consider the offences under ss. 304 and 325 made out.

Mr. *Dutta* in addressing the jury for the prisoner contended that before they could convict the accused of any of the offences charged, they must be satisfied that either criminal knowledge, intention, rashness, or negligence was clearly proved. The prosecution did not allege any criminal intention, and as regarded "knowledge," the evidence negatived the prisoner, who was an ignorant man, having had any idea that he was likely to cause death or even hurt, as it was clearly proved that he had had sexual intercourse with his wife on several occasions previous to the night of the occurrence. They had nothing to do with Hindu, Mahomedan or natural law, and before they could convict they must be satisfied that the prisoner had committed an offence under the Penal Code. Under that Code it was only an offence to have sexual intercourse with one's wife if she was under the age of 10, and unless the prisoner could be held to have had a guilty knowledge or intention, or been guilty of culpable negligence or rashness, they must acquit him. He then commented on the evidence and contended that it negatived these, and that the prisoner in having sexual intercourse with his wife was doing a perfectly lawful act, and one sanctioned by Hindu usage and custom, and pointed out that the custom alleged by the mother of the deceased, that in their caste wives were not allowed to cohabit with their husbands until they had attained the age of puberty, was one unknown amongst Hindus; and he referred to the case of *Sreenauth Mullick* v. *Brijolall Pyne* (1) as showing that it was a common occurrence for wives of 10 and 11 in this country to cohabit with their husbands, and even to bear children. He also referred to the definition of rashness and negligence given in *The Queen* v. *Nidamarti Nagabhushanam* (2), and contended that, having regard to the fact of the previous [59] cohabitation, and that the prisoner was engaged in a perfectly lawful act, the jury could not find there had been any culpable rashness or negligence, and that the injury must have been the result of purely accidental circumstances for which the prisoner could in no way be held responsible.

The following was the charge delivered to the jury:—

WILSON, J.—*Gentlemen of the Jury*,—The prisoner is accused of several different offences, but all arising out of the same event. What you are enquiring into is the death of the girl Phulmoni, the wife of the prisoner, which occurred on the afternoon of the 16th June, and which is said to have been the result of injuries caused by the prisoner to her during the previous night. The prisoner is charged with having caused his wife's death, or having injured her, in four different forms. He is first charged with having caused her death under such circumstances as to amount to culpable homicide, though not to murder. Culpable homicide means causing the death of a person by an act which is done either with the intention of causing death, or with the knowledge that it is likely to cause death. In the present case there is no suggestion of an intention to cause death, and therefore, practically, you may take it that the case put to you upon this charge is that the accused

(1) 1 Hyde. 30, (2) 7 M.H.C. 119.

caused his wife's death by doing an act which he knew was likely to cause death. I now take up another charge, not because it is the next in order, but because, in principle, it is the same as the first. By it the prisoner is charged with having voluntarily caused grievous hurt. The grievous hurt consists in a dangerous lacerated wound in the *vagina* and he is charged with voluntarily causing that hurt. Now, gentlemen, in order voluntarily to cause that hurt, the accused must have known that what he was doing was likely to cause grievous hurt. Therefore in this charge there is this element, in common with the other, that it cannot be established unless you are satisfied that the accused knew that what he was doing was likely, in the one case, to cause death, and in the other, to cause serious injury. Then there are two other charges corresponding in their character to each other. In one, the prisoner is charged with having caused the death of this girl by a rash and negligent act; in the other, he is charged with having caused her grievous hurt by an act so [60] rashly or negligently done as to endanger life. If you will just bear in mind the characteristic distinction between these two pairs of charges, you will see the importance of it. In the one pair of charges, knowledge is of the essence of the charge; in the other pair of charges, knowledge is not of the essence of the charge. It has been pointed out that a fifth charge is really included in the charge of causing grievous hurt, namely the charge of causing simple hurt.

1890
JULY 26.
ORIGINAL
CRIMINAL.
18 C. 49.

It will be most convenient if I now go through the evidence with you, and then call your attention to the bearing of it upon the particular charges which are brought against the prisoner. The main evidence consists of two parts, the evidence of the people of the house in which the girl met her end, and the medical evidence. I shall refer to the first class of evidence first.

[His Lordship then proceeded to read the evidence to the jury, during the course of which he pointed out to them that the question as to Phulmoni's age was not of primary importance in the case, as their decision would not have to depend on any hard-and-fast rule as to age, but upon the facts of the case. He also pointed out with regard to the medical evidence that all the doctors agreed that to account for the absence of external injuries, there must have been a previous dilatation of the part, whether by natural process or some other. He then read the statement made by the prisoner and continued.—]

Those, gentlemen, are the whole of the materials before you, and it is upon those materials that you will have to decide what is the truth as to the facts, and then to see whether the facts bring the prisoner within any of the rules of the criminal law to which I have referred you. You will have to say, first of all, did his act cause the death of the girl? As to that you have the evidence of the people of the house as to how they found the accused and the girl when the cries or calls had brought them to the spot. If you believe the girl's mother, the girl was heard calling out, *bapre,! mare!*, and when the women went to the room and to the place where she was, she and the accused were found alone in the room. She was found covered with blood, and he was found with blood on his cloth. These circumstances, if true, tend to suggest what had been the cause of the blood which was flowing from the girl, that [61] it was some such act as that imputed to the prisoner. And then you have the evidence of what passed between the old lady and the prisoner. She is said to have charged him with having done something improper, which endangered the life of the girl, and he is said to have remained silent.

1890 JULY 26. — ORIGINAL CRIMINAL. — 18 C. 49.

Then you have the evidence of Dr. Annoda Prosad Das as to what the accused said to him on the following afternoon. Dr. Annoda Prosad Das said, "I asked him how this happened, and he said it happened through sexual intercourse." You have also his evidence as to what he observed on the living girl, that is, clots of blood obtruding from the lips of the vagina, and blood on the mat and underneath the bed. You have, further, Dr. Cobb's evidence as to the injuries he found after death; and his evidence, and Dr. MacLeod's and Dr. Joubert's, as to the probable cause of those injuries. If you are satisfied with that evidence, you will no doubt come to the conclusion that the prisoner had sexual intercourse with the girl on that occasion, and that the hæmorrhage was connected with that. On the other hand, you will give what weight you think right to the statement made by the prisoner to-day, which seems practically to involve the statement that he had no sexual intercourse with the girl at all that night. If you are satisfied with the evidence to which I have referred, you will no doubt come to the conclusion that the act of the prisoner in having sexual intercourse in the way that he did with the girl on the occasion in question, was the cause of her death. But, of course, that is only the first step in considering whether you can bring home criminal guilt to the accused; and that brings me to the law of the question and the bearing of the evidence in this case on the various charges which have been framed against the prisoner.

Now, gentlemen, I must begin by asking you carefully to distinguish a certain branch of the law which has no connection with this case from other branches of the law which may have a connection with it. The branch of the law which has no connection with this case is the law of rape. It is probably within the knowledge of you all, gentlemen, that the crime of rape consists in having sexual intercourse with a female either without her consent, or when she is of such an age that she cannot in law consent, and that the crime consists in the fact of intercourse, independently of **[62]** circumstances, of intention, of knowledge, and of consequences. And, in the case of married females, as you probably know, the law of rape does not apply as between husband and wife after the age of ten years. But it by no means follows that because the law of rape does not apply as between husband and wife, if the wife has attained the age of ten years, that the law regards a wife over ten years of age as a thing made over to be the absolute property of her husband, or as a person outside the protection of the criminal law. That of course cannot be supposed. Under no system of law with which Courts have had to do in this country, whether Hindu or Mahomedan, or that framed under British rule, has it ever been the law that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her, as for instance, if the circumstances be such that it is certain death to her, or that it is probably dangerous to her life. The law, it is true, is exceedingly jealous of any interference in matters marital, and very unwilling to trespass inside the chamber where husband and wife live together, and never does so except in cases of absolute necessity. But, as I have said, the criminal law is applicable between husband and wife wherever the facts are such as to bring the case within the terms of the Penal Code. I am not aware that there has occurred any case in this country in recent years in which such a matter has come under the consideration of a criminal Court; but in earlier times there are recorded instances in the reports of the Sudder Nizamat, in which husbands have been criminally punished for having sexual intercourse with their wives with fatal results, in consequence of their wives

being unfit by reason of immaturity for such intercourse, even in cases which did not fall within the law of rape. But at present we are guided simply by the Penal Code, and we have to see what provisions of the Penal Code are or may be applicable to the facts of this case.

I have just said that the law of rape is not applicable; and from that follow certain consequences. One is, that in cases to which the law of rape is not applicable, neither Judges nor juries have any right to do for themselves what the law has not done—I mean not done with reference to girls above the age of ten, that is, to lay down any hard-and-fast line of age, and to say, we think that when sexual intercourse takes place with a female below such an age, it is [63] dangerous and must be regarded as punishable, and when sexual intercourse takes place with females above that age, it is safe and must be regarded as right. We have no right to do that because the law has not done it, and therefore in cases of sexual intercourse with females above ten years of age, but of whom it is alleged that they are so immature as to render sexual intercourse dangerous, we cannot take the simple and easy method, as in cases of rape, of enquiring merely into the age of the girl. We have to enquire into all the circumstances of each individual case. And, secondly, when we come to apply the law to the facts of each case, we have no hard-and-fast line drawn for us as in the case of rape, in which the fact of sexual intercourse is the only matter to be inquired into, but we have to do with a wholly different class of evidence involving many delicate considerations, of intention, of knowledge, of rashness, of negligence, and of consequences. Thus you will see that the real practical difference between the case of wives under ten years of age and the case of wives over ten years of age is that, in the case of wives under ten years of age, there is a hard-and-fast line laid down for us, as to the condition of the wife, her age; and a hard-and-fast rule as to what constitutes criminality in the husband; if he has had sexual intercourse he is guilty of rape. But in cases of wives over ten years of age, you have to consider, on the one hand, not only the question of age, but questions of physical condition, and, on the other, questions of motive, questions of intention, questions of knowledge, questions of rashness, questions of negligence, and questions of consequences. In such cases we have not to do with any general question as to what is the usual age of puberty, or what we should say, if attempting to lay down a general rule, is the safe age for the consummation of marriage. We have simply to do with the facts of the particular case on the evidence, and to say whether, having regard to the physical condition of the particular girl with whom sexual intercourse was had, and to the intention, the knowledge, the degree of rashness or of negligence, with which the accused is shown to have acted on the occasion in question, he has brought himself within any of the provisions of the criminal law.

Now, gentlemen, applying these general considerations to the facts of this particular case, I shall ask you now to consider the [64] several charges brought against the accused. He is first charged with culpable homicide. As I pointed out to you before, to constitute culpable homicide, there must have been either a criminal intention, of which there is no trace whatever in the present case, or there must have been knowledge that the act that was done was likely to cause death; so that you will be entitled to convict the accused of culpable homicide if you find that his act caused the death of his wife, and that he knew that it was likely to do so. I do not think I can properly withdraw that charge from your consideration; but I think it is my duty to say that I think there

1890 JULY 26. — ORIGINAL CRIMINAL. — 18 C. 49.

is hardly such solid and satisfactory ground as would make it safe to say that this man must have had knowledge that he was likely to cause the death of the girl.

In connection with this matter, I specially invite your attention to a part of the medical evidence upon which great stress was laid by the Counsel for the defence, and that is, upon the question whether there had or had not been previous sexual intercourse between the prisoner and his wife. The importance of it is this, that if he had had previous sexual intercourse with his wife, and no danger apparently followed from it, it would make it very difficult to say that he must have known that on the present occasion her life would be likely to be placed in danger. The evidence as to that consists, first, of the evidence of the women of the house. If you think they are speaking correctly, their evidence excludes all likelihood of there having been sexual intercourse in the child's grandfather's house, but of course it cannot exclude the idea of there having been sexual intercourse between the accused and the girl during the time she was in her father-in-law's house. His statement is that they had had sexual intercourse during that time. As to the likelihood of that, some at least of the gentlemen of the jury are better able to judge than I am. The expression of one of the women was that the girl was sent to the father-in-law's house as a bride. Whether she was likely to be sent to her father-in-law's house for the purpose of having sexual intercourse with her husband, or not, I cannot tell. You may perhaps be able to say. He, at any rate, says that he had sexual intercourse with her during that time.

[65] Now the medical evidence upon this point appears to come to this. Dr. Cobb found on the *post-mortem* that the principal folds of the *vagina*, that is, the fourchette and the hymen, were wanting. He also speaks to minor matters, such as the wrinkles in the interior part of the vagina, and he thinks that the absence of these folds, and principally of the fourchette and the hymen, can only be accounted for on the supposition of there having been previous sexual intercourse. The other two medical men who were examined took very much the same view of the matter, but they say at the same time that of course the removal of these obstacles may be effected by artificial means or by disease, though they say that it also may well indicate previous sexual intercourse.

There is, on the other hand, one matter in connection with this, which I think I ought to point out. Dr. Cobb, at first, only spoke of previous intercourse. When his attention was called to the distinction between an act or acts of intercourse in which penetration was effected to such an extent as to pass the hymen, but not to the extent which took place on this occasion, namely, to reach the extreme end of the vagina and the part actually ruptured, he said he could not say—he was not prepared to speak. Dr. Macleod and Dr. Joubert, both speaking from the indications found on the *post-mortem* examination, say they think that though there may have been previous sexual intercourse, it must either have been an intercourse involving penetration less complete than that which took place on the occasion now being enquired into, or, as Dr. Macleod put it, there must have been less sexual vigour. You will, of course, in these, as in all matters, give the benefit of any doubt in favour of the prisoner. If you think that there had been previous intercourse, whether it was a complete intercourse in the sense of penetrating the whole length of the vagina, or a less complete penetration, but involving the passage of the hymen, I think you will find it difficult to come to the conclusion that on this

occasion the prisoner must have known that he was likely to cause the death of the girl; and unless you could come to this conclusion, you could not find him guilty of the culpable homicide.

The charge which I before took second, I take now; that is, the charge of voluntarily causing grievous hurt. The grievous hurt is the same injury, already spoken of, that is, the rupture of the vagina, [66] and the same considerations apply as in the case of the first charge. If the prisoner had sexual intercourse with the girl before, whether complete penetration was effected or not, it will be difficult to say that he must have known that on this occasion he was likely to cause any such grievous hurt as the rupture of the vagina; and unless you are able to come to this conclusion you cannot convict him on this charge.

Now, gentlemen, I come to the two other charges on which wholly different considerations arise. The charges are based on the prisoner having done a rash and negligent act. Now I have already pointed out to you that in the case of girls over ten years of age every case has to be judged on its own merits, and that is peculiarly the case in an enquiry of this kind, where you have to say whether or not there has been a rash or negligent act on the part of the man. Now, in order to constitute the offence of causing death by a rash and negligent act, the death must be caused by the act of the accused, and that act must be a rash or negligent act. I do not propose to do what I think, is a dangerous thing, that is, to try and give any abstract definition of words used in the law, but which the framers of the law have not themselves defined. The wiser course, I think, is to explain those words so far as is necessary for the purpose of the case before us, and no further.

With regard to this I tell you that if you are of opinion that the act of the accused caused the death of the girl, that is to say, that the act of cohabitation on the part of the accused had the effect of rupturing the vagina, and so causing the hæmorrhage which led to her death; if you should further be of opinion that that act was in itself dangerous, that is to say, that the act of cohabitation between a fully developed man, such as the accused is, and a girl so immature as this girl was, is, in itself, a thing likely to lead to dangerous consequences; and if you further think that the act that was done was one of such a character as to indicate either a reckless indifference to the welfare of the girl, or a want of reasonable consideration about what the accused was doing; if you think that the act was one which the husband of that girl, if he had had a reasonable regard to the welfare of the girl, and had exercised reasonable thought as to the act he contemplated doing, would have abstained from doing, then you [67] will be justified in finding that the accused caused the death of the girl by a rash or negligent act.

The questions then that you have to consider as to this charge are, *first*, did the accused cause this girl's death. I do not propose to repeat the evidence bearing upon death. *Secondly*, was the act that was done really a dangerous one, and in considering this you have to look at the facts of this particular case. The evidence of the women of her family is that she had not attained the age of puberty. The evidence of the medical men is that she had not attained the age of puberty in any sense whatever. Dr. Cobb, if he speaks correctly, shows that she had not attained the size which was requisite to make the contact between male and female reasonably suitable. He says that her organs, such as the ovary, were not developed, that menstruation had not commenced, and that the external signs of puberty were not present; and I think you will find

1890
JULY 26.
—
ORIGINAL
CRIMINAL.
—
18 C. 49.

there is no trace in the evidence of any sign of puberty except the single one of partially developed breasts, which the medical men say is a sign that the stage of puberty is approaching or commencing, but not that it is attained. The question of what is the best test of fitness for sexual intercourse is one perhaps about which people may differ. But the prosecution say that no such question arises in this case because whatever test, or group of tests, you apply, or whatever view you take about such matters, this girl was immature for all purposes ; and if you believe the medical evidence and the evidence of the women of the house, it seems to me that the prosecution is right in so putting it.

That, gentlemen, is the evidence as to the condition of the girl ; and that being the state of the girl, was it dangerous for an adult man to have connection with her ? You have had the evidence of the medical men, Dr. Cobb, Dr. Macleod, and Dr. Joubert, and they all express the opinion that if the act of connection were to take place between an adult person and a girl such as she was, in the condition in which she was, it would be highly dangerous, because not only were other injuries likely to follow, but the particular injury which did occur in the particular instance was the likely and natural consequence of the act.

If then, gentlemen, you think that the act that was done was one likely to be dangerous, the remaining question for you to consider [68] is, was the accused, in doing that act, doing a rash or negligent act. In regard to this matter the fact, if it be a fact, that the accused had previous intercourse, more or less complete, with the girl, though a matter proper to be considered, would not be, to the same extent, an answer to this charge as in the case of the charge of culpable homicide ; because an act may be a rash or negligent act, an act which a man with a proper regard for the safety of his wife and giving proper attention to what he was doing would not do, and yet the state of his mind may be very far short of knowledge that he is likely to cause her death or serious injury. What you have to say is, whether the act done was a rash and negligent act in the sense which I have indicated to you for the purposes of the present charge.

The remaining charge is the charge of causing grievous hurt by an act so rashly and negligently done as to endanger life. The same considerations which I have brought to your notice in connection with the previous charge, apply to this charge also. You cannot convict unless you are satisfied that the prisoner caused the grievous hurt which the girl sustained, that is, the rupture of the vagina which led to her death, and that the act which caused it was rash or negligent and dangerous to life.

These, gentlemen, are the charges, and the observations I have made are those which occur to me as likely to assist you. You will have to consider, first, is the prisoner guilty of culpable homicide ; secondly, is he guilty of voluntarily causing grievous hurt ; thirdly, is he guilty of causing death by doing a rash or negligent act ; and fourthly, is he guilty of causing grievous hurt by doing a rash or negligent act dangerous to life.

[The Jury acquitted the prisoner on the first three charges, but convicted him of the offence covered by the 4th charge of the indictment, namely, under s. 338 of the Penal Code, and he was sentenced to one year's rigorous imprisonment.]

Solicitor for the prosecution : The Offg. Government Solicitor (Mr. *W. K. Eddis*).

Solicitor for the defence : Mr. *C. A. Smith.*

H. T. H.

18 C. 69.

1890 JULY 30. APPELLATE CIVIL. 18 C. 69.

[69] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

MONDAKINI DASI (*Defendant No.* 1) *v.* ADINATH DEY, MINOR, REPRESENTED BY HIS GUARDIAN MOHESH CHUNDER DAS (*Plaintiff*) AND ANOTHER (*Defendant No.* 2).*
[30th July, 1890.]

Hindu law—Inheritance—Inheritance of adopted son—Divesting estate—Effect of adoption by one of two widows—Power of minor to adopt.

A son adopted to the last male proprietor, who was the full owner of an estate, is entitled to take the whole of that estate and to divest the interest of any person in that estate, whose title by inheritance is inferior to his, and who could not have inherited if the adoption had taken place before the death of the last full owner; but such adopted son is not entitled to claim as preferential heir the estate of any other person besides his adoptive father, when such estate has vested before his adoption in some heir other than the widow who adopts him. Where a man died leaving two widows and having given either of them the power to adopt a son, and the younger widow on the refusal of the elder one to adopt, adopted a son: *Held*, that the estate which was in the elder widow was divested by the adoption, and that the adopted son took all the estate of his adoptive father.

A widow, although a minor, is competent to adopt a son.

[**F.**, 18 C. 385 (396); **R.**, 22 C. 565 (572); 33 C. 694 (698) = 12 Ind. Cas. 460 (461); 26 M. 143 (152) = 12 M.L.J. 197; 16 C.L.J. 304 = 17 C. W. N. 319 (322) = 16 Ind. Cas. 817; **D.**, 1 C. W. N. 121 (128).]

THIS was a suit brought on behalf of one Adinath Dey, a minor, for a declaration that he was the adopted son of Raj Narain Dey, and for recovery of possession of the properties left by Raj Narain.

Raj Narain died on 16th Joisto 1291 (28th May 1884), leaving two widows, Mondakini and Biraj Mohini, the latter of whom was a minor, 11 or 12 years old when her husband died. Shortly after his death an application for probate of a will said to have been executed by him was made by Mondakini, who was by the will appointed his sole executrix, but this application was rejected by the District Judge on 10th Falgoon 1291 (20th February 1885), the evidence as to the due execution of the will not being satisfactory.

[70] Whilst that application was pending, the plaintiff, Adinath Dey, was adopted by Biraj Mohini as the son of Raj Narain, in pursuance of an alleged authority given, both on the 19th Choitro 1290 (31st March 1884) and on the 15th Joisto 1291 (27th May 1884), to his wives to adopt him, and it was alleged in the plaint that the adoption was made by Biraj Mohini on the refusal of the elder widow, Mondakini, to adopt the boy. Mondakini, the defendant No. 1, denied that the plaintiff was the adopted son of Raj Narain, and that either she herself or Biraj Mohini had any authority from their husband to adopt him.

The defence of the defendant No. 2, Biraj Mohini, who appeared by a guardian, was that the adoption was invalid by reason of her minority, and consequent disability to adopt a son. She did not, however, deny the authority to adopt.

---

* Appeal from appellate decree No. 2463 of 1889, against the decree of F. J. G. Campbell, Esq., Judge of Burdwan, dated the 26th of August 1889, affirming the decree of Baboo Rajendro Kumar Bose, Subordinate Judge of Burdwan, dated the 27th of August 1887.

1890
JULY 30.
——
APPELLATE
CIVIL.
——
18 C. 69.

The Subordinate Judge found that permission had been granted by Raj Narain to either of his wives to adopt the plaintiff, and that the adoption was valid. He therefore gave a decree for the plaintiff.

This decision was reversed by the District Judge, but on second appeal the High Court on the ground of the improper admission of evidence set aside his decision and remanded the case; and on remand the decree of the Subordinate Judge was affirmed by the District Judge on both points. From this decision Mondakini appealed to the High Court, making Biraj Mohini a respondent.

Mr. *Woodroffe* and Baboo *Golap Chunder Sircar*, for the appellant.

Mr. *Pugh* and Baboo *Opendro Chunder Bose*, for the respondent.

JUDGMENT.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was delivered by

BANERJEE, J.—This was a suit instituted on behalf of the minor, Adinath Dey, one of the respondents before us, for a declaration that he was the adopted son of the late Raj Narain Dey, and for possession of the properties left by Raj Narain. The plaintiff alleged that the adoption was made according to the permission given by Raj Narain by his younger widow, Biraj Mohini Dasi, defendant No. 2, upon the refusal of the elder widow, Mondakini, defendant No. 1. The defendant No. 1 denied the **[71]** fact of adoption, as well as the existence of any authority to adopt, and the defendant No. 2, while admitting that there was permission to adopt, questioned the validity of the adoption on the ground that she was a minor and could not make a valid adoption.

The first Court held that the adoption was valid, and it gave the plaintiff a decree. That decree was reversed by the District Judge on appeal; but on second appeal, this Court set aside the decision of the District Judge on the ground of improper admission of evidence, namely, certain papers on the record of a will case, and it sent the case back to the lower appellate Court for a fresh trial. The lower appellate Court has now affirmed the decree of the first Court, and the defendant No. 1, Mondakini, has preferred this second appeal.

The points urged before us are—*first*, that the lower appellate Court has erred in law and acted contrary to the directions contained in the remand order of this Court, in referring to the record of the will case of Mondakini, which as a whole was not properly made evidence in this case; *secondly*, that the adoption was invalid, as the alleged power could only be exercised either by the two widows jointly or by the elder widow alone; *thirdly*, that the adoption was invalid, as the younger widow by whom it was made was a minor; and *fourthly*, that even if the adoption was valid, it could not divest the estate of the elder widow who was no consenting party to it, and that the plaintiff was not entitled to recover the eight annas share of the estate of Raj Narain which had been inherited by her.

Upon the first point, though the learned District Judge in one part of his judgment observes that the will case requires to be carefully looked into, there is nothing to show that he has used any part of the record of that case which was not properly in evidence. It appears from the remand order that some portions of that record were properly used as evidence; and the learned Judge in the decision now appealed against distinctly says that in deciding the case he has put aside the evidence wrongly considered by his predecessor. We do not therefore think that there is anything in the first ground.

The second point is, in our opinion, settled by the findings of fact arrived at by the Courts below. The first Court has found as a fact [72] (and its finding has been accepted as correct by the Court of appeal below) that the permission given by Raj Narain to his wives was to the effect that either of them should adopt the youngest son of Prankrishno, whose name was Ashu, and that that boy was adopted by the younger widow on the refusal of the elder to take him in adoption. We do not see any reason for holding that an adoption so made is contrary to law.

Nor is there anything in the third point urged before us. The Indian Majority Act (IX of 1875) provides that nothing contained in that Act shall affect the capacity of a person to act in matters relating to adoption. It has been decided by this Court in the case of *Rajendra Narain Lahoree* v. *Saroda Sundari Dabee* (1) that a minor who has arrived at the age of discretion is competent to give permission to adopt, and this decision has been approved by the Privy Council in *Jumoona Dassya* v. *Bama Sundari Dassya* (2). What is meant by the age of discretion in these cases is not clearly stated, nor is there anything to show that at the date of the adoption in question Biraj Mohini had not attained sufficient maturity of understanding to comprehend the nature of the act. It should also be borne in mind that in this case the authority to adopt was given by a person of full age, and the validity of the adoption is questioned on the ground that the person who exercised that authority was a minor. Upon this point there is a case given in Macnaghten's Precedents of Hindu Law (chap. VI, case V) in which the pandit's opinion was to the effect that the non-age of the widow is no obstacle to an adoption by her. Moreover, as the boy taken in adoption in this case was definitely named in the authority as the person to be adopted, we do not see how the minority of the widow who exercised that authority can effect the validity of the adoption.

The fourth point does not appear to have been raised in the Courts below. But as it is a point of law not requiring for its disposal any further enquiry into facts, we allowed it to be raised and argued here. The sum and substance of the argument on behalf of the appellant is that an estate vested in any person by inheritance cannot be divested by a subsequent adoption, except where the adoption is made by such person; and that the plaintiff [73] is not therefore entitled to recover anything more than the share of Raj Narain's estate inherited by his younger widow by whom the adoption was made; and in support of this argument the cases of *Bhoobunmoyee* v. *Ramkishore Acharjee* (3) and *Kally Prosunno Ghose* v. *Gocool Chunder Mitter* (4) were relied upon. There can be no doubt that as a general rule an estate vested in any person by inheritance is not divested by a nearer heir subsequently coming into existence (see *Kalidas Das* v. *Krishna Chandra Das* (5)). But there are exceptions to this rule, and the question is whether the present case is one of those exceptions. Upon that question the cases cited are not exactly in point, and in those cases the adoptions which were held inoperative in divesting vested estates were made not to the last full owners to whom inheritance had to be traced, but to other persons, that is, to the father of the last full owner in the first-mentioned case, and to his brother's son in the second. The cases of *Annammah* v. *Mabbu Bali Reddy* (6), *Drobomoye* v. *Shamacharan* (7), and *Rupchand* v. *Rakhmabai* (8) are similarly distinguishable from

(1) 15 W.R. 548. (2) 1 C. 289. (3) 10 M.I.A. 279.
(4) 2 C. 295. (5) 2 B.L.R.F.B. 103=11 W.R.O.C. 11.
(6) 8 M.H.C.R. 108. (7) 12 C. 246. (8) 8 B.H.C.R.A.C. 114.

1890 JULY 30. — APPELLATE CIVIL. — 18 C. 69.

the present, the adoption having been made to the father of the last full owner in the first and the second, and to his brother in the third.

On the other hand, there are cases (some of which are exactly in point) which support the respondent's view that a son adopted by one of several widows to her deceased husband takes the whole of his estate, divesting the estates of all the widows.

In *Virada Pratapa Raghunada Deo* v. *Brojo Kishoro Patta Deo* (1), the widow of Rajah Adikonda Deo, the holder of an impartible zemindari, having adopted a son under the authority of her deceased husband, the adopted son was held entitled to recover the estate from Raghunada, the half-brother of the deceased zemindar, who, as the Judicial Committee observed, must be taken to have been an undivided brother and the person who, according to the ordinary law of succession, was entitled to the zemindari on the death of Adikonda without a legitimate son, either procreated or adopted.

[74] In *Rakhmabai* v. *Radhabai* (2), it was held that a son adopted by an elder widow without the consent of the younger was entitled to take the whole estate of his adoptive father, and to defeat the interest of the younger widow. Sir Richard Couch in delivering the judgment of the Court observed :—" It would seem to be unjust to allow the elder widow to defeat the interest of the younger by an adoption against her wish. But, on the other hand, if the adoption is regarded as the performance of a religious duty and a meritorious act, to which the assent of the husband is to be implied wherever he has not forbidden, it would seem that the younger widow is bound to give her consent, being entitled to a due provision for her maintenance; and if she refuses, the elder widow may adopt without it." This is a case clearly in point.

The same view was taken by this Court in an unreported case decided on the 16th of February 1882 (Appeal from Original Decree No. 97 of 1880)—(*Bhuteswari Chowdhrani* v. *Siddheswari Chowdhrani*), in which it was held that a son adopted by one of two widows according to the authority of her deceased husband was entitled to take the entire estate and to divest the estate of both the widows.

The true rule deducible from all these cases is, as stated by Mr. Mayne in his learned work on Hindu Law and Usage (§. 179), this, namely, that a son adopted to the last male proprietor, who was the full owner of an estate, is entitled to take the whole of that estate, and to divest the interest of any person in that estate whose title by inheritance is inferior to his, and who could not have inherited if the adoption had taken place before the death of the last full owner, though he is not entitled to claim as preferential heir the estate of any other person besides his adoptive father, when such estate has vested before his adoption in some heir other than the widow who adopted him. There is nothing unjust in this. Indeed there would be great injustice if the opposite view were to prevail, and if the lawfully adopted son of the last full owner, who is to bear all the obligations of a son, were to be deprived of any part of his adoptive father's estate. The case is wholly different where an adopted son claims not the estate of his adoptive father, but that of another person after it **[75]** has vested in some other heir who was entitled to it before the adoption. It would obviously lead to inconvenience and injustice to allow vested interests to be divested in such cases.

---

(1) 1 M. 69. (2) 5 B.H.C.R.A.C. 181.

1890 JULY 30. — APPELLATE CIVIL. — 18 C. 69.

The contention of the appellant is therefore wholly opposed to the authority of decided cases. It is equally repugnant to the spirit of the Hindu law. According to the law of the Bengal school, an adoption by a widow according to the express permission of her husband is a perfectly valid adoption. [See Dattaka Chandrika I, 7; Macnaghten's Principles of Hindu Law, p. 91—*The Collector of Madura* v. *Muttu Ramalinga Sathupathy* (1).] Such an adoption, if it is to be of any effect, must lead to the divesting of some vested interest in the property left by the person to whom the adoption is made. It was not denied that if the appellant had joined in the act of adoption, it would have been operative in divesting her estate. Now when a man authorises an adoption by any of his widows, it is clearly the religious duty of all his widows to co-operate in bringing it about; and it would be contrary to reason and justice to allow any one of them to gain an advantage by opposing or withholding her consent from that which it is her duty to accomplish.

The grounds urged on behalf of the appellant, therefore, all fail, and this appeal must consequently be dismissed with costs.

J. V. W. *Appeal dismissed.*

---

18 C. 75.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Hill.

QUEEN-EMPRESS *v.* MANIRUDDIN MUNDUL.* [8th August, 1890.]

Magistrate, power of—District Magistrate, power of, to order further enquiry—Improper discharge—Sessions case, further enquiry directed in—Criminal Procedure Code (Act X of 1882), *ss.* 436, 437.

It is competent to a District Magistrate, who has issued a notice to an accused person who in his opinion has been improperly discharged, to show cause under s. 436 of the Criminal Procedure Code why he should [76] not be committed to the Court of Sessions, on cause being shown to order a further inquiry under the provisions of s. 437.

THIS was a reference from the Officiating Sessions Judge of Faridpur, the facts of which were as follows:—

One Maniruddin Mundul preferred a charge of dacoity against certain persons. His complaint was investigated by the police and the Joint-Magistrate, and the latter came to the conclusion that the charge was false, and directed the records of the case to be sent to the District Magistrate under s. 476 of the Code of Criminal Procedure, with the view of proceedings being instituted against the complainant under s. 211 of the Penal Code for bringing a false charge. The District Magistrate made the case over to a Deputy Magistrate, with a view to committing the accused to the Sessions under s. 211, cl. 2 of the Penal Code. The Deputy Magistrate heard the case and examined some twenty witnesses on the part of the prosecution, and ultimately came to the conclusion that the charge of making a false charge of dacoity was not satisfactorily established, and discharged the accused under s. 209 of the Code of Criminal Procedure. On the record of the case coming before the District Magistrate on the 22nd April 1890, that officer passed the following order:—

"On an examination of the record of the case *Empress* v. *Maniruddin Mundul*, s. 211, Indian Penal Code, in which the accused was discharged

* Criminal Reference No. 168 of 1890 made by H. Cox, Esq., Officiating Sessions Judge of Faridpur, dated the 30th of June 1890.

(1) 1 B.L.R.P.C. 1=10 W.R.P.C. 17=12 M.I.A. 397.

1890 AUG. 8. — CRIMINAL REFERENCE. — 18 C. 75.

by Baboo Raj Mohan Chuckerbutty on the 25th March 1890, under s. 209 of the Code of Criminal Procedure, it appears that the accused has been improperly discharged. I therefore direct that a notice be issued on the said Maniruddin to show cause before me, on the 5th May next, why he should not be committed to the Court of Sessions for trial. Let notices also be given to Gool Mahomed and others, accused by Maniruddin, to appear before me on that day."

On the 5th May the accused through his pleaders presented a petition showing cause against the rule. The District Magistrate did not hear the pleaders, but adjourned the case to the 15th May, on which day the prosecution filed a further list of witnesses whom they desired to be examined. The District Magistrate fixed the 25th May for a further hearing of the case, on which day apparently nothing was done. On the 28th May the District Magistrate made [77] an order directing a Deputy Magistrate to examine the witnesses and submit the record with his report.

On the case being taken before the Sessions Judge, that officer on the 30th June referred the matter to the High Court under the provisions of s. 438 of the Code of Criminal Procedure, being of opinion that the order of the 28th May was illegal. The material portion of the letter of reference was as follows :—

"I am inclined to think that the Magistrate has not acted regularly in writing his order of the 28th ultimo, by which he directs an examination of witnesses by a Deputy Magistrate in a case against the petitioner Maniruddin Mundul, who had been discharged of an offence under s. 211, Indian Penal Code, exclusively triable by the Court of Sessions.

"The Magistrate has submitted an explanation as required by my order of the 23rd instant. Having read his remarks, I am still of opinion that the papers of the case should be submitted to the High Court for orders. The ruling of 1888 referred to by the Magistrate had indeed escaped my notice, and in that case no doubt the whole procedure in such cases of revision as the present has been pretty fully dealt with. My order of the 23rd instant therefore requires to be read with what I now submit for the orders of the High Court. It will be seen from the District Magistrate's order of the 22nd April that he considered that Maniruddin, accused had been 'improperly discharged;' and he directed a notice to be issued on Maniruddin to show cause under s. 436, Criminal Procedure Code. I believe the only regular and consistent course of procedure for the Magistrate to have then pursued was to have considered any cause shown, and then, if he still maintained that the accused Maniruddin should be committed for trial, he should have ordered the committal, there being nothing, as I understand, to prevent his also requiring the examination of further witnesses, on his subsequently hearing of their existence and importance, to strengthen the case in the trial by the Court of Sessions. In short, the Magistrate's order of the 22nd April must mean that he thought a case was made out for a trial by the Court of Sessions. That being so, his not considering cause under s. 436 (*a*), Criminal Procedure Code, but instead, proceeding under s. 437 and ordering the examination of further evidence, seems to argue a want of [78] consistency of judgment and lack of sound discretion which are calculated to needlessly harass the accused and prejudice his position.

"Under the circumstances, I would recommend that the orders of the Magistrate be quashed. The explanation of the Magistrate and my order of the 23rd instant will be found in the record."

The reference came on to be heard on the 15th July before a Bench consisting of Norris and Gorden, JJ. No one appeared at the hearing, and the following judgment was delivered :— 1890 AUG. 8.

"This case comes before us upon a reference from the Officiating Sessions Judge of Faridpur. The facts are as follows ":—[Their Lordships then proceeded to state the facts as set out above and continued—] CRIMINAL REFERENCE.

"The order of the District Magistrate of the 22nd April was one which it was clearly competent for him to make under the provisions of s. 436 of the Code of Criminal Procedure. His order of the 28th of May was one made under the provisions of s. 437 of the Code. It is not necessary in our opinion to express any opinion as to whether the District Magistrate, having once determined to exercise the powers vested in him under s. 436, could legally change his method of procedure and direct a further inquiry under s. 437, without having finally disposed of the proceedings under s. 436. In his letter of explanation to the Sessions Judge, the District Magistrate pointed out that, as only the question of the legality of the proceedings is called in question by the Sessions Judge, he confines himself to dealing with that question, and offers no observations upon the question as to whether or no he exercised a sound discretion in the course he pursued. Apparently the District Magistrate has some observations to make upon this question of his discretion; and before making any final order upon this reference, we think it would be well that the District Magistrate should favour us with any observations he may have to make as to his reasons for abandoning, or holding in suspense, the proceedings under s. 436, and adopting the procedure under s. 437. 18 C. 75.

"As the matter is somewhat urgent, we direct a copy of this order together with the record to be sent direct to the District Magistrate, with a request that he will return the record, with any observations [79] that he may have to make, at his earliest possible convenience. A copy of this order will also be sent to the Sessions Judge.

"All proceedings against the accused will of course be stayed until our final order is made."

Upon this the Magistrate submitted an explanation, dealing fully with the facts of the case, which is immaterial for the purpose of this report.

The reference again came on to be heard before a Bench consisting of PRINSEP and HILL, JJ.

No one appeared on the reference.

The following judgment was delivered :—

JUDGMENT.

The District Magistrate having reason to believe that the accused in this case had been improperly discharged by a Subordinate Magistrate, issued a notice under s. 436, Code of Criminal Procedure, on the accused to show cause why he should not be committed for trial by the Court of Sessions. On the day on which the matter was considered, the District Magistrate thought that certain evidence should be taken before any order of commitment should be passed. He accordingly directed the Subordinate Magistrate to take that evidence. The Sessions Judge has referred this case that this order should be set aside because on the notice under s. 436 the District Magistrate was not competent to order anything short of a commitment. We observe that, in the petition to the Sessions Judge, it was amongst other matters represented that the accused was not heard on the

1890 AUG. 8. — CRIMINAL REFERENCE. — 18 C. 75.

notice. But this has not been made the subject of reference to us, and we must take it that it was either abandoned or overruled by the Sessions Judge.

The matter for consideration therefore is simply whether on a notice under s. 436 the District Magistrate could order a further inquiry in supersession of the order of discharge, or whether he could only either order commitment or abstain from interference. We have no doubt that from the terms of s. 436 a District Magistrate, in a case triable exclusively by a Court of Sessions, is not restricted to ordering the commitment of the accused who may have been discharged by a Subordinate Magistrate. He is not prevented from dealing with such a case under s. 437. Section 436 contemplates a fresh or a further inquiry being held, for it empowers a Distrate Magistrate "instead **[80]** of directing a fresh inquiry" to order the commitment of the accused, and there is nothing in the terms of s. 437 which would prevent a District Magistrate from ordering a further inquiry merely because the case may be one triable exclusively by the Court of Sessions. Section 437 declares that such an inquiry may be ordered into the case of any accused person who has been discharged.

The mere fact that the notice to the accused may have been merely to show cause why he should not be committed would not necessarily prevent the District Magistrate from directing a further inquiry instead of a commitment. The accused cannot possibly be prejudiced by such an order passed in his presence, and could not claim a notice, specially under s. 437, to show cause why a further inquiry should not be held. In this case the commitment could have been made, and the further evidence, which the District Magistrate desired to have taken, might be tendered at the Sessions Court, but in order to have the case clearer, the District Magistrate thought proper to have the evidence first taken, and this was certainly in favour of the accused.

We therefore see no sufficient reason to interfere. The case will be dealt with by the Deputy Magistrate in accordance with the order of the District Magistrate, and after taking that evidence, the Deputy Magistrate will proceed according to law.

H. T. H. *Order upheld.*

---

18 C. 80.

CIVIL REFERENCE.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

NATABAR PARUE AND OTHERS (*Plaintiffs*) *v.* KUBIR PARUE AND OTHERS (*Defendants*).* [1st September, 1890.]

Specific Relief Act (I of 1877), s. 9—Right of Fishery—Suit for possession of right to fish in a khal.

A suit for the possession of a right to fish in a khal, the soil of which belongs to another, does not come within the provisions of s. 9 of the Specific Relief Act, 1877.

[F., 19 C. 544.]

[81] THIS was a reference by the Munsif of Bongong, Jessore, under s. 617 of the Code of Civil Procedure. The case was stated as follows in the judgment of the Munsif:—

* Civil Reference No. 15-A of 1890, made by Baboo Triguna Prosonno Basu, Munsif of Bongong, dated the 30th of July 1890.

"This is a suit under s. 9 of Act I of 1877. The subject-matter of dispute is a jalkar. The case as set forth in the plaint is that the plaintiffs held jointly with the defendants possession of the jalkar up to Kartick last. In that month the defendants acquired by private sale the proprietary interest in the said jalkar, turned the plaintiffs out of possession, and came to hold exclusive possession thereof.

1890 SEP. 1. — CIVIL REFERENCE. — 18 C. 80.

" The defendants traverse the allegation of the plaintiffs. They deny that the plaintiffs ever held jointly with them possession of the jalkar in suit; and aver that the jalkar is their property, and that they are in exclusive possession of it. They further object to the maintenance of the suit in its present form.

"The points then that arise for determination are—

" (1) Is the suit maintainable?

" (2) Were the plaintiffs in joint possession of the jalkar with the defendants? and

" (3) Are they entitled to the relief sought for?

"It is clear from the testimony of the plaintiffs' witnesses (if that testimony is to be believed) that the plaintiffs had nothing whatever to do with the soil, but that they had only a right of fishery in the khal described in the plaint. One of the plaintiffs who has been examined says that the jalkar in question dries up in the hot whether, and that with the setting in of the rains they commence fishing. Witness Benode Mondol says that the jalkar dries up in Cheyt and Bysack, and that the fishermen, evidently meaning thereby the plaintiffs, do not repair to the jalkar then. The evidence then clearly leaves upon me the impression that it is no possession of an immoveable property that is sought to be recovered, but a right to fish in a *khal* when it is full of water and stocked with fishes, or, in other words, a right to enjoy the produce of water within certain prescribed limits is sought to be enforced. That being so, I have grave doubts if the suit can lie under the provisions of s. 9 of Act I of 1877. That section distinctly provides for possession of specific *immoveable property*.

[82] " Now the possession of the jalkar in the case, as we have seen, is quite a distinct and separate thing from possession of immoveable property such as contemplated by the section above referred to. The case of *Parbutty Nath Roy Chowdhury* v. *Mudho Paroe* (1) has been cited by the plaintiffs to show that jalkar is an interest in immoveable property. I have very carefully gone through the case. It has been held there by the Hon'ble Judges of the High Court that jalkar was not an easement, but an interest in immoveable property within the meaning of the Limitation Act. That being the case, the ruling cited by the plaintiffs cannot help them in any way. The case of *Kalee Chunder Sein* v. *Adoo Shaik* (2) shows, on the contrary, that s. 15 of Act XIV of 1859, which has been replaced by s. 9 of Act I of 1877, provided a special remedy for a particular kind of grievance, *e.g.*, to replace in possession a person who had been evicted by a wrongful act from *landed property*, of which he had been in undisturbed possession, and to prevent a powerful person from thus shifting the evidence of proof from himself to another less able to support it. However, as the point is one not free from doubt, I deem it expedient, under the provisions of s. 617, to refer it to the High Court for an expression of their Lordships' opinion. Accordingly, the suit is adjourned, pending receipt of the orders of the High Court."

---

(1) 3 C. 276. (2) 9 W.R. 602.

1890
SEP. 1.

CIVIL REFERENCE.

18 C. 80.

Baboo *Harendra Nath Mookerjee*, for the plaintiffs.

Baboo *Karuna Sindhu Mookerjee*, for the defendants.

The opinion of the Court (O'KINEALY and AMEER ALI, JJ.) was as follows :—

OPINION.

This is a question on a reference made by the Munsif of Bongong, as to whether s. 9 of the Specific Relief Act applies to a case now before him. The facts as found by him, and on which the reference is based, are as follows :—Plaintiffs and defendants had jointly obtained the power to fish on another man's land, that is to say, they obtained a benefit out of another man's land; but had no interest in the soil itself. Subsequently one of the defendants bought the *Gyanti* tenure on which this jalkar lies, and he prevented his co-sharers from fishing at certain period of the year, [83] when the khal became full. The Munsif is of opinion that such a suit does not come within the purview of s. 9, Act I of 1877, and in that opinion we concur. It is clear that the plaintiffs have no right to the land, nor are they in possession of the land; and all that can be said in their favour is that for a certain part of the year they had power or license to fish. A dispute in regard to that does not, in our opinion, amount to a dispossession from any immoveable property, under s. 9 of Act I of 1877 (1).

Let this expression of opinion be communicated to the Munsif of Bongong.

C. D. P.

---

18 C. 83.

CIVIL RULE.

Before Mr. Justice Ghose and Mr. Justice Rampini.

JOGI AHIR (*Defendant*), *Petitioner v.* BISHEN DAYAL SINGH (*Plaintiff*), *Opposite Party.**
[25th July, 1890.]

Provincial Small Cause Court Act (*IX of* 1887), *s.* 17—*Application for new trial—Deposit of decretal amount or security for same, condition precedent to the granting of such application.*

It is a condition precedent to the granting of a new trial that, in accordance with the provisions of s. 17 of the Provincial Small Cause Court Act, 1887, an applicant should at the time of presenting his application for new trial deposit in Court the decretal amount or tender security for payment of the same.

Ramasami v. *Kurisu* (2) dissented from.

[**F.**, 28 A. 470=3 A.L.J. 318=A.W.N. (1906) 93; 9 Bom. L.R. 383; 2 N.L.R. 23 (24); **Rel.**, 15 Ind. Cas. 159 (160); **R.**, 15 C.W.N. 102 (106)=6 Ind. Cas 154; **Doubted**, 3 O.C. 296 (298); **D.**, 32 C. 339=1 C.L.J. 43 (45).]

THIS was a rule calling upon the opposite party, Bishen Dayal Singh, to show cause why the order of the Munsif of Buxar, dated 30th December 1889, refusing to grant the petitioner, Jogi Ahir, a new trial in a Small Cause Court case, should not be set aside.

---

* Civil Rule No. 392 of 1890, against the order of Baboo Purna Chunder De, Additional Munsif of Buxar, dated the 30th of December 1889.

(1) See the case of *Bhundal Panda* v. *Pandal Pos Patil*, 12 B. 221.—ED.

(2) 13 M. 178.

A suit was instituted against the petitioner in the Court of the Munsif of Buxar, and decreed *ex parte* against him on the 16th September 1889. An application for a new trial was filed on 16th Kartick 1296 (31st October 1889); but the petitioner did not at [84] the time of presenting his application either deposit the amount due under the decree, or give security for its performance in accordance with the provisions of s. 17 of the Provincial Small Cause Courts Act, 1887. At the hearing on the 30th December 1889, the petitioner attempted to meet the objection that was raised on this ground by offering to deposit the decretal amount in Court. The Munsif in rejecting the application passed the following order:—

1890 JULY 25.

CIVIL RULE.

18 C. 83.

"This is an application for an order to set aside a decree passed *ex parte* in the Small Cause Court suit No. 59 of 1889. I find that at the time of making this application the petitioner did neither deposit the decretal amount, nor give any security for the performance of the decree, as required by the provisions of s. 17 of the Provincial Small Cause Courts Act, 1887. The petitioner now wants to make the deposit; but I think he cannot have the defect in his case remedied by the course he seeks to adopt. The law is positive on the subject, and it distinctly lays down that the deposit and so forth must be made at the time of presenting the application. The petitioner having failed or neglected to make the deposit in due time, he must take the consequences of his own act. The law may be hard, as argued by the applicant's pleader, but so it is; and I am bound to administer it just as I get it in the Act. I think the application under notice is not maintainable. Accordingly, it is ordered that the case be dismissed; but considering the fact that the opposite party did not take the objection in express terms in his petition of objection, I direct each party to bear his own costs."

The petitioner thereupon moved the High Court and obtained the above rule.

On the rule coming up for argument—

Baboo *Rughoonundun Pershad*, for the petitioner.

Baboo *Mahabir Sahoy*, for the opposite party.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This is a rule which has been obtained calling upon the opposite party to show cause why an order of the Munsif of Buxar, dated the 30th December last, refusing to grant the applicant a new [85] trial in a Small Cause Court case, should not be set aside. The facts of the case are that a suit had been brought against the applicant in the Court of the Munsif of Buxar, and that it had been decreed against him *ex parte*. The applicant, subsequently, applied to the Munsif to set aside the *ex parte* decree against him; but he did not comply with the provisions of s. 17 of Act IX of 1887, and deposit the decretal amount, or tender security for it at the time of making his application. The Munsif, therefore, rejected his application on the ground that the provisions of s. 17 of the Provincial Small Cause Courts Act are imperative. On behalf of the applicant it is now contended that the Munsif's order is wrong — (1) because the provisions of s. 17, Act IX of 1887, are merely directory and not mandatory, as has been held by the Madras High Court in the case of *Ramasami* v. *Kurisu* (1);

(1) 13 M. 178.

1890 JULY 25. — CIVIL RULE. — 18 C. 83.

and (2) that as the opposite party did not in his petition of objection to the applicant's application to the Munsif expressly urge the provisions of s. 17 of Act IX of 1887, he must be held to have waived any objection to the validity of the applicant's application that might be urged on that score. We, however, do not think that this rule should be made absolute. We feel considerable doubts as to the correctness of the ruling in the case of *Ramasami* v. *Kurisu* (1). The learned Judges of the Madras High Court give no reasons for their opinion that the provisions of s. 17, Act IX of 1887, are merely directory; and in our opinion, from the terms of the section, it would seem as if the Legislature intended to make it a condition precedent to the granting of a new trial to any applicant, that he should present with his application the decretal amount, or tender security for the payment of the same. This being so, it may be doubted whether the enforcement of the provisions of the section can be waived at the instance of a party to the suit. Moreover, we do not think that as a matter of fact the opposite party intended to, or actually did waive them. It is true that in his petition of objection to the applicant's application to the Munsif, he did not refer to the provisions of s. 17 of Act IX of 1887; but it is clear that at the hearing of the application itself, the objection was raised, though it does not appear whether it was at the instance of the **[86]** opposite party, or was taken by the Court itself. In any case there does not seem to be any ground for supposing that the opposite party really intended that the provisions of s. 17, Act IX of 1887, should not be enforced, or that he waived them. We are, accordingly, of opinion that in the circumstances, the Munsif's order of the 30th December 1889 was correct, and hence we discharge this rule with costs.

C. D. P. *Rule Discharged.*

---

18 C. 86.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep and Mr. Justice Pigot.

RAM NARAIN NURSING DOSS *v.* RAM CHUNDER JANKEE LOLL.*
[30th July 1890].

Joinder of Parties—Partnership Debt—Representatives of a deceased partner—Mitakshara family—Contract Act (IX of 1872)—Succession Certificate Act (VII of 1889).

In a suit by surviving partners for the recovery of a partnership debt which became due during the life of a deceased partner, the representatives of such deceased partner, having regard to s. 45 of the Contract Act (IX of 1872), are necessary parties; and the provisions of s. 4 of the Succession Certificate Act (VII of 1889) must be complied with in order that the suit may be properly constituted.

Quære-whether in the case of a family partnership under the Mitakshara law a question might arise as to the applicability of s. 45 of the Contract Act and s. 4 of the Succession Certificate Act (VII of 1889).

Gobind Prasad v. *Chunder Sekhar* (2) dissented from.

[**Diss**, 20 A. 365 (366); 4 L.B.R. 99 (100); 10 P.R. 1906; **N.F.**, 17 B. 6 (13); **F.**, L.B.R. (1872—1892) 651 (652); 13 C.W.N. 509=9 C.L.J. 331 (335); **Rel. on**, 70 P.R. 1904; **R.**, 17 M. 147 (150); 9 C.P.L.R. 65 (67); U.B.R. (1892—1896) 204; **Doubted**, 17 C.L.J. 648 (651)=21 Ind. Cas. 509.]

---

* Small Cause Court Reference No. 5 of 1890 made by G.C. Sconce, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 15th of July 1890.

(1) 13 M. 178. (2) 9 A. 486.

1890 JULY 30.

SMALL CAUSE COURT REFERENCE.

18 C. 86.

THIS was a reference to the High Court by the Chief Judge of the Small Cause Court under s. 69 of Act XV of 1882 and s. 617 of the Code of Civil Procedure.

The suit was brought for the recovery of Rs. 889-2 claimed as the balance due on account of grey shirtings sold and delivered [87] on sundry dates by the plaintiffs' firm to the defendants. There was no defence upon the merits, but the defendants objected that the suit could not proceed until the representatives of Nursing Doss, the deceased brother and partner of the plaintiffs, were made parties to the suit, and that the plaintiffs should further produce a probate or letters of administration or certificate as required by s. 4 of the Succession Certificate Act (VII of 1889).

The following case was submitted for the opinion of the High Court:—

"The following is the title of the suit and cause of action as it appears on the plaint :—' Issur Doss and Juggurnath, surviving partners of Nursing Doss, deceased, who carry on business in 99, Cross Street, Calcutta, in the name and style of Ram Narain Nursing Doss, against Ram Chunder and Jankee Loll, carrying on business in the name of Ramchunder and Jankee Loll in 44, Cotton Street, Calcutta.' The cause of action is as follows:—'That the plaintiffs sold and delivered grey shirtings to the defendants on sundry dates between Falgoon Sudi 4th, 1946, and Bysak Budi 13th, 1947, to the value of Rs. 899-2, which is now due and owing; that the cause of action arose on the different dates the goods were sold; that Nursing Doss died on Bysak Sudi 9th, 1947, leaving him surviving the present plaintiffs, who carry on business for the benefit of the partnership business. The plaint is signed in the name of the firm 'Ram Narain Nursing Doss.' The words 'Ram Narain Nursing Doss' are the handwriting of Juggurnath, the second plaintiff, who appears for himself and his partner and brother, Issur Doss, the first plaintiff. The signature to the verification is written by Juggurnath, thus 'Signature, Juggurnath.'

"There is no defence to the action on the merits. The money sued for is, admittedly, due to the firm of Ram Narain Nursing Doss, but the defendant pleads a nonjoinder of plaintiffs. It was contended on behalf of the defendant that the suit could not proceed until the representatives of the deceased brother and partner, Nursing Doss, were made parties to the suit, nor even then without the production by the person 'claiming to be entitled to the effects of the deceased person or any part thereof' of a probate or letters of administration, or a certificate granted under the Succession Certificate Act (VII of 1889).

[88] "The point is taken for the first time. It seems to me of great importance that an authoritative decision should be obtained as speedily as possible upon it. I think, having regard to s. 45 of the Indian Contract Act, and s. 4 of the Succession Certificate Act (VII of 1889), I have no option but to stay proceedings until Buldeo Doss, a son of Nursing Doss, is made a party to the suit; and further, until he produces a probate or letters of administration, or a certificate such as is required by that section.

"The plaintiff relied on the rules given in Dicey on Parties [see edition of 1870, Rule 16, p. 128; Rule 24, p. 162; Rule 52, p. 237; Rule 58, p. 274; and the case of *Gobind Prasad* v. *Chandar Sekhar* (1)], as showing that the surviving partners of the firm of Ram Narain Nursing Doss alone had the right to sue, and, on recovery, would be liable to

(1) 9 A. 486.

1890 JULY 30. — SMALL CAUSE COURT REFERENCE. — 18 C. 86.

account to the representative for the deceased partner's share. The case of *Gobind Prasad* v. *Chandar Sekhar* was decided by Edge, C.J. (Mahmood, J., concurring) on the 22nd March 1887, before the Succession Certificate Act (VII of 1889) came into force. It might be doubted whether the construction put by Edge, C. J., on s. 45 of the Contract Act is correct, notwithstanding the force of His Lordship's observations when he begins by saying (see p. 490 of the report):—"It is obvious to my mind that it would lead in many cases to difficulties and confusion in the getting in of the assets of a firm on the death of a partner, if it were held that a surviving partner could not sue for such assets unless he joined in the action the representatives of the deceased partner.' The report does not show whether the partners were members of a joint Hindu family, or merely connected together in business as partners.

"When the transactions, which are the subject of the present suit, took place, the firm of 'Ram Narain Nursing Doss' consisted of three brothers, Issur Doss, Juggurnath Doss, and Nursing Doss, a Marwari family joint in food, worship, and estate. Juggurnath states that the firm was started 30 or 32 years ago by their father with his own money, in the names of himself and his eldest son Nursing Doss. Ram Narain died four or five years ago. Nursing Doss died on Bysak Sudi 9th, 1947, eleven days after the last sale to the defendants. Nursing Doss was about 15 or 16 years older than Juggurnath, who says he is now 25 years old. Nursing Doss **[89]** left a son, Buldeo Doss, who is about the same age as Juggurnath. Buldeo Doss—so Juggurnath says—during his father's lifetime took a share in the management of the business of the firm, just as he himself and his brothers did; but that Buldeo Doss was not actually a partner in the firm till the death of his father, since which time he has an equal undivided share in the business of the firm, with his uncles, the present plaintiffs, which they jointly carry on. Nursing Doss also left a widow and three daughters, still children. Scorjee, aged six years; Surrosuttee, aged about three years, and a child not yet named, one and-a-half months old, born since her father's death. I apprehend it will not be necessary to make the widow and three children parties to the suit, but it will be necessary to make Buldeo Doss a party to the suit as representing his father's interest in the old firm with which the defendants contracted; not because he is a partner in the new firm consisting of himself and his two uncles, with whom the defendants did not contract, and which came into existence on the death of Nursing Doss. Even then the suit cannot proceed, except upon Buldeo Doss producing probate, or letters of administration, or a certificate granted under Act VII of 1889, s. 4, having the debt specified therein.

"It has always, I believe, been held in Calcutta, since s. 45 of the Indian Contract Act came into force, that the representatives of a deceased partner in a firm must always be made parties to the suit as plaintiffs with the surviving partner or partners. I feel a great deal of doubt about the matter, and therefore, under s. 69 of the Presidency Small Cause Courts Act, and s. 617 of the Code of Civil Procedure, I reserve judgment and refer the question for the opinion of the High Court, and, in the meantime, stay the proceedings."

No one appeared for either party at the hearing of the reference.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., PRINSEP and PIGOT, JJ.) was delivered by

1890 JULY 30. — SMALL CAUSE COURT REFERENCE. — 18 C. 86.

PIGOT, J.—We quite agree with the learned Chief Judge of the Small Cause Court in the opinion expressed by him that it has always been held in Calcutta, since s. 45 of the Indian Contract Act came into force, that the representatives of a deceased [90] partner must always be made parties to suits as plaintiffs with the surviving partner or partners.

There are two cases in which that matter has come before this Court—One is suit No. 243 of 1881, *Remfry* v. *Patitpaban Sen*, in which case the hearing was, on the 9th December 1881, adjourned in order that the plaint might be amended in accordance with this construction of the section. The second which we may mention was suit No. 103 of 1890, *Balkishen* v. *Monimadhab Sen*, the hearing of which was, on the 5th May 1890, adjourned for a similar purpose notwithstanding that the case of *Gobind Prasad* v. *Chandar Sekhar* (1) referred to by the learned Chief Judge, was cited.

It is possible that, in some other partnership case, a question might arise as to the applicability of s. 45 and of s. 4 of the Succession Certificate Act; that is to say, the case of a family partnership under the Mitacshara law. It is not necessary to express any opinion, which would necessarily be more or less speculative, as to the effect of the statutory law upon such partnerships when we observe that, in the present case, it is stated in the learned Chief Justice's summary of the evidence that Buldeo Doss, according to Juggurnath, though, during his father's lifetime he took a share in the management of the business of the firm, signing in the name of the firm, just as Juggurnath and his brothers did, was not actually a partner in the firm at the death of his father. It would appear from this, therefore, that whether the members of the partnership firm were, or were not members of a Mitacshara family, the firm was carried on as the creature, not of birth and relationship, but of contract, since, had it been family property under the Mitacshara law, Buldeo would probably have been interested upon his birth, as a Mitacshara co-sharer, in the assets of the family business. The case being relieved of any question of this nature, we answer the reference by saying that the representatives of the deceased Nursing Doss must be appointed under the Act, VII of 1889, and must be made parties to the suit in order that the suit may be properly constituted.

A. A. C.

---

18 C. 91.

[91] APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep and Mr. Justice Pigot.

DWARKA NATH GUPTO (*Plaintiff*) *v.* THE CORPORATION OF CALCUTTA (*Defendants*).* [15th September, 1890.]

Calcutta Municipal Consolidation Act (*IV of* 1876), *s.* 357—*Limitation—Accrual of right to sue—Notice in writing—Continuing damage.*

The plaintiff in April 1888 sued the defendants for damages for injuries caused by the defendants' works to his house. On the case coming on for hearing it appeared that the notice of action served upon the defendants was defective in form, and the suit was on the 11th December 1888 dismissed with liberty to the plaintiff to bring a fresh suit for the same cause of action.

---

* Original Civil Appeal No. 11 of 1890, against the decree of Mr. Justice Wilson, dated the 12th March 1890.

(1) 9 A. 486.

1890
SEP. 15.

APPEAL FROM ORIGINAL CIVIL.

18 C. 91.

On the 15th December 1888 the plaintiff served the defendants with a fresh notice, and on the 15th March 1889 instituted the present suit. It appeared from the plaintiff's evidence that in the beginning of December 1888 the house had been reduced to such a condition that it was incapable of sustaining further damage;

Held, that the right to sue accrued to the plaintiff upon the happening of damage by reason of the subsidence arising from the defendants' act; that the plaintiff had not shown that a right to sue upon which the suit could be maintained had accrued within three months before the institution of the suit as required by s. 359 of the Municipal Act (IV of 1876), and within the terms of the notice of the 15th December; and that the suit was therefore barred. *The Darley Main Colliery Co.* v. *Mitchell* (1) distinguished.

Per PIGOT, J.—*Semble* that, as to whether, under s. 357, damage arising out a subsidence referred to in the notice, but arising after the date of the notice, could be recovered without fresh notice and fresh suit, a liberal construction should be placed upon s. 357 as to the requirements of the notice.

THIS was a suit brought to recover Rs. 17,675 from the Corporation of Calcutta for damages alleged to have been sustained by the plaintiff's house by reason of the negligent, improper, and unworkmanlike manner in which the workmen, employed by the defendants in the construction of a reservoir in the vicinity of the plaintiff's house, carried out the work. The plaintiff also claimed further damages sustained by reason of the alleged **[92]** wrongful acts of the defendants after the completion of the works, and alleged that the house was still suffering damage by reason thereof; he claimed Rs. 540 for loss of profits from December 1887 to date of suit. The plaint was filed on the 15th March 1882.

The construction of the reservoir was commenced in November 1887 and the works were finished in June 1888.

The plaintiff brought a suit in April 1881 against the defendants for damages for injuries caused by the defendants' works to his house.

In this suit he claimed the same sum of Rs. 17,675: he also claimed in respect of further damage and claimed Rs. 171 for loss of profits from December 1887 to date of that suit. The case came on for hearing in December 1888 before Mr. Justice Trevelyan, when it appearing to that learned Judge that the notice of action served upon the defendants under s. 357 of the Calcutta Municipal Act was defective in point of form, inasmuch as it did not state the place of abode of the plaintiff according to the requirements of that section, the suit was on the 11th December 1888 dismissed, with liberty to the plaintiff to bring a fresh suit for the same cause of action.

On the 15th December 1888 the plaintiff served the defendants with fresh notice of action, and on the 15th march 1889 instituted the present suit.

The present suit came on for hearing before Mr. Justice Wilson who dismissed it, on the ground that the suit was barred by s. 357 of the Municipal Act (IV of 1876), which section corresponds with s. 427 of Act II of 1888. The plaintiff appealed.

Mr. *Woodroffe* and Mr. *Bonnerjee*, for the appellant.

Mr. *T. A. Apcar* and Mr. *Sale*, for the respondents.

Mr. *Woodroffe*.—The excavation was not an act done under the Municipal Act, so the limitation prescribed by s. 357 does not apply. We gave them notice *ex cautela*, which does not estop us. Even if the Act applies, the cases show that the right of suit arises as each damage occurs. Here there has been a continuing wrong, as to which the cause of action arises *de die in diem*. The Court below erred in thinking on

(1) L.R. 11 App. Ca. 127=L.R. 14 Q.B.D. 125.

1890 SEP. 15. — APPEAL FROM ORIGINAL CIVIL. — 18 C. 91.

the evidence that the house [93] could not have sustained further damage after December 1888. The evidence is there was more and more subsidence owing to the weight of the building and the withdrawal of subterranean water by drainage into the defendants' reservoir. The section should be construed strictly. Our cause of action is the damage, and we are not bound to sue until that is ascertained. The following cases were referred to in the argument:—*Darley Main Colliery Co.* v. *Mitchell* (1), *Lamb* v. *Walker* (2), *Backhouse* v. *Bonomi* (3), *Midland Railway Company* v. *Withington Local Board* (4), *Rajrup Koer* v. *Abul Hossein* (5).

Mr. *Bonnerjee* followed on the same side.

Mr. *Apcar* for the respondents contended that the only cause of action was under the Act, and that no damage had been proved to have been sustained within the period of limitation. He referred to the following cases:—*Whitehouse* v. *Fellowes* (6), *Lloyd* v. *Wigney* (7), *Smith* v. *London and South-Western Railway Co.* (8), *The Mersey Docks Trustees* v. *Gbbis*(9), *Jolliffe* v. *Wallasey Local Board* (10), *Price* v. *Khilat Chandra Ghose*(11), *Cook* v. *Leonard* (12), Addison on Torts, Fifth Edition, 712, *Popplewell* v. *Hodkinson* (13), *Ulman* v. *Justices of the Peace for the Town of Calcutta* (14), *Waterhouse* v. *Keen* (15).

Mr. *Woodroffe* in reply—In the Court below the case of the *Darley Main Colliery Co.* v. *Mitchell* (1) was cited, and issues were framed. This Court should look not to the mere wording of the plaint, but to the issues settled for trial, *Rajah Rup Singh* v. *Rani Baisni* (16). There is no finding except upon the question of limitation. The case should be remanded upon the merits, the question of limitation being set aside. The case comes within the *Darley Main Colliery Co.'s* case and *Backhouse* v. *Bonomi* (3). [94] [Pigot, J., referred to s. 24 of the Limitation Act (XV of 1877) and the cases cited at p. 51 of Satis Chandra Ray's edition.] It is said that there is no right to the support of subterranean water, and *Popplewell* v. *Hodkinson* (17) is relied on; but that case may be distinguished (see *Chasemore* v. *Richards* (18), *Elliot* v. *North-Eastern Railway Company* (19), *Rigby* v. *Bennett* (20)).

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., PRINSEP and PIGOT, JJ.) was delivered by

PIGOT, J., who (after stating the facts) continued:—The present suit came on for hearing before Mr. Justice Wilson, who dismissed it, on the ground that the suit was barred by s. 357 of the Municipal Act. He said:—"The question is whether on the plaintiff's own evidence it is shown that any right to sue accrued within three months before the 15th March, on which date the present suit was brought. I think it is not so shown."

The suit was dismissed on the ground of limitation alone: there was no finding on the other issues in the case.

The plaintiff appeals against the decree of the original Court. Section 357 is as follows:—"No suit shall be brought against the Commis-

(1) L.R. 11 App. Ca. 127=L.R. 14 Q.B.D. 125.
(2) L.R. 3 Q.B.D. 389.
(3) 9 H.L.C. 503.
(4) L.R. 11 Q.B.D. 788.
(5) 6 C. 394.
(6) 10 C.B.N.S. 765 (785).
(7) 6 Bing. 489.
(8) L.R. 5 C.P. 98.
(9) L.R. 1 E. & I. Ap. 93 (112).
(10) L.R. 9 C.P. 62 (82).
(11) 5 B.L.R. Ap. 50.
(12) 6 B. & C. 351.
(13) L.R. 4 Ex. 248.
(14) 8 B.L.R. 265.
(15) 4 B. & C. 200.
(16) 11 I.A. 149 (155).
(17) L.R. 4 Ex. 248.
(18) 7 H.L.C. 349.
(19) 1 J. & H. 145=10 H.L.C. 333.
(20) L.R. 21 Ch. D. 559.

1890 SEP. 15. — APPEAL FROM ORIGINAL CIVIL. — 18 C. 91.

sioners or any of their officers or any person acting under their direction for any thing done under this Act until the expiration of one month next after notice in writing has been delivered or left at the office of the Commissioners, or at the place of abode of such person, stating the cause of suit and name and place of abode of the intending plaintiff. Unless such notice be proved, the Court shall find for defendant. Every such suit shall be commenced within three months next after accrual of the right to sue and not afterwards. If any person to whom any such notice of suit is given shall, before the suit is brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover in any such action when brought; and if no such tender shall have been made, it shall be lawful for the defendant in such action, by leave of the Court where such action shall be pending at any time before issue joined, to pay into Court such sum of money as he shall think fit, and thereupon such proceedings shall be had as in other cases where defendants are allowed to pay money into Court."

[95] In his judgment the learned Judge says :—

"In order to see whether the plaintiff can maintain this suit we must see how the plaintiff's case stands on his evidence. The really important evidence is that of Rameshwar Nath, who was the adviser of the plaintiff and who had been an Executive Engineer in the service of Government. He spoke from the notes which he had made at the time he visited the premises, and his evidence is clear that at the time the tank was excavated serious damage was caused to the plaintiff's house which he attributed to the excavation. For the purposes of the former suit this witness prepared an estimate of the damage done to the house up to that time, and he prepared it on the basis of a new building having to be put up because at that time the house was practically a wreck. He said there was nothing to be done but to pull it down. He said that even the materials were of no value because it would cost as much to pull down and cart away the materials as they were worth. He spoke to the injuries on the 1st December. At that time all the injuries had been incurred and the house was a ruin." I think that this is an accurate statement of the purport of this witness' testimony as to the amount of damage already done to the house more than three months before the institution of the suit.

For the appellant it was contended that the case did not come under s. 357 at all; that the excavation by the defendants was in itself an act which the defendants were entitled to do [*Darley Main Colliery Co.* v. *Mitchell* (1)]; that the subsidence of the plaintiff's land whereby the damage was caused was the cause of action, and not the excavation by the defendants; and that therefore this was not a suit for anything done under the Act within the meaning of the section.

Assuming for the purposes of the argument that the *Darley Main Colliery Co.* v. *Mitchell* (1) and that class of cases are applicable to the present, I think that it cannot be deduced from the principles laid down in those cases that s. 357 does not apply to the present. Taking it that in such a case the cause of action is a subsidence which causes a disturbance of the plaintiff's enjoyment of his land, the defendant surely can only be liable if that **[96]** subsidence is attributable to his act or default. In the judgment of Fry, L. J., (pp. 139-140, L.R. 14 Q.B.D.) adopted by learned Counsel for appellants in the case of *The Darley Main Colliery Co.* v. *Mitchell* the principle on which that decision rests is expounded.

(1) L. R. 11 App. C. A. 127 = L. R. 14 Q. B. D. 125.

1890 SEP. 15. — APPEAL FROM ORIGINAL CIVIL. — 18 C. 91.

Now with reference to principle, it appears to me to be plain that all damages which result from one and the same cause of action must be recovered at one and the same time, and therefore we are driven to the inquiry what is the cause of action in a case of this description. As has been pointed out by Bowen, L. J., very clearly, there are two possible ways of stating that cause of action. It may be said that the subsidence attributable to the defendants is itself an interference with the plaintiff's enjoyment of his property, and as such is the cause of action in itself, or it may be said that the cause of action is the defendants' allowing the cavity to continue without giving proper support to the superadjacent land, and the damage which follows from that circumstance to the plaintiff. To my mind it is not very material to inquire which of the two is the more accurate way of stating the cause of action. Like Bowen, L. J., I incline to consider that the more simple and more correct mode of statement is to say that the subsidence of land attributable either to the acts or default of the defendants is itself an interference with the plaintiff's enjoyment of his own property, and as such constitutes the cause of action.

The mere withdrawal of the stratum of coal in itself is a perfectly legitimate and lawful act, and it is only because it is done without doing something else which would prevent the injury to the plaintiff that the cause of action arises.

I think it cannot be successfully contended that in such a case the suit is not brought for anything done by the defendants, whether it be said that the subsidence "attributable to the defendants" is the cause of action in itself, or that the cause of action is "the defendants allowing the cavity to continue without giving proper support, &c." In either view the defendant is liable by reason of, or "for," an act done by him; whether that be an act of commission or of omission, is quite immaterial. If it be necessary to seek authority as to acts of omission from this point of view, it has been decided that omission to repair the handrail [97] of a bridge is a "something done" under the Highway Act (*Holland* v. *Northwich Highway Board*) (1), and in an action for damages resulting from such omission, plaintiff was non-suited, because the action was not brought within three months. A suit could not lie against a defendant at all unless for something done by him, leading (at any rate) to the cause of action. It is plain that here the defendants are sued for something done by them under the Act, and that s. 357 applies.

The case being, as I think, within s. 357, the question is whether the plaintiff has shown that a right to sue on which this suit can be sustained accrued within the period prescribed by the section, and within the terms of the notice of December 15th. It is clear, I think, that the right to sue accrues—assuming as most favourable to him the applicability of the *Darley Company* case—to the appellant upon the happening of damage by reason of a subsidence arising from the defendants' act. Without damage no suit would lie; (*Smith* v. *Thackerah*) (2), a case the great authority of which cannot be affected by the observations, intentionally thrown out as speculative (as I understand them), of Bowen, L. J., at p. 137 of his judgment in the *Darley Company* case.

Now Rameshwar Nath's evidence is clear, in my opinion, as to this that more than three months before suit the house had been reduced to such a condition, from whatever cause, that it was incapable of sustaining further damage. A further subsidence (of which indeed there is no

(1) 34 L. T. 137.

(2) L. R. 1 C. P. 564.

1890 SEP. 15. — APPEAL FROM ORIGINAL CIVIL. — 18 C. 91.

evidence whatever) might perhaps have caused further changes in the ruined structure: the walls, or parts of them, might have fallen in, or fresh cracks have begun, or old ones widened; but these changes would be merely the displacement of materials already valueless as they stood, and could not amount, in any true sense, to fresh damage to the plaintiff's house.

In truth, the exigencies of the appellant's case before us compelled him to deal with Rameshwar's evidence very differently from that in which, as I suppose, he would have dealt with it if the question of limitation had not arisen. It was suggested that that evidence did not really amount to what the learned Judge understood to be the effect of it, or that, if it did, it was exaggerated; and that Rameshwar's picture of total ruin was probably **[98]** coloured by a professional impulse, which would lead him to take a fastidious view of dilapidated buildings, and to encourage rather than to avert a complete condemnation of them, and an entire reconstruction of them with skilled professional assistance. This argument was put with great skill, and with much lightness of touch. But in plain words it amounts to an attempt to discredit the evidence of the plaintiff's own witness—his chief witness—upon whose estimate the claim in the former and in the present suit was based; and to do this, not because he has turned out hostile to the appellant, but because he has been too favourable to him; and has so completely supported his case as to prove it out of Court on the point of limitation.

I think it would be of the worst example to allow a party in appeal so to deal with the most material part of his evidence, and that the appellant must be made to abide by the fair meaning of what Rameshwar said, which I see no reason whatever to doubt. That evidence proves that no damage and therefore no right to sue could have accrued after the beginning of December. The leave to bring a fresh suit granted on December 11th could not, of course, operate to prevent the operation on the present suit of the provisions of s. 357.

Then it was said that this was a case of continuing damage. If this be granted, plaintiff could only sue for damage accruing within the three months, *Wilkes* v. *Hungerford Market Co.* (1) [3rd point not overruled, as the case was on another point in *Ricket's* case in Dom. Proc. (2)]. No subsidence is proved to have taken place after December 1st, 1888, and whether any such subsidence did take place or not, it is certain, as has been already said, that no damage to the plaintiff in respect of the house did or could have occurred after that time.

I think the appeal must be dismissed with costs.

PIGOT, J.—I may add an observation not necessary for the judgment in this case, but which may arise, having regard to the recent English cases cited before us in cases to which s. 357 of the Municipal Act may be applicable, with respect to the scope of the notice required under that Act.

[99] Whether or not damage arising out of a subsidence referred to in the notice, but arising after the date of the notice, could be recovered, without fresh notice and fresh suit, may be a question. If the subsidence alone constituted the cause of action, of course subsequent damage arising from it might be recovered in a suit brought within three months from the subsidence. If the damage arising from the subsidence be the cause of action, as seems to be the result of the cases, then only what is stated in the notice can be recovered, and nothing arising after it.

---

(1) 2 Bing. N. C. at pp. 294-5. (2) L. R. 2 H. L. 175.

It may be that the Courts in the face of the recent decisions, if this be the effect of them, might be asked to place a liberal construction on the words of s. 357 as to the requirements of the notice.

Appeal dismissed.

Attorney for the appellant: Baboo *Mooraly Dhur Sen.*

Attorney for the respondents: The Offg. Government Solicitor, (Mr. *W. K. Eddis*).

A. A. C.

---

18 C. 99 (P.C.) = 17 I.A. 90 = 5 Sar. P.C.J. 564.

PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

LUCHMESWAR SINGH (*Plaintiff*) *v.* CHAIRMAN OF THE DARBHANGA MUNICIPALITY (*Defendant*).
[12th March and 25th April, 1890.]

Minor—Guardian, Powers of, to deal with minor's estate—Application of the Land Acquisition Act, 1870, *to the land of a minor—Insufficiency of compliance with the other requirements of the Act, without actual compensation to the minor's estate—Recovery of land by minor on coming of age.*

The guardian of a minor's estate has no power to waive a right to compensation for part of the estate taken under the Land Acquisition Act, 1870; although the owner, had he been of full age, might have waived it.

[100] Although the Court of Wards had no power to alienate the land of a minor of whose estate it had charge, yet possession might have been lawfully taken of the land for a public purpose, under and in conformity with the Land Acquisition Act, 1870, if there had been due compliance with the provisions of the Act, as regards compensation to the minor's estate.

Where, however, compensation had not been given, and a merely nominal consideration had passed, the Collector not having acted, as the representative of the Court of Wards, so as to protect the interests of the minor, *held*, that no valid title to the land was established as against the ward, and that on his attaining full age he could recover it with mesne profits.

[**Diss.**, 30 C. 36 (90, 92) = 7 C. W. N. 249; **F.**, 3 C. W. N. 748 (749); **Appl.**, 30 C. 576 (579); **R.**, 11 C. L. J. 612 (614) = 6 Ind. Cas. 457 (459); **D.**, 38 C. 230 (243) = 12 C. L. J. 505 = 15 C. W. N. 87 = 8 Ind. Cas. 107 (110); 14 C. L J. 151 = 11 Ind. Cas 899 (903).]

APPEAL from a decree (24th February 1888), reversing a decree (1st September 1886) of the District Judge of Mozufferpore, and dismissing the appellant's suit with costs.

The appellant, the Maharaja of Darbhanga when the proceedings which afterwards gave rise to this suit took place, was a minor whose estates were under the charge of the Court of Wards (Bengal Act IV of 1870), and he so remained until the 24th September 1879. That Court, for Darbhanga, consisted of the Commissioner of the Patna Division, acting under the orders of the Board of Revenue, and the representative of the Commissioner and Agent of the Court of Wards was the Collector of the district. There was also a manager of the estates of the Raj Darbhanga appointed by the Government. The transaction which occasioned this suit, between the latter and the Collector, in his capacity of *ex-officio* Chairman of the Municipality of Darbhanga, and in another capacity acting under the Commissioner's authority, is stated in their Lordships' judgment.

1890
APRIL 25.
PRIVY COUNCIL.
18 C. 99 (P.C.) = 17 I.A. 90 = 5 Sar. P.C.J. 564.

The suit was brought to recover possession of about 18 cottahs of land on the bank of the river Baghmati in the town of Darbhanga, which had been taken for a public purpose by proceedings nominally in pursuance of the Land Acquisition Act, 1870, and made over to the municipality, during the minority of the Maharaja. The Court of Wards had waived the minor's right to substantial compensation, therein acting in excess of its powers. But the High Court had held that a reference having been formally made under s. 15 of the above Act, although only on the passing of a nominal consideration, and the other forms having [101] been complied with, the result had been to establish in the municipality a good title to the land—a decision which this appeal questioned. But no question was raised as to the plaintiff's liability to reimburse the municipality for money spent on the land, he being willing to pay it.

The principal issue was whether the notification under s. 6 followed by merely nominal compensation, and a reference to the Civil Court under ss. 15 and 18, with the order to take possession issued under s. 16 of the Land Acquisition Act, 1870, conferred a legal title.

The District Judge, in reference to this, found that the transaction was really a gift, and a gift by a guardian of his ward's property, which the guardian was unable, legally, to make. He concluded that the arrangement was illusory and void from its commencement. He therefore decided the issue in the plaintiff's favour, decreeing possession and mesne profits.

On appeal the High Court (WILSON and O'KINEALY, JJ.) also regarded the transaction as merely a gift which the Court of Wards had no power to make. But it was of opinion that the operation of the Land Acquisition Act, 1870, was not reversible, and that it had operated. All the forms had been complied with, and there was nothing to prevent the Government from taking the land when the proper notices were issued. "The proceedings were, both in substance and form, proceedings under the Land Acquisition Act, and all that was done by the guardian was to accept nominal compensation when he had a right to insist on substantial compensation." The Court then examined the proceedings in detail, and expressed its opinion that everything had been done under ss. 6, 9 and 15 to entitle the Collector to take possession; and that his action in doing so could not be reversed. "The question is not before us whether the Maharajah was or is entitled to claim compensation, or whether he was or is bound to accept nominal compensation. The question is one which was open to the District Judge on the reference, and, for aught we know, it may be open now." Finally, the Court held that the municipality was justified in using the land for any purpose for which the statute authorised its use, although not the purpose for which it was professedly taken, it having been taken for a bathing ghat, but afterwards, in part, used for a market.

[102] On this appeal,

Mr. *T. H. Cowie*, Q. C., and Mr. *J. H. A. Branson*, for the appellant, argued that the proceedings taken did not constitute either an award or a reference under the Land Acquisition Act, 1870, and did not operate to extinguish the plaintiff's title. The land had been, in fact, given to the municipality at the suggestion, and by the sanction, of those who were the guardians of the appellant, and the trustees of his estate. Such a transaction was invalid, and inoperative against the appellant, who was then a minor.

Mr. *W. F. Robinson*, Q. C., and Mr. *J. D. Mayne*, for the respondent, argued that the High Court had been right in deciding that the land had vested in the municipality by the effect of the Land Acquisition Act, 1870. If the appellant had any claim in respect of the inadequacy of the compensation, still no suit would have lain against this respondent, nor was this suit framed to assert such a right. No appeal had been preferred against the decision of the District Judge, to whom reference had been made under the Act, and, consequently, the whole proceeding had become final. They referred to ss. 35 and 38 of Act X of 1870.

1890 APRIL 25. — PRIVY COUNCIL. — 18 C. 99 (P.C.) = 17 I.A. 90 = 5 Sar. P.C.J. 564.

Mr. *T. H. Cowie*, Q.C., replied.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH :—The question in this appeal is whether a piece of land, which was the property of the appellant and is now in the possession of the Darbhanga Municipality, represented in the suit by their Chairman, the respondent, has been validly acquired by the municipality under the provisions of the Land Acquisition Act, 1870. On the 26th of August and 2nd and 9th of September 1874, a declaration was published in the *Calcutta Gazette*, in accordance with s. 6 of the Act, that the land in question was required to be taken by Government, at the expense of the Darbhanga Municipality, for a public purpose, *viz.*, construction of a public ghat or landing place in the town of Darbhanga. At this time the appellant was a minor, under the care of the Court of Wards of the Province of Bengal, and he remined a minor until the 25th of September 1879. The Court [103] of Wards for the District of Darbhanga was the Commissioner of Patna, and the representative of the Commissioner in Darbhanga was the Collector for the time being of Darbhanga, who was also *ex-officio* Chairman of the Darbhanga Municipality. The Court of Wards has power to appoint a manager of the estate of a minor who is under its care, and at this time the manager appointed was Colonel J. Burn.

On the 10th May 1875 the Officiating Collector of Darbhanga wrote to the manager a letter, in which, after referring to a petition which had been presented by the manager's mookhtar claiming rent for the land at the rate of Rs. 16-5-3 pie per annum, he says—"Permit me to invite your attention to the last clause of s. 3 of the Act. From this it appears that you, as far as acquisition of land under this Act is concerned, are as competent to act for the minor Maharaja as he himself would be were he of age. This being so, I trust you will favour me with the expression of your consent to the sale of the land. The object in view is to benefit the town, and I am confident that this object will have weight with you in making your claim for compensation." The clause referred to says, under the description of persons deemed entitled to act, "the guardians of minors and the committees of lunatics or idiots shall be deemed respectively the persons so entitled to act to the same extent as the minors, lunatics, or idiots themselves, if free from disability, could have acted." These words must be read with reference to the obligations and duties of guardians and committees, which appear to have been entirely overlooked in this and his subsequent proceedings by the Officiating Collector, who was the representative of the Court of Wards, the guardian of the minor. On the 12th May 1875, the manager wrote to the Collector:—"Sir,—With reference to your letter No. 49 of 10th instant, I have the honour to represent that, from the tenor of s. 68 of Bengal Act IV of 1870,

1890 APRIL 25. — PRIVY COUNCIL. — 18 C. 99 (P.C.) = 17 I.A. 90 = 5 Sar. P.C.J. 564.

you will perceive that the Court of Wards has not power to alienate raj land except for the purposes mentioned in that section; but I beg the matter be submitted to the Court of Wards for orders. I have no objection to present the land in question to the town, but doubt my power to do so." The Collector appears to have written to the Commissioner of Patna, who represented the Court of Wards, on the 19th [104] of May. This letter is not in the proceedings, but its contents may be inferred from the notice of it in the reply of the Commissioner on the 2nd June. That is, "Sir, I have the honour to acknowledge the receipt of your letter No. 62, dated the 19th ultimo, regarding the land belonging to the Darbhanga Raj made over to the municipality, free of cost, for the construction of a bathing ghat. In reply, I beg to state that Act X of 1870 came into force on the 1st June 1870, while Bengal Act IV of 1870, though it purports to have come into force on the same date, does not appear to have been sanctioned until the 17th June 1870. As regards the procedure to be observed in the case, you should offer the manager one rupee compensation, and allow the manager to refer the point to the Board of Revenue, with whose sanction the award can undoubtedly be accepted, and acceptance of the award will act as a valid conveyance." The words "made over to the municipality free of cost," in their Lordships' opinion, show that the matter submitted to the Commissioner was the presenting the land to the town, which was in accordance with the manager's letter of the 12th May. Their Lordships feel compelled to state their opinion that the direction or suggestion to offer one rupee compensation was a colourable way of doing indirectly what it was seen could not be done directly, *viz.*, the guardian making a present to the town of the land of his ward.

The procedure referred to is contained in ss. 11 and 13 of the Land Acquisition Act. On a day fixed the Collector, who, after the declaration, is by s. 7 to take order for the acquisition of the land, is to proceed to inquire summarily into the value of the land, and to determine the amount of compensation which, in his opinion, should be allowed for it, and to tender such amount to the persons interested. And in determining the amount of compensation, he is ordered to take into consideration the matters mentioned in s. 24, one of which is the market value, at the time of awarding compensation, of the land. It is obvious that the offer of one rupee compensation was not in accordance with the duty of the Collector under these sections, and it would be altogether wrong to treat one rupee as the amount of compensation determined under s. 13. Section 14 says that if the Collector and the persons interested agree as to the amount of compensation [105] to be allowed, the Collector shall make an award under his hand for the same. This was never done. On the 14th July 1875 the Collector wrote to the manager enclosing a copy of the Commissioner's letter, and saying, "I hereby offer you one rupee as compensation for the land in question, and request you to refer the point to the Court of Wards, with a view to obtaining sanction for the acceptance of the offer." Upon which, on the 16th July, the manager wrote back to the Collector asking him to obtain the authority of the Board of Revenue to accept the one rupee as compensation. This letter appears to have been sent by the Collector to the Commissioner of Patna, and by him to the Board of Revenue. On the 4th August 1875 the Officiating Secretary of the Board of Revenue wrote to the Commissioner that the Member in charge had no objection to the manager of Darbhanga estate accepting the compensation of one rupee which had been awarded by the Collector of Darbhanga for the land belonging to the estate which had been taken up by the

1890 APRIL 25. PRIVY COUNCIL. 18 C. 99 (P.C.) = 17 I.A. 90 = 5 Sar. P.C.J. 564.

Darbhanga Municipality for the construction of a ghat on the Bagmati river. On the 19th August 1875 the rupee was paid by the Collector, and the manager gave a receipt for it, describing it as a nominal compensation for the raj land taken up by the Darbhanga Municipality. The land was thereupon taken possession of by the municipality, a bathing ghat was erected upon a portion of it, and the rest has been used by the municipality as a market.

On the 11th February 1886 the Maharaja brought a suit to recover possession of the land, and for mesne profits and damages. The District Judge of Mozufferpore on the 1st September 1886 made a decree in his favour, which has been reversed by the High Court, and the suit has been dismissed. Although the Court of Wards had not power to alienate the land for the purpose for which it was required, possession might have been lawfully taken of it if the provisions of the Land Acquisition Act had been complied with. But they were not. The Collector made no inquiry into the value of the land. He was the Chairman of the municipality, and his sole object appears to have been to benefit the town, forgetting that, as the representative of the Court of Wards, it was his duty to protect the interests of the minor, and to see that the provisions of the Act were complied with. It is [106] not true, as the High Court seems to have thought, that, as the Maharaja, if he were of age, might waive the right to compensation, his guardian might do so. The Maharaja, if of age, might have made a present of the land to the town, and probably, if it was only to be used for a bathing ghat, would have done so, but it was known by all parties that the manager had no power to do this. The offer and acceptance of the Rupee was a colourable attempt to obtain a title under the Land Acquisition Act without paying for the land, and their Lordships have felt some surprise at the direction which originated it having come from the Commissioner. It is, however, to be observed that the letter of the 2nd June is signed by a Subordinate officer.

The 16th section of the Act says that when the Collector has made an award under s. 14 or a reference to the Court under s. 15, he may take possession of the land, and it has been argued that there was a reference which authorized him to take possession, although he had not made any award. This appears to have been the view of the High Court. Section 15 says that if the Collector considers that further inquiry as to the nature of the claim should be made by the Court, or if he is unable to agree with the persons interested as to the amount of compensation to be allowed, he shall refer the matter to the determination of the Court in manner after appearing. A reference to the Civil Court was made by the Collector on the 7th February 1876, months after the rupee had been paid and accepted. That acceptance as compensation is stated in the reference, and it is also stated that all the claimants for compensation except four had agreed to the Collector's award and accepted the compensation tendered to them. Then facts are set forth as to the four claimants and the amounts of compensation tendered to them. The document then concludes.—" As they have refused to accept this compensation, and as it appears to the Officiating Collector that their claims are preposterously high and there is no chance of their coming to terms, the matter is referred to the District Judge for decision under ss. 15 and 18 of the Land Acquisition Act " This cannot be held to be a reference of a claim to compensation by the manager of the Darbhanga estate, his claim being treated as settled.

[107] The claims of the four who had refused to accept the compensation tendered to them are the matter referred, and their Lordships can see

1890 APRIL 25. — PRIVY COUNCIL. — 18 C. 99 (P.C.)= 17 I.A. 90= 5 Sar. P.C.J.

no ground for the opinion of the High Court that on this reference the whole matter was open to the District Judge, and that "he could inquire, and possibly he did inquire, whether or not the consent was binding on the minor." The Collector had not said that an inquiry ought to be made, and there is no trace in the proceedings of the District Judge having made such an inquiry. Their Lordships are clearly of opinion that the reference had not the effect which has been given to it by the High Court, and that the decree reversing the decree of the District Judge cannot be supported. But the latter decree must be modified. The District Judge, in allowing mesne profits, has taken the income for the three years 1883 to 1885, and has set that off against the Rs. 5,000 which it was admitted by the plaintiff he was bound to pay to the defendant for the money expended on the land. This income was received by the municipality after the expenditure of a considerable sum of money on the land. It is not the measure of the damages sustained by the Maharaja by being out of possession. The rent which could have been obtained for the land if the Maharaja had been in possession during those years is the fair measure of the mesne profits. And it appears from the Collector's letters of the 10th May that the manager had claimed rent for the land at the rate of Rs. 16-5-3 per annum. Their Lordships therefore think that Rs. 50 will be a proper sum to allow for mesne profits for three years. That sum only must be deducted from the Rs. 5,000.

Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of the High Court and the District Judge, and to make a decree that, on payment to the defendant of Rs. 4,950, the plaintiff recover possession of the land claimed in the plaint, and that he recover the costs of the suit in both the lower Courts. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*
Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C.B.

---

18 C. 108 (P.C.)=5 Sar. P.C.J. 582.

[108] PRIVY COUNCIL.

PRESENT:

Lord Watson, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

RADHA PERSHAD SING (*Decree-Holder*) *v.* TORAB ALI AND OTHERS (*Defendants*). [25th April, 1890.]

Decree—Construction of decree—Construction in execution of an order in Council.

An order of Her Majesty in Council was that a decree-holder should recover what was demarcated by "the thakbust map and proceedings of 1839." *Held*, on the construction of the order, that the latter words meant the proceedings relating to the thakbust map, and did not include a survey map, which differed from it.

APPEAL from a decree (2nd May 1887) of the High Court, affirming a decree (15th April 1886) of the Subordinate Judge of Shahabad.

This appeal arose out of proceedings in execution of an order of Her Majesty in Council of 17th May 1879, and the matter in dispute is stated in their Lordships' judgment.

On two occasions in the Court of the Subordinate Judge, first on 30th June 1881, and again on 15th April 1886, it was found that the amin deputed to the spot, and directed to report, had taken into consideration the survey map instead of confining himself to the thakbust. An appeal from the order of the latter date was preferred to the High Court, whereupon a Division Bench (TOTTENHAM and NORRIS, JJ.) was of opinion that the Subordinate Judge had been right in limiting the decree-holder to the thakbust, and that he had, as a matter of construction of the order in Council, strictly adhered to its terms, correctly declining to give it a wider scope.

1890
APRIL 25.
—
PRIVY
COUNCIL.
—
18 C. 108
(P.C.) =
5 Sar. P.C.J.
582.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, appeared for the appellant.

Mr. *C. W. Arathoon*, for the respondents.

For the appellant it was argued that he was entitled to lands appearing by the survey proceedings of 1839, in other words, by the thakbust, as corrected by the subsequent proceedings, and the scientific survey maps, to lie to the north of the northern bank of the true channel of the Ganges in 1839. Reference was made to Wilson's Glossary, 501, for the definition of thakbust.

[109] Counsel for the respondent was not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH.—This is an appeal from a decree of the High Court of Calcutta affirming an order of the Subordinate Judge made in the execution of an order in Council of the 17th May 1879. The judgment of this Board upon which that Order in Council was made was given on the 22nd March 1879. It referred to and adopted a judgment which was given on the same day in another case of a similar nature. In that judgment their Lordships said that the Board, when the matter was previously before them, came to the conclusion that the Maharaja, the present appellant, had had adverse possession of all the land that was above the northern bank of the river Ganges in 1839, and from that time to 1857, and had therefore established a title to that portion of the land in dispute, but to no more, and that a map of the amin which was made in a great measure from the thakbust proceedings of 1839 which had been referred to was at that time assumed by the Board to be correct, but that their attention having been called to a statement of the amin, showing that this map was not a correct map, they "thought it better and safer in this case to take the thakbust map of 1839." That being so, they came to the conclusion that the Maharaja was entitled to recover "so much, if any, of the land claimed by him in this suit as was demarcated by the thakbust map and proceedings of 1839, as then lying to the north of the northern bank of the river Ganges." Her Majesty's Order in Council was made in the same terms.

Now the present contention of the appellant is fairly stated in the appellant's case, and it is this :—" In the present case it has appeared on the proceedings in execution of Her Majesty's Order in Council that the professional survey made in the same year as the thakbust, 1839, differed materially from the latter, and would give this appellant a much larger area as lying to the north of the northern bank of the Ganges, and that the thakbust map was unscientific and untrustworthy. This appellant contended" that is, before the lower Courts—" and now submits that his contention was well founded, that the intention of their Lordships' judgment and report was to give him all the land which in fact lay to the north of

1890
APRIL 25.
PRIVY COUNCIL.
18 C. 108 (P.C.) = 5 Sar. P.C.J. 582.

the true river bed of 1839, and [110] that such true river bed is that shown by the survey map of 1839." In the reasons of the appellant's case it is said that "it should have been held that this appellant was, on a due construction of the judgment of the Judicial Committee of the 22nd March 1879, and the Order of Her Majesty in Council of the 17th May 1879, entitled to whatever lands should by the survey proceedings of 1839, *i.e.*, the thakbust map as corrected by the subsequent proceedings, and scientific survey map, appear to have lain to the north of the northern bank of the true bed of the river Ganges in 1839." So that in fact what the appellant contended for in the lower Courts and now contends for here is that the survey map is to be taken as the map showing the demarcation of the land correcting the thakbust map, where it differs from it; in fact that the survey map should be substituted for the thakbust map.

Now, whatever may be the merits of the one map or the other, about which it is not necessary to say anything, because their Lordships have not the materials before them to enable them to say whether the survey map is the map which ought to have been used by the Judicial Committee when this judgment was given the words of the judgment and of the Order in Council are not in any way ambiguous. There is no difficulty in interpreting them. They say distinctly that the Maharaja is to recover what was demarcated by the thakbust map and proceedings of 1839, and it appears from the judgment to be obvious that the proceedings in 1839 meant the proceedings relating to the thakbust map. It could hardly be that their Lordships, when they gave that judgment, intended by the words "proceedings of 1839" to include a survey map which it is now said differs from the thakbust map and is sought to be used to correct it. The lower Courts in the execution of this Order in Council appear to have taken the right view, and their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed and the decree of the High Court be affirmed. The appellant will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Burton, Yeates, Hart & Burton.*
Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

C. B.

---

18 C. 111 (P.C.) = 17 I.A. 173 = 5 Sar. P.C.J. 590 = Rafique and Jackson's P.C. No. 120.

[111] PRIVY COUNCIL.

PRESENT:

Lord Watson, Sir B. Peacock, and Sir R. Couch.
[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

RAN BIJAI BAHADUR SINGH (*Defendant*) *v.* JAGATPAL SINGH (*Plaintiff*)

AND A CROSS-APPEAL

BISHESHAR BAKSH SINGH (*Plaintiff*) *v.* RAN BIJAI BAHADUR SINGH AND ANOTHER (*Defendants*). [29th and 30th April, 1890.]

Oudh Estates Act I of 1869, *ss.* 8 *and* 22, *and sub-s.* 11 *of s.* 22—*Descent of talukh—Disqualification of insane person to inherit by Hindu law—Insanity not proved.*

A talukh, entered in the lists 1 and 2, prepared in conformity with s. 8 of the Oudh Estates Act, 1869, descends, according to the rules pointed out in s. 22, as an impartible estate to the single heir determined by the Hindu law of inherit-

ance. *Brij Indar Bahadur Singh* v. *Jankee Koer* (1) followed. Exclusion, under the Hindu law, of a claimant from the inheritance on the ground of insanity could not be inferred merely from his being described in the plaint as insane, or from his suing by a guardian certified under Act XXXV of 1858. Although he might be incompetent to commence the suit, or to proceed with it except by a guardian, this did not establish that he was excluded when the succession opened.

1890 APRIL 30.

PRIVY COUNCIL.

[F., 23 A. 369 (P.C.) = 3 Bom. L. R. 293 = 5 C. W. N. 602 = 28 I. A. 100 = 11 M. L. J. 178 = 8 Sar. P. C. J. 19 ; Expl., 16 O. C. 290 (309) (F.B.) = 22 Ind. Cas. 577 ; R., 26 A. 393 (401) ; 32 A. 599 (609) (P. C.) = 7 A. L. J. 1122 = 12 Bom. L. R. 1015 = 12 C. L. J. 303 = 14 C.W. N. 1010 = 7 Ind. Cas. 724 = 20 M. L.J. 917 = 8 M.L.T. 273 = 13 O. C. 316 ; 8 O. C. 45 (48) ; 11 O. C. 256.]

18 C. 111 (P.C.) = 17 I.A. 173 = 5 Sar. P.C.J. 590 = Rafique & Jackson's P.C. No. 120.

APPEAL from a decree (1st November 1886) of the Judicial Commissioner modifying a decree (19th January 1885) of the District Judge of Rae Bareli.

This suit was instituted in 1882 on behalf of Rae Jagmohun Singh, deceased during the proceedings and succeeded by his son Rai Jagatpal Singh, the respondent, a minor, by his mother and guardian. With Rae Jagmohun, his brother, Rae Bisheshar Baksh Singh, also sued, and was the appellant in the second of these appeals. They claimed possession, by right of inheritance, of nineteen villages forming the talukh of Dasratpur in the Pertabgurh district, and also of a one-third share in four villages alleged to have been purchased out of the profits of the talukh. They made title as the nearest male heirs of the last talukhdar, Rudr Narain Singh, who died without issue in May 1869, and [112] was succeeded by his mother, who died in 1879. The talukh was then held by his stepmother Saghu Nath, on whose death in 1881 possession was obtained by the defendant Diwan Ran Bijai Singh, a descendant from an ancestor common to him and the plaintiffs, named Hirde Sah.

The questions now were whether the talukh descended as an impartible estate, and whether, if Jagmohun was the heir, he had not been excluded from the inheritance by reason of his having been of unsound mind.

In the plaint Jagmohun was described as insane; and as therefore suing through his wife, Thakurain Sultan Kunwar, who had been appointed his guardian under the provisions of Act XXXV of 1858, by reason of his unsoundness of mind.

Diwan Ran Bijai by his written statement, alleged that the plaintiffs were not the nearest male heirs of Rudr Narain, and claimed that he, as the nearest male heir of the elder branch of Hirde Sah's descendants, had the best right of succession.

Issues were fixed on these points, and also on the question raised in the course of the proceedings, as to Jagmohun's disqualification. The suit was, after two remands by the Judicial Commissioner, dismissed by the District Judge, on the ground that the plaintiffs were not shown to be the nearest heirs of Rudr Narain Singh. On the appeal and cross-appeal of the parties, the suit was a third time remanded by the appellate Court, for the trial of new issues relating to Jagmohun's mental condition and his alleged exclusion on that account. The return of Muhammad Samiulla Khan (who had succeeded the District Judge whose judgment was under appeal) was to the effect that, although Jugmohun was weak, the evidence had not shown that, from any defined period, he had been in a state of mental unsoundness, such as would, in the Judge's opinion, have excluded him from inheriting.

(1) 5 I. A. 1.

1890 APRIL 30. — PRIVY COUNCIL. — 18 C. 111 (P.C.) = 17 I.A. 173 = 5 Sar. P.C.J. 590 = Rafique & Jackson's P.C. No. 120.

After this Jagmohun died, and by order of the appellate Court, dated 22nd June 1886, Jagatpal, his minor son, suing by a guardian *ad litem*, Thakurain Sultan Kunwar, was entered on the record.

The Judicial Commissioner's finding reversed the above as to Jagmohun's state of mind; and, in effect, was that he (at [113] that time deceased) had been of unsound mind, and thereby had been disqualified from inheriting, at the date of the death of the last talukdar's mother in 1879. However, he held that the present respondent, Rai Jagatpal, his minor son, was entitled at that time to inherit, and had inherited the talukh upon his father's exclusion; and that he alone was entitled, without Rae Bisheshar Baksh Singh having any interest in the talukh or any right to sue jointly or alone, by reason of the talukh being impartible, and descending according to the custom of primogeniture upon Rai Jagatpal. But the latter was not in his opinion entitled to a share of the four villages.

From that judgment the present three appeals were preferred—the first, by the defendant Diwan Ran Bijai, the second, a cross appeal, by Rae Jagatpal as to the four villages: and the third was preferred by Rae Bisheshar Baksh. The first two of these appeals, by an Order in Council of the 3rd April 1889, were directed to be consolidated, and heard on one case on each side; and Rai Jagatpal was allowed to refer to his printed case, in them, for his case in the third also.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. H. A. Branson*, for the appellant, Diwan Ran Bijai, argued that the lower appellate Court had been wrong in reversing the decree of the District Judge, which dismissed the suit. That dismissal was right, and it should have been held, affirming the decree of the first Court, that Diwan Ran Bijai was rightly in possession. The respondent Jagatpal, having been brought on to the record as representing his father Jagmohun, was not entitled to a decree on the basis of any supposed rights of his own, superior to those of his father, whom he represented. As to the devolution of the inheritance according to Act I of 1869, s. 22, they referred to *Brij Indar Bahadur Singh* v. *Jankee Koer* (1).

Mr. *J. Rigby*, Q. C. and Mr. *R. V. Doyne*, for Jagatpal, argued that the judgment of the Judicial Commissioner, though wrong as to the exclusion of Jagmohun, on the ground of his insanity, was correct in holding that this respondent was entitled to inherit. This they maintained against the appellants in the first and third appeal; and in the cross-appeal they argued that [114] the four villages should be treated as an increment to the talukhdari estate, devolving, like that estate, upon Jagatpal.

Mr. *J. D. Mayne*, for Rae Bisheshar Baksh, maintained his right to claim, and that there should be no decree against him carrying costs.

Mr. *R. V. Doyne* replied.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR BARNES PEACOCK.—These appeals relate principally to a talukh called Dasratpur, which was created by a sanad by the Governor-General after Lord Canning's proclamation; and as to which it was stated that it was a condition of the grant that it should descend to the nearest male heir under the rule of primogeniture. The estate was entered in the lists No. 1 and No. 2 established by s. 8 of Act I of 1869; and conse-

(1) 5 I. A 1.

1890 APRIL 30. — PRIVY COUNCIL. — 18 C. 111 (P.C.) = 17 I.A. 173 = 5 Sar. P.C.J. 590 = Rafique & Jackson's P.C. No. 120.

quently, according to a former decision of this Board, it descended according to the rules pointed out in s. 22 of that Act. The last male owner of the estate was Rudr Narain Singh, who died in the year 1869; and according to cl. 11 of s. 22 it descended to the heir according to Hindu law. He died a minor without having been married, and his mother, Kharaj Kunwar, became his heir, and took a mother's interest in the estate, which is not an estate for life, but a woman's estate by inheritance. A mutation of names was made in which her name was entered together with that of Saghu Nath Kunwar, who was the stepmother of the last owner of the talukh, and who had no interest as an heiress. Kharaj Kunwar, the mother, died in the year 1879, but the stepmother, Saghu Nath, remained in possession up to the time of her death on the 21st of November 1881. Upon her death Ran Bijai Singh took possession of the estate.

A question might arise upon the construction of cl. 11 of s. 22 whether the estate descended as an impartible estate. Their Lordships are of opinion, looking to the provisions of Act I of 1869, list 2, s. 8, and s. 22, that it was the intention of the Legislature that the estate should descend as an impartible estate.

The action out of which these appeals arise was brought by Jagmohun, who was the eldest son, and Bisheshar, who was the third son, of Pirthipal, against Ran Bijai for the recovery of the [115] estate of which he had held possession. They were the nearest relatives entitled to succeed but for Drigbijai Singh, who was the second son of Pirthipal. Drigbijai was not made a party to the suit, though he was living at the time when it was commenced. He never claimed the estate. According to the construction which their Lordships put, and which seems to have been put in the Courts below, upon s. 22, the estate descended as an impartible estate, and consequently Jagmohun and Bisheshar could not take jointly. Regarding the question which of those two should take, it was rightly decided that Jagmohun was the proper heir if he was not excluded from inheritance in consequence of insanity. The question of Jagmohun's sanity or insanity appears, so far as the talukh is concerned, to be the main question now before their Lordships. In the plaint he is described as insane, and he sued through his wife as his guardian. But the plaint, nevertheless, claimed that the estate had descended to him, and although he might be incompetent to commence the suit, or to proceed therein except by a guardian, it is no evidence, nor does it lead to any inference, that he was not the heir-at-law, and that he was excluded from inheritance on the ground of insanity; the plaint, in which Bisheshar joined, goes on to state that "the plaintiffs are sapindas, being the sixth in descent from Hirde Sah, and under the ordinary rules of the Hindu law the plaintiffs are the nearest male heirs and collaterals." Jagmohun could not have been an heir if he was excluded from inheritance. The plaint shows that Jagmohun was considered competent to inherit, and that he was not excluded by reason of insanity at the time when the succession opened, although he might have been insane at the time of the filing of the plaint.

Upon the question of his sanity many witnesses were called, and especially two medical men, Dr. Bond and Dr. McReddie. Their evidence varied, and the Judge of the first Court found that Jagmohun was not so insane as to exclude him from the right of inheritance. The learned Judge states:—"I am of opinion that, from the evidence on record, the fact of Rae Jagmohun Singh's being insane so as to be declared disqualified to inherit

1890 APRIL 30.

PRIVY COUNCIL.

18 C. 111 (P.C.) = 17 I.A. 173 = 5 Sar. P.C.J. 590 = Rafique & Jackson's P.C. No. 120.

the property in suit is not proved." Again he says, "In this case the important evidence is that of two respectable surgeons, one of whom has been [116] produced by defendant, and the other by plaintiff. The evidence of Dr. McReddie is for defendant, and that of Dr. Bond for plaintiff. Both these gentlemen are civil surgeons, but with all, their evidence is so conflicting that the conclusion to be arrived at therefrom can in no way be identical. Dr. McReddie has distinctly deposed that Rae Jagmohun Singh is insane, while Dr. Bond's evidence clearly indicates that Rae Jagmohun Singh is by no means insane; he is weak and idiotic" (he gives a native word for idiotic, which probably is not accurately translated), "and does not speak, but his body and mind are all right. In order to decide the case one way or the other, it is necessary to give preference to the evidence of one party over that of the other. I have read the evidence of both these gentlemen twice over, and after a careful consideration I am of opinion that preference should be given to the evidence of Dr. Bond."

Their Lordships have carefully considered the evidence of these gentlemen, and they concur in the view expressed by the Judge of first instance, that the preference ought to be given to that of Dr. Bond, and that Jagmohun was not so insane as to be incapable of inheriting.

Dr. Bond states that he examined Jagmohun, He says, "I have seen Rae Jagmohun Singh three or four times within the last 18 or 19 months. I do not remember the period of intervals between each visit, but my visits were not paid successively. There are no symptoms of paralysis now. It is possible he might have been struck with paralysis on a previous occasion, because his tongue is clogged. It happens in paralysis and from other causes. I did not examine him to ascertain why he lost his power of speech." Therefore Dr. Bond rather attributes his incapacity to speak to an attack which he may have had of paralysis than to insanity. On the other hand, Dr. McReddie speaks of his not replying to questions as one of the symptoms which induced him to believe that the gentleman was insane. He says, "I went to examine Rae Jagmohun Singh to Birapur a second time, as requested by the Court, on 6th June 1882, but could not see him, as he was not at Birapur then. When I saw Rae Jagmohun Singh on 29th April 1882 he was quite insane; from his appearance he had been insane probably for [117] a long time. His age being between 60 and 70, it was very probable that he would never recover from his insanity. I could not say exactly how many years he had been insane, but probably for many years. I could not say with any certainty if he ever had any lucid intervals. He could make no difference between right and wrong, and could not manage his affairs." Their Lordships, in the course of the argument, called attention to the view of Dr. McReddie as to his not being able to distinguish between right and wrong. It appears that he gave no answers to the questions. It did not follow that he was not capable of distinguishing between right and wrong from his being incapable of answering the questions. He says, on cross-examination, "I judged his insanity from the appearance of his face and from his not replying to or understanding questions put to him, and from my experience of insane people." Then, again, to defendant's vakil he says, "When I saw Rae Jagmohun his insanity seemed to be congenital; but with a healthy woman a sane child might be born." This no doubt had reference to the fact of Jagmohun's having a son then living who was sane. Looking to the evidence of those two gentlemen, their Lordships agree with the first Judge

that the evidence of Dr. Bond is more reliable than that of Dr. McReddie.

1890 APRIL 30.

PRIVY COUNCIL.

18 C. 111 (P.C.) = 17 I.A. 173 = 5 Sar. P.C.J. 590 = Rafique & Jackson's P.C. No. 120.

Many other witnesses were called, and conflicting evidence was given on the subject of this gentleman's state of mind. Some say that he was insane; that he could not speak; that he pointed; and that if he wanted the revenue paid, he made a pointing with his hand in some way; and so he did with reference to his servants; but it did not follow from that that he was insane; he was exercising his mind upon the subject: although he did not express his thought by words, he expressed them by signs. If he was incapable of speaking, this expression of his ideas by signs did not necessarily show that he was insane, if the orders which he gave by signs as to the payment of revenue or as to other matters were not those of an insane man.

A very important matter in considering his state of mind is the manner in which he was treated by his own family. None of his family, prior to the application for a certificate of insanity, long after the right to the succession had attached, ever treated him [118] as insane. The priests allowed him to perform all his religious duties. He performed the oblations to his father, which, according to the religion of the Hindus, would have no beneficial effect, and ought not to have been performed by him, if he had been in a state of insanity. One of the principal reasons why according to the Hindu law insanity excludes from the right of inheritance, is, that an insane person is incapable of performing religious duties, and because he is incapable of providing for the marriage of daughters, and other matters of that sort. But in this case this gentleman performed them all. His family never objected; the priests never objected. He is stated to have been present at the marriage of his daughter, although there is conflicting evidence upon that point. He himself was allowed to marry; he was married three times to ladies whose fathers would in all probability have refused to allow their daughters to marry an insane man, and by one of them he had a son who was not insane. All these circumstances, with reference to the mode in which he was treated by his family, appear to their Lordships to have considerable weight and considerable importance in deciding the question of his sanity.

The first Judge having found that he was not insane, the Judicial Commissioner upon considering the evidence came to a contrary conclusion. One point to which the Judicial Commissioner attached very great importance was the will of his father, Pirthipal, in which the father stated that he was insane. The mere statement by the father in his will that his son was insane was no evidence upon which the Court could properly act in determining the question as to the son's exclusion from the right of inheritance upon the ground of insanity.

Looking to the evidence on both sides, their Lordships arrive at the conclusion that there were no sufficient grounds for the Judicial Commissioner reversing the finding of the first Court. Drigbijai, who was the next heir, has never claimed the estate. Why, we are not told. If he believed that Jagmohun was insane, and excluded from inheritance, the estate would have belonged to him. Bisheshar, the co-plaintiff and younger brother of Jagmohun, never claimed the estate upon the ground that Jagmohun was excluded from inheritance, for he joined him in the suit, and stated that he was one of the heirs. He made a mistake at the [119] time in considering that the estate went to two sons, whereas it was impartible; but he treated Jagmohun as a man who was competent

1890 APRIL 30. — PRIVY COUNCIL. — 18 C. 111 (P.C.) = 17 I.A. 173 = 5 Sar. P.C.J. 590 = Rafique & Jackson's P.C. No. 120.

to succeed by way of inheritance, and not as one who was excluded from inheritance, by reason of the state of his mind. Ran Bijai, the defendant, sets up the insanity of Jagmohun, not as showing that he himself had a title, in consequence of the insanity, but as a technical objection. His case is "Jagmohun is insane, and not competent to inherit, and therefore I have a right to remain in possession until the right person sues me"—that is, until the sons of Drigbijai who was the heir if Jagmohun is excluded, come forward and assert their right. But they do not come forward, nor do they claim the estate. It is therefore to be inferred that they do not consider Jagmohun to be excluded from the right to inherit.

That appears to their Lordships to dispose of the case so far as the talukh is concerned. But another question was raised with regard to some villages. It appears that some villages were purchased by Saghu Nath before her death and whilst she was in possession of the talukh, and that she had left those villages by her will to Ran Bijai, who took possession of them. Both Courts have concurred in finding that those villages were not purchased by Saghu Nath out of the profits of the estate, but that they were purchased by Ran Bijai in her name, and that he provided the money for their purchase. But, even if this had not been so, Saghu Nath was merely a trespasser upon the estate, and if she trespassed upon the estate and received the mesne profits, it is not clear that a Court of Equity would earmark those mesne profits, and say that because the mesne profits must have been expended in the purchase of the villages they necessarily passed with the estate. It is not the case of a widow inheriting and purchasing property out of the assets of the estate which she takes as widow, for those have been considered by law as an augmentation of the estate; but this is the case of a stepmother who was not entitled to succeed to the estate, and who, if she disposed of any portion of the rents and profits, was disposing of them as profits which she had received as a trespasser.

Under these circumstances their Lordships think that Ran Bijai is entitled to the villages.

[120] In the course of the proceedings Jagmohun died, and Jagatpal, as his eldest and, their Lordships understand, his only son, was admitted to represent him in the appeal. But the Judicial Commissioner has awarded the estate to him as if he was the plaintiff in the suit, whereas he ought to have awarded it to him as the heir and representative of his father, Jagmohun. In that respect their Lordships think that the decree of the Judicial Commissioner ought to be modified.

As regards the moveable property mentioned in the Judicial Commissioner's decree, their Lordships at the commencement of the argument asked what property was the subject of appeal, and it was stated by the learned counsel that the moveable property was not a subject-matter of the appeal. The Judicial Commissioner has awarded certain moveable property to the substituted appellant, but it is not a subject of the appeal.

Their Lordships, upon the whole, will therefore humbly advise Her Majesty that the decree of the Judicial Commissioner be varied by describing Jagatpal as the "substituted appellant, as representative of his father, Jagmohun," instead of describing him as "the minor plaintiff," and, subject to such variation, that the decree be affirmed.

The appellant, Diwan Ran Bijai, must pay the costs of his appeal.

In the appeal of Bisheshar their Lordships will humbly advise Her Majesty that that appeal be dismissed. The appellant must pay the costs of both the respondents.

Appeals dismissed.

Solicitors for the appellant Diwan Ran Bijai: Messrs. *Watkins & Lattey.*

Solicitors for the appellant Rae Bisheshar Baksh; Messrs. *Barrow & Rogers.*

Solicitors for the respondent and cross-appellant, Rae Jagatpal: Messrs. *Young, Jackson & Beard.*

C. B.

1890 APRIL 30.

PRIVY COUNCIL.

18 C. 111 (P.C.) = 17 I.A. 173 = 5 Sar. P.C.J. 590 = Rafique & Jackson's P.C. No. 120.

---

18 C. 121.

[121] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Rampini.

E. MASEYK AND OTHERS BY THEIR RECEIVER C. V. ARGLES ((*Defendants*) v. BHAGABATI BARMANYA (*Plaintiff*).*
[14th August 1890.]

Right of occupancy—Effect upon acquisition of right of occupancy of raiyat being jointly interested in land as ijaradar—Bengal Tenancy Act (VIII of 1885), *s.* 22, *sub-s.* (3).

Both under s. 22, sub s. (3) of the Bengal Tenancy Act (VIII of 1885), and under the previous law a person jointly interested in land as ijaradar does not thereby lose his occupancy rights, and *a fortiori* his entire rights as a tenant, in land held and cultivated by him as a raiyat.

Gur Buksh Roy v. *Jeclal Roy* (1) referred to.

[Appr., 17 C.W.N. 881 (883) = 19 Ind. Cas. 635 (637).]

THIS suit was instituted by Fudan Kumari and Bhagabati Barmanya, alleging that they were 8 annas proprietors of two estates in the district of Moorshedabad, and claiming to eject the defendants from a half share in 602 bighas 18 cottahs and 16½ gundahs of land. The plaintiffs stated that the defendants were formerly ijaradars of the land, but their lease expired in the year 1282 when the plaintiffs let their 8 annas share to one Gopi Lal Panday, who defaulted in payment of his rent, whereupon they sued and ejected him under the terms of his lease, thus obtaining direct possession of the land belonging to them with the exception of the land in suit. They prayed for joint possession of the land along with the principal defendants and the defendant Chhya Kumari and for mesne profits.

The defendants pleaded (*inter alia*) that they were occupancy raiyats of the land in question and could not be ejected.

During the pendency of the suit in the lower Court the plaintiff No. 1, Fudan Kumari, died, and the plaintiff No. 2, Bhagabati [122] Barmanya, claimed to be entitled and was allowed to continue the suit as owner by right of survivorship of the entire 8 annas share of the land.

There was no dispute as to the following facts. In 1253 B. S. Mr. James Maseyk, the predecessor of the defendants, took an ijara lease of

---

* Appeals from original decrees Nos. 130 and 176 of 1889, against the decrees of Babu Raj Chunder Sanyal, Subordinate Judge of Moorshedabad, dated 23rd April 1889.

(1) 16 C. 127.

1890 AUG. 14. — APPELLATE CIVIL. — 18 C. 121.

the defendant No. 4 Chhya Kumari's 8 annas share of the land, and the defendants 1 to 3 continued to hold this ijara lease up to the date of suit. The plaintiff's 8 annas share was let in ijara to one Khudiram Pandey from 1253 to 1258 B. S., after which it was let in ijara to the defendant No. 2, Mr. C. B. Maseyk, down to the year 1282. From 1283 to 1290 it was let to Gopi Lal Pandey, the son of Khudiram, but, as already mentioned, his lease was put an end to, and he was ejected on the 28th Bysack 1290. The Maseyks therefore were ijaradars of the whole 16 annas share of the land from 1258 to 1282, from which year they were holding an 8 annas interest in it.

The defendants alleged that, in addition to their interest as ijaradars in the land, they had since the years 1253 and 1254 a raiyati interest in the land in dispute which had ripened into an occupancy right, or at least into a non-occupancy right, in consequence of which they could not be ejected in the suit as framed.

The lower Court gave to the plaintiff, Bhagabati Barmanya, a decree for the relief sought. The defendants appealed to the High Court.

Mr. *Woodroffe* and Baboo *Dwarka Nath Chuckerbutty*, appeared for the appellants.

Mr. *Evans* and Baboo *Grija Sunker Mozumdar*, appeared for the respondent.

The judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) after setting out the facts, proceeded as follows :—

JUDGMENT.

It is evident that both under the former and present law the defendants (being down to 1282 ijaradars of the whole 16 annas proprietary interest) could acquire no occupancy rights in the land. No doubt if they had acquired an occupancy right previously to 1258, they would not lose it by their becoming ijaradars, but they themselves assert that they acquired the jotes in 1253 and 1254, and between those years and 1258 there was not [123] sufficient time for the acquisition of occupancy rights by them. Hence, unless they have acquired occupancy rights subsequently to 1283 (*i.e.*, 1876), they cannot have acquired them at all. Now, there can be no doubt that the defendants have cultivated the land as raiyats from 1283 up to now. This is apparent from the evidence in the case, and the fact that they have of late years held land as tenants is further proved by an arbitration award passed in a case, No. 47 of 1879, in which Gopi Lal Panday was plaintiff and the Maseyks were defendants. The decree based on this award is dated the 18th June 1881, and it decidedly confers on the defendants the status and rights of tenants, for by it is settled that the defendants are in future to pay rent to the plaintiff for the land in dispute in this case ; so that even if the defendants were not tenants previous to 1881, they certainly became so on the 18th June 1881. They therefore cannot now be regarded and dealt with as mere trespassers. We think, however, that there is ample evidence to show that they were raiyats of the land from the beginning of the year 1283 B. S, (*i.e.*, 12th April 1876), and from that date rights of occupancy began to accrue to them.

The plaintiff, however, contends that the defendants cannot have acquired occupancy rights since then for two reasons : (1) owing to the operation of the provisions of s. 22, sub-s. 3 of the Bengal Tenancy Act, which has checked the growth of occupancy rights from the 1st November 1885 ; and (2) owing to the fact that the land is *khamar* land, in which according to s. 116 of the Bengal Tenancy Act, as well as to s. 6 of

1890 AUG. 14. — APPELLATE CIVIL. — 18 C. 121.

Bengal Act VIII of 1869, no occupancy rights can accrue. Under the Tenancy Act even non-occupancy rights cannot accrue in such land.

The provisions of s. 22 (3) of the Tenancy Act are, however, peculiar. They no doubt lay down that a person holding land as an ijaradar shall not acquire a right of occupancy in any land comprised in his ijara. But they do not say that he shall thereby lose all his rights as a non-occupancy raiyat or as a tenant. Further, while they say that an ijaradar shall in this way lose his occupancy rights, they do not say that a person merely jointly interested in land as an ijaradar shall thereby lose them. **[124]** It is to be observed that sub-ss. 1 and 2 of the same section clearly lay down that a person interested as proprietor and permanent tenure-holder, whether jointly or singly, shall lose his occupancy right in land cultivated by him. It can scarcely be by accident, then, that a similar provision with regard to ijaradars has been omitted from sub-s. 3. No case has been brought to our notice in which it has been laid down that under the old law a person jointly interested in land as an ijaradar shall lose his occupancy rights in land cultivated by him. In *Gur Buksh Roy* v. *Jeolal Roy* (1) it has been pointed out that the rule of law laid down in sub-s. 2 of the Tenancy Act did not prevail under the old law, so that when sub-s. 2 is clearly an innovation, it must be concluded that the difference between its provisions and those of sub-s. 3 is deliberate and intentional. Hence we must hold that, both under the former and the present law, a person jointly interested in land as ijaradar does not thereby lose his occupancy rights, and *a fortiori* his entire rights as a tenant, in land held and cultivated by him as a raiyat.

[The judgment then proceeded to deal with the question as to whether upon the evidence the disputed land was *khamar* land, and, after holding that it was not, concluded as follows :—]

In these circumstances we cannot but hold that the plaintiff has failed to discharge that burden, and consequently there would seem to be nothing to prevent the accrual of occupancy and non-occupancy rights in the disputed 602 bighas. As to whether the defendants are occupancy or merely non-occupancy raiyats, it is unnecessary for us to decide. It is sufficient for the purposes of this case if we find the defendants to be raiyats or tenants of the land in dispute. As we find them to be such, it is clear that they cannot be ejected in the present suit as framed, for they cannot be ejected except on the grounds specified in the Tenancy Act, and which are not alleged to exist. We accordingly decree this appeal and dismiss the plaintiff's suit with costs.

A. A. C. *Appeal allowed.*

---

(1) 16 C. 127.

1890
SEP. 10.

APPEL-
LATE
CIVIL.

18 C. 125.

18 C. 125.

[125] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

MONINDRA NATH MOOKERJI (*Defendant*) *v.* SARASWATI DASI (*Plaintiff*).* [10th September, 1890.]

Sale for arrears of Road Cess—Certificate of title—Certificate of unpaid demand—Collector of the district—Defects in service of notice and in proclamation of sale—Act XI of 1859, *ss.* 27, 28—*Bengal Act VII of* 1868, *ss.* 5, 8, 11—*Bengal Act VII of* 1880, *ss.* 2, 4, 7, 8, *cl.* (4), 10, 19—*Code of Civil Procedure* (*Act XIV of* 1882), *ss.* 289, 314.

A certificate of title under Act XI of 1859, s. 28, and Bengal Act VII of 1868, s. 11, issued before the expiry of the period of sixty days required by s 27 of Act XI of 1859 from the date of sale, is not a certificate duly issued under the provisions of these Acts, and cannot cure defects in the service of notice or in the proclamation of sale.

The certificate in execution of which the plaintiff's estate was sold was not made or signed by the Collector of the district, but by a Deputy Collector: *Held*, that under s. 7 of the Public Demands Recovery Act (VII of 1880) a certificate under the Act must be made and filed by the Collector of the district, and not by any officer gazetted to perform the functions of a Collector under Act VII of 1880.

[**R.**, 26 C. 414 (426); **Expl.**, 2 C.W.N. 363 (365).]

THIS was a suit to set aside a sale of taluk No. 1072, comprising mouzah Chundiberia and other mouzahs, and to recover possession thereof with mesne profits. The sale took place on the 29th November 1886, under an order of the Deputy Collector, for arrears of road cess, amounting to Rs. 2-14 due in March 1885, and the taluk was purchased by the defendant for Rs. 400. The plaintiff alleged that she received no notice as prescribed in s. 10 of the Public Demands Recovery Act (VII of 1880); that no proclamation of sale was regularly issued; that the property was sold far below its proper price, causing substantial loss to the plaintiff; that the defendant purchased the property fraudulently; and that the defendant was placed in possession thereof within sixty days, the usual time prescribed by s. 27 of Act XI of 1859 for the confirmation of the sale. The Subordinate Judge gave a decree in favour of the plaintiff, finding that her allegations **[126]** were substantiated, and ordered the sale to be cancelled and the plaintiff placed in possession. The plaintiff also recovered mesne profits from the date of the defendant's taking possession, deducting the sum of Rs. 165-2, paid by the defendant on account of cesses. The defendant appealed to the High Court.

Mr. *W. C. Bonnerjee* and Baboo *Umacali Mookerjee*, appeared for the appellant.

Dr. Rash *Behari Ghosh* and Baboo *Saroda Churn Mitter*, appeared for the respondent.

The arguments sufficiently appear from the following judgment of the High Court (PETHERAM, C. J., and RAMPINI, J.)

JUDGMENT.

The plaintiff has brought this suit to set aside the sale of a taluk of hers, which was sold on the 29th November 1886 for arrears of road cess,

* Appeal from Original Decree No. 119 of 1889, against the decree of Baboo Radha Krishna Sen, Subordinate Judge of the 24 Pergunnahs, dated the 2nd April 1889.

amounting to Rs. 2-14, and which taluk was purchased by the defendant. She alleges that she received no notice of the filing of the certificate under the Public Demands Recovery Act in the office of the Collector, as required by s. 10, Bengal Act VII of 1880; that the proclamation of sale was not duly made; that the estate was in consequence sold for an inadequate price; and that the sale was confirmed before the expiry of 60 days from the date of sale, as required by s. 27, Act XI of 1859. The defendant traverses all these allegations, but the Subordinate Judge has found them to have been substantiated by the plaintiff. He has accordingly given her a decree, setting aside the sale, and has awarded her mesne profits, less a sum of Rs. 165-2, proved to have been paid by the defendant as cesses during the time he has been in possession.

The defendant now appeals and contends (1) that the Subordinate Judge's findings as to the non-service of the notice required by s. 10, Act VII of 1880, and of the proclamation of sale and as to the property having been in consequence sold for an inadequate price are wrong; and (2) that even if there has been any omission or irregularity in the service of the notice and proclamation of sale, yet, as the appellant has obtained a certificate of title dated 7th January 1887, his title cannot under the provisions of s. 8, Act VII of 1868, be impeached on this ground, and cannot thereby be affected.

[127] We will deal first with the second of these contentions. Section 8, Bengal Act VII of 1868, prescribes that every certificate of title which may be given to a purchaser under s. 28 of Act XI of 1859 or s. 11 of Bengal Act VII of 1868 shall be conclusive evidence in favour of such purchaser that all notices in or by Act XI of 1859 or Act VII of 1868 required to be served or posted have been duly served and posted, and the title of any person who may have obtained any such certificate shall not be impeached or affected by reason of any omission, in formality or irregularity as regards the serving or posting of any notice in the proceedings under which the sale was had at which such person may have purchased. Then it is said by s. 2, Bengal Act VII of 1880, that Acts XI of 1859, Bengal Act VII of 1868, and Bengal Act VII of 1880 are to be read as one Act. Accordingly, as the defendant has obtained a certificate of title dated the 7th January 1887, his title to the taluk cannot be assailed on the ground of irregularity in the service of the notice required by s. 10 or in that of the proclamation of sale.

To this it is replied on behalf of the respondent that the certificate of title referred to in s. 8, Act VII of 1868, must mean a certificate duly issued under the provisions of the Act, and that the plaintiff's certificate is not such a certificate, as it was issued before the expiry of 60 days from the date of sale, as required by s. 27 of Act XI of 1859. We think that this contention is correct. No doubt by s. 19, Act VII of 1880, a certificate obtained under the Public Demands Recovery Act is to be enforced under the practice and procedure provided by the Code of CivilProcedure in respect of sales in execution of decrees, but the provisions of s. 27, Act XI of 1859, which Act, as already pointed out, is to be read as one Act with Acts VII of 1868 and VII of 1880, apparently lay down a rule of substantive law, *viz.*, that a sale held under the Act shall not be final and conclusive till noon of the sixtieth day from the day of sale. The confirming the sale prescribed by s. 314, Code of Civil Procedure, may be a matter of practice and procedure; but the provision that a sale shall be final and conclusive on the sixtieth day cannot be considered as such. This view

1890 SEP. 10. — APPELLATE CIVIL. — 18 C. 125.

has already been taken by this Court in the case of *Sadhu Saran Singh* v. *Panchdeo* [128] *Lal* (1), in which it has been said that "all sales under Act VII of 1880 become final in the manner and at the time provided in s. 27 of Act XI of 1859.".

In these circumstances we do not think that the certificate of title obtained by the appellant, which was certainly issued before the sixtieth day from the sale, can cure all defects in the service of the notice under s. 10, Act VII of 1880, and of the proclamation of sale.

As to the facts, we have no hesitation in agreeing with the Subordinate Judge. The appellant has totally failed to prove that any attempt was made to serve the notice personally on the plaintiff, as ought to have been done under s. 5, Act VII of 1868, and the evidence adduced by him by no means satisfactorily proves that the house on which the notice was affixed was the usual and last known place of abode of the plaintiff.

Further, it is clear that no copy of the proclamation of sale was affixed at the Collector's office as required by s. 289, Civil Procedure Code. The property has clearly been sold for a very inadequate price, and it is a fair inference that the paucity of bidders at the sale was due to the want of publicity given to the fact of its being about to take place.

We further think that there is still another ground on which the sale of the plaintiff's property must be held null and void. Under s. 7, Act VII of 1880, a certificate under the Act must be made and filed by the *Collector of the district*. It is, however, clear that the certificate in execution of which the plaintiff's estate was sold was not made or signed by the Collector of the district, but by a Deputy Collector. The Subordinate Judge in his judgment has observed that this Deputy Collector had been authorised by the Lieutenant-Governor to discharge the functions of a Collector under Bengal Act VII of 1880, and no doubt by s. 4 of the Act the term "*Collector*" has been defined as meaning the Collector of a district or any officer specially appointed by the Lieutenant-Governor to perform the functions of a Collector under this Act. But throughout the Act a distinction is clearly drawn between the Collector of a district and a Collector (see ss. 5, 9, 15, &c.) and, [129] an officer specially appointed to perform the functions of a Collector can only have the powers of the latter and not of the former. No section lays down that the term "*the Collector of a district*" shall include any officer so authorised to perform the functions of a Collector, and indeed no section authorises the Lieutenant-Governor to invest an officer with such powers. Hence to gazette an officer to perform the functions of a Collector under Bengal Act VII of 1880 will not make him *the* Collector of the district as required by s. 7. It may make him *a* Collector, or *one* of the Collectors of the district, but it will not make him *the* Collector of the district, which expression evidently refers to the officer specially appointed and gazetted by the Lieutenant-Governor to act as such.

We accordingly cannot but hold that the certificate in execution of which this sale was held was not duly made and filed under the Act, and all subsequent proceedings held under it must be considered to be null and void and without jurisdiction [see cl. (4) to the proviso to s. 8, Bengal Act VII of 1880.]

For these reasons we think that the decree of the Subordinate Judge in this case is right, and we accordingly dismiss this appeal with costs.

---

(1) 14 C. 1.

The plaintiff cross-appeals as to costs, which she says the Subordinate Judge should have allowed her. Seeing, however, that she admittedly was in arrear with her road cess, we see no reason to interfere with the exercise of the Subordinate Judge's discretion in this matter. The cross-appeal therefore is also dismissed.

1890 SEP. 10.

APPELLATE CIVIL.

18 C. 125.

A. A. C. *Appeal dismissed.*

---

18 C. 129.

APPELLATE CRIMINAL.

Before Mr. Justice Norris and Mr. Justice Gordon.

KACHALI HARI (*Appellant*) v. QUEEN-EMPRESS (*Respondent*).*
[28th August, 1890.]

Evidence—Deposition of medical witness—Criminal Procedure Code (*X of* 1882), *s.* 509 *—Deposition wrongly admitted in evidence—Evidence Act* (*I of* 1872), *ss.* 80 *and* 114, *ill.* (*e*).

Before the deposition of a medical witness taken by a committing Magistrate can, under s. 509 of the Code of Criminal Procedure, be given [130] in evidence at the trial before the Court of Sessions, it must either appear from the Magistrate's record, or be proved by the evidence of witnesses, to have been taken and attested by the Magistrate in the presence of the accused. The Court is neither bound to presume under s. 80, nor ought it to presume under either s. 80 or s. 114, ill. (*e*) of the Evidence Act (I of 1872), that the deposition was so taken and attested.

Queen-Empress v. *Riding* (1), and *Queen-Empress* v. *Pohp Singh*(2), approved.

THE appellant was found guilty by the Sessions Judge of Rajshahye under ss. 363 and 366 of the Penal Code of having kidnapped a girl from lawful guardianship, and of having abducted her in order that she might be seduced to illicit intercourse, and was sentenced by the Judge to two years' rigorous imprisonment under the former section. No separate sentence was passed under s. 366. Important evidence against the prisoner with regard to the girl's age was given before the committing Magistrate by Dr. Kelly, the Civil Surgeon. He was not called as a witness at the trial before the Sessions Judge, but his deposition, taken before the committing Magistrate, was tendered and accepted in evidence, although there was nothing on the face of the deposition to show that it was attested by the Magistrate in the presence of the accused, as is required by s. 509 of the Code of Criminal Procedure, and no witnesses were called to show that it had in fact been so attested.

The accused appealed to the High Court.

No one appeared on the appeal for either the Crown or the appellant.

The judgment of the Court (NORRIS and GORDON, JJ.) was as follows:—

JUDGMENT.

We are of opinion that this appeal should be allowed. As regards the charge under s. 363, Indian Penal Code, we think that the evidence as to the girl's age is unsatisfactory and by no means sufficient to warrant the finding that she was under 16 years of age on 18th April last, the day on which it is alleged that she was kidnapped.

---

* Criminal Appeal No. 474 of 1890, against the order passed by F. E. Pargiter, Esq., Sessions Judge of Rajshahye, dated the 2nd of June 1890.

(1) 9 A. 720. (2) 10 A. 174.

1890
AUG. 28.
—
APPELLATE
CRIMINAL.
—
18 C. 129.

As regards the charge under s. 366, the only evidence of abduction is that of the girl herself, and looking at the palpable [131] falsehood of her story of having been ravished by the prisoner and four other men, we do not think it would be safe to rely upon it.

In this connection we have to observe that the Sessions Judge ought not to have admitted the deposition of Dr. Kelly, the Civil Surgeon, taken before the committing Magistrate, as evidence against the prisoner. To render the deposition of a Civil Surgeon or other medical witness admissible in evidence under s. 509, Code of Criminal Procedure, it must be shown to have been taken in the presence of the accused, and to have been attested by the Magistrate in his presence. The deposition in question is signed by the Civil Surgeon and by the committing Magistrate, and it appears that the Civil Surgeon was cross-examined, but there is nothing on the face of the deposition to show that it was attested by the Magistrate in the prisoner's presence. No doubt this fact might have been proved by calling the committing Magistrate or any other person who was present at the inquiry before him and able to testify thereto. In the case of *Queen-Empress* v. *Riding* (1) the deposition of an Assistant Surgeon, signed by him and by the committing Magistrate, was tendered in evidence on behalf of the prosecution under s. 509, Code of Criminal Procedure. Edge, C. J., refused to receive it. The learned Judge pointed out that "under s. 509, Code of Criminal Procedure, it was essential that the deposition should have been taken and attested in the presence of the accused," and he added "since the prosecution are bound to prove every step of the case against the prisoner before such a deposition can be admitted, it must appear on the Magistrate's record or must be proved by the evidence of witnesses, to have been taken and attested in the prisoner's presence." The learned Judge's attention was called to s. 114 of the Evidence Act, and to illustration (*e*) thereto. That section says "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case," and illustration (*e*) is as follows:—"The Court may presume that judicial and official acts have been regularly performed."

Upon this the learned Judge observed "that section did not direct the Court to presume the existence of facts likely to have [132] happened such as the regular performance of judicial acts, but left the Court free to make the presumption or not according to its discretion. This being a criminal case, in which, as he had said, the prosecution must prove every step of its case, he did not think it proper or expedient to act on a presumption that the requirements of s. 509, Code of Criminal Procedure, had been complied with."

There is a reporter's note appended to that case which is as follows:—"Section 80 of the Evidence Act, under which the Court is bound, subject to certain conditions, to presume that evidence recorded by a Judge or Magistrate was 'duly taken,' was not referred to either in the argument or the judgment in this case; but it would doubtless have been held inapplicable. Though, as a general rule, all evidence must be taken in the presence of the accused, there is nothing in chap. XXV of the Criminal Procedure Code or elsewhere which expressly requires a Magistrate to attest depositions in the accused's presence. Such attestation, therefore, does not fall within the scope of the presumption

(1) 9 A. 720.

provided for by s. 80; and if required for any special purpose, such as that of s. 509 of the Criminal Procedure Code, must be established *aliunde*. Assuming the deposition to have been duly taken so as to be good evidence *quoad* the proceedings before the Magistrate, it could not be given in evidence at a further inquiry without satisfying the further condition of attestation in the presence of the accused, and there is no provision in the Evidence Act (apart from s. 114) under which the fulfilment of this condition could be presumed." This view of the law does not appear to be correct. Section 18 of the Evidence Act is as follows:—"Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statements as to the circumstances under which it was taken purporting to be made by the person signing it are true, and that such evidence, statement, or confession was duly taken." No doubt this section will be of no **[133]** assistance in a case under s. 509, Criminal Procedure Code, where there are no "statements as to the circumstances under which the deposition was taken purporting to be made by the person signing it," but if the Magistrate records a statement at the foot of the deposition to the effect that the deposition was taken in the presence of the accused and was attested by him, the Magistrate, in the presence of the accused, and signs such statement, the Court would be bound to presume that such statement was true, and to admit the deposition under s. 509, Criminal Procedure Code. This is clearly the view of Edge, C.J., who says in *Queen-Empress* v. *Pohp Singh* (1), where the reporter's note to *Queen-Empress* v. *Riding* (2) is discussed.—"A Magistrate should take and attest a deposition in the presence of the accused, and should also, by the use of a few apt words on the face of the deposition, make it apparent that he has done so."

1890 AUG. 28.

APPELLATE CRIMINAL.

18 C. 129.

H. L. B. *Conviction quashed.*

---

18 C. 133.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

DUNGARAM MARWARY (*Decree-holder*) v. RAJKISHORE DEO AND ANOTHER (*Judgment-debtors*).*

[16th September, 1890.]

Sonthal Pergunnahs—Act XXXVII of 1855, s. 2—Regulation III of 1872, ss. 3 and 4—Civil Courts Act (XII of 1887)—Suit exceeding Rs. 1,000 in value—Officer invested with power of a Civil Court—"Court."

The effect of s. 2 of Act XXXVII of 1855 and s. 3 of Regulation III of 1872, is to make the general laws and regulations, including the provisions of the Code of Civil Procedure, applicable in the Sonthal Pergunnahs to suits exceeding Rs. 1,000 in value without any qualifications; provided that such suits are tried in the Courts established under the Civil Courts Act, XII of 1887.

---

* Appeal from Order No. 163 of 1890, against the order of W. R. Bright, Esq., Deputy Commissioner of Sonthal Pergunnahs, dated the 1st of April, 1890, reversing the order of W. M. Smith, Esq., Sub-Divisional Officer of Deoghur, dated the 14th of January 1890.

(1) 10 A. 174. (2) 9 A. 720.

1890
SEP. 16.

APPELLATE
CIVIL.

18 C. 133.

[134] An officer in the Sonthal Pergunnahs invested by the Local Government with the powers of a Civil Court under s. 4 of Regulation III of 1872 is a Court established under Act XII of 1887 within the meaning of s. 3 of the Regulation.

[F., 18 C. W. N. 662=22 Ind. Cas. 848.]

THE facts of this case, so far as they are necessary for this report, were that in May 1888, Dungaram Marwary obtained a decree against the respondents for Rs. 2,500 in a suit on a bond executed for money lent; that in January 1890 the decree-holder applied to have the decree executed by the issue of a warrant of arrest against the judgment-debtors, and on the 14th January such a warrant was issued by order of the Sub-Divisional Officer of Deoghur, notwithstanding objections preferred by the judgment-debtors. The judgment-debtors appealed from the order granting the warrant of arrest to the Deputy Commissioner of the Sonthal Pergunnahs, who, after holding that the appeal lay, held as follows :—

"The next question to be decided is whether the order for the issue of the warrant of arrest was a proper one. On this point it is first of all necessary to determine as to the laws and codes in force in cases of this kind. The pleader for the decree-holder has argued that the Civil Procedure Code is not in force, but this has already been decided in the case of *Sorbojit Roy* v. *Gonesh Proshad Misser* (1) in which the High Court ruled that in cases above Rs. 1,000 the Code of 1882 is now in force in the Sonthal Pergunnahs, subject to the qualifications contained in the notification of the 19th August 1867. The 8th restriction contained in this notification is important; 'Section 201 of Act VIII of 1859 shall be subject to the following additions :—Except that where the execution of decree is for money lent, it shall not be enforced by imprisonment of the party against whom the decree was made'. Section 201 is reproduced somewhat amplified in s. 254 of the present Civil Procedure Code, and this section therefore must run—'Every decree or order directing a party to pay money as compensation or costs, or as the alternative to some other relief, &c., may be enforced by the imprisonment of the judgment-debtor, provided that where the execution of a decree is for money lent it shall not be enforced by imprisonment of the party against whom the decree was made.

[135] "In this case the decree was for Rs. 2,500 or more, and therefore the provisions of the Civil Procedure Code apply, and the decree being for money lent, the warrant of arrest was under s. 254. But under these circumstances the notification expressly forbids the imprisonment of the judgment-debtor. I think therefore that the issue of the warrant was illegal and *ultra vires*; and even if I had held there was no appeal, I should have considered it my duty to submit this case to the High Court in order that the warrant might be cancelled. As it is, I allow this appeal and cancel the order issuing the warrant."

From this decision the decree-holder appealed to the High Court; mainly on the grounds that the Deputy Commissioner was in error in holding that the notification of 19th August 1867 applied to suits above Rs. 1,000; that such suits were subject to the general laws and regulations; and that the Civil Procedure Code was applicable to such suits without the qualifications laid down by the case of *Sorbojit Roy* v. *Gonesh Proshad Misser* (1).

Mr. *H. Bell* and Baboo *Karuna Sindhoo Mookerjee*, for the appellant.

(1) 10 C. 761.

Dr. *Rash Behari Ghose* and Baboo *Nalini Runjan Chatterjee*, for the respondents. 1890 SEP. 16.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :— APPELLATE CIVIL.

JUDGMENT.

18 C. 133.

This is an appeal from an order of the Deputy Commissioner of the Sonthal Pergunnahs, reversing an order of the Sub-Divisional Officer of Deoghur for the issue of a warrant of arrest against the respondent, judgment-debtor, in execution of a decree against him.

The learned Deputy Commissioner has held that, in accordance with a Government notification dated the 19th August 1867, the Code of Civil Procedure obtains in the Sonthal Pergunnahs, subject to certain qualifications, one of which is, that there shall be no imprisonment in execution of a decree ; and in support of this view he refers to a decision of this Court in the case of *Sorbojit Roy* v. *Gonesh Proshad Misser* (1).

[136] The value of the suit which resulted in the decree now sought to be executed was admittedly over a thousand rupees.

It is contended on behalf of the appellant, decree-holder, that the decision of the Deputy Commissioner is wrong, because the Government notification referred to by him had no application to suits where the value exceeds a thousand rupees, and because that notification, whatever its application was, was superseded by Regulation III of 1872 ; and it is argued that, under the provisions of s. 2 of Act XXXVII of 1855 and of s. 3 of Regulation III of 1872, the Code of Civil Procedure is in force in the Sonthal Pergunnahs as regards suits of a value exceeding a thousand rupees without any qualification.

We think the appellant's contention is correct. Section 2 of Act XXXVII of 1855 contains a proviso to the effect "that all civil suits, in which the matter in dispute shall exceed the value of one thousand rupees, shall be tried and determined according to the general Laws and Regulations as if this Act had not been passed." Now it was by virtue of this Act that the Sonthal Pergunnahs were excluded from the operation of the general Regulations of the Bengal Code and of the Laws passed by the Governor-General of India in Council, so that the effect of this proviso is to make the Sonthal Pergunnahs a non-Regulation Province—that is, a place not governed by the general Laws and Regulations only so far as suits up to a certain value are concerned. As regards suits exceeding that limit of valuation, they are left to be governed by the ordinary Laws and Regulations as before. That being so, when Act VIII of 1859 was passed, notwithstanding the provisions of s. 385 of that Act, which, for the reasons just stated, excluded from the operation of that Act the Sonthal Pergunnahs only as regards suits of value not exceeding a thousand rupees, the Procedure Code of 1859 by its own force came to have operation as regards suits of a value exceeding one thousand rupees ; and the Government notification referred to above related only to the procedure in suits whereof the value did not exceed a thousand rupees.

When Regulation III of 1872 was passed, it was enacted by s. 3 of that Regulation, read with certain subsequent amending enactments, that, with the exception of certain Acts and **[137]** Regulations therein mentioned, "no other Regulations or Acts heretofore or hereafter passed shall be deemed to be in force in the Sonthal Pergunnahs, except so far as

(1) 10 C. 761.

1890 SEP. 16. — APPELLATE CIVIL. — 18 C. 133.

regards the trial and determination of the civil suits mentioned in s. 2, Act XXXVII of 1855, in which the matter in dispute exceeds the value of rupees one thousand, when such suits are tried in the Courts established under Act XII of 1887." As regards suits whereof the value exceeds a thousand rupees, the law then stands in the same way in this last-mentioned Regulation as it stood under s. 2 of Act XXXVII of 1855, that is to say, such suits continue to be governed by the general Laws and Regulations, subject only to this further condition, that they will be so governed only when the suits are tried in the Courts established under Act XII of 1887.

Of the two conditions, then, necessary to be satisfied in order that a suit in the Sonthal Pergunnahs may be regarded as governed by the general Laws and Regulations, one, namely the limit of valuation, is in this case admittedly satisfied; and the only question that remains to be considered is, whether in the present case the suit was tried in a Court established under Act XII of 1887, that is, under the Civil Courts Act. Now the suit here was tried by an officer in the Sonthal Pergunnahs invested by the Local Government with the powers of a Civil Court established under Act XII of 1887 under s. 4 of Regulation III of 1872; and the question is finally reduced to this, namely, whether an officer of the Sonthal Pergunnahs so invested is a Court established under Act XII of 1887.

It was urged by the learned vakeel for the respondent that the investiture of an officer in the Sonthal Pergunnahs with powers of a Court under Act XII of 1887 would not make him a Court established under that Act.

At first sight there is no doubt some anomaly in holding that he was a Court established under that Act. But, on the other hand, if the respondent's contention be correct, it would lead to this obvious result, that in regard to suits tried by officers of this class, whatever the value of these suits may be, we shall have no law governing them or regulating their procedure. That is an anomaly which, in regard to suits valued at over a thousand rupees, the Legislature could never, we think, have intended.

[138] We must therefore hold that an officer invested with the powers of a Civil Court under s. 4 of Regulation III of 1872 is a Court established under Act XII of 1887 within the meaning of the third section of the same Regulation; and that being so, the suit out of which the present execution proceedings have arisen and the execution proceedings themselves must be held to be governed by the Code of Civil Procedure as it now obtains. This view is in accordance with the decision of this Court in the case of *Kaliprosad Rai* v. *Meher Chundro Roy* (1), and also with another decision in the case of *Tarini Prosad Misser* v. *Mahammad Chowdhry* (2).

It is true that the view taken by the learned Deputy Commissioner is supported by a *dictum* of this Court in the case of *Sorbojit Roy* v. *Gonesh Prosad Misser* (3), that the Code of Civil Procedure obtains in the Sonthal Pergunnahs in respect of suits valued over one thousand rupees, subject to certain modifications and qualifications. But the question for decision in that case was, not whether the Code of Civil Procedure applied to suits of that class, subject to modifications and qualifications, but whether the Code applied to suits of that class at all.

---

(1) 4 C. 222. (2) 6 C.L.R. 555. (3) 10 C. 761.

The conclusion that the Court arrived at in that case is the same as the one to which we have come, namely, that the Code of Civil Procedure does apply. As to whether it applies subject to any qualifications not having been a question in that case, the remarks of the Court on that point must be taken to be an *obiter dictum*, and therefore not binding in this case.

1890 SEP. 16. — APPELLATE CIVIL. — 18 C. 133.

The result then is that the order of the Deputy Commissioner must be set aside, and that of the Sub-Divisional Officer of Deoghur restored and the execution allowed to proceed.

The appellant is entitled to costs in this Court.

Appeal allowed.

---

18 C. 139.

[139] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

SIVA PERSHAD MAITY AND OTHERS *(Defendants)* v. NUNDO LALL KAR MAHAPATRA *(Plaintiff)*.* [10th July, 1890.]

Sale in execution of decree—Suit to set aside sale on ground of fraud—Sale in execution of mortgage decree directing the sale of the mortgaged property under ss. 88 *and* 89 *of Transfer of Property Act—Decree* nisi *not absolute—Right of suit—Civil Procedure Code*, ss. 244, 311, *and* 312.

Where a suit to set aside a sale in execution of a decree was brought on the ground that by the fraud of the judgment-creditor the proclamation of sale had not been duly made, and the facts were that the sale was not an ordinary sale of attached property in execution of a decree, but a sale in execution of a mortgage decree which directed the sale of the mortgaged property in accordance with the provisions of ss. 88 and 89 of the Transfer of Property Act, but that there was no such decree in existence, as only a decree *nisi* and not a decree absolute directing the sale had been made; and it was contended that until a decree absolute was made for the sale, the right to redeem existed, and that the suit might be regardrd as a suit to redeem: *Held*, that there was nothing in these facts to distinguish the case from the Full Bench case of *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1), and that the suit was therefore not maintainable. An order directing a sale in such a case would be sufficient authority under s. 89 of the Transfer of Property Act even if the order did not take the form of a a decree such as is prescribed for a decree absolute in the case of a suit for foreclosure.

[**N.F.**, 12 C.P.L.R. 82 (84); **F.**, 28 C. 73 (77); **R.**, 25 M. 244 (263) (**F.B.**); 25 M, 300 (311); 7 C.P.L.R. 40 (41); 8 O.C. 75 (76); 93 P R. 1908=164 P.L.R. 1908=133 P.W.R. 1908 (**F B.**); **D.**, 22 C. 931 (935); 15 M. 389 (392); 9 C. P. L. R. 75 (76).]

THIS was a suit to set aside a sale in execution of a decree obtained by the defendants against the plaintiff for a sum of Rs. 9,526-5 on the 19th November 1886. The decree was for money due on a mortgage bond, and it directed that if the amount decreed was paid within the month of February, the mortgaged property should be released, otherwise that on the expiry of the prescribed period, the decretal amount should be realized by the sale of the mortgaged property. As the money was not paid, the property was sold on the 18th May 1887, and purchased by the decree-holders (the defendants) for the sum of Rs. 6,800.

[140] On the 15th June 1887 the plaintiff applied to have the sale set aside on the ground that the sale proclamation had not been duly published. This application was rejected on the 17th December 1887, as

---

* Appeal from Original Decree No. 61 of 1889, against the decree of Baboo Dwarka Nath Bhuttacharjya, Subordinate Judge of Midnapore, dated 10th of December 1888.

(1) 17 C. 769.

1890 JULY 10. — APPELLATE CIVIL. — 18 C. 139.

he adduced no evidence and the decree-holders opposed it; and the sale was confirmed. On the 13th January 1888 the defendants, the auction-purchasers, obtained possession of the property purchased by them.

The plaint was filed on the 21st May 1888. It alleged that the sale was invalid because no proclamation by beat of drum had been made; that the omission to so proclaim it was the result of fraud; and that there had been collusive biddings. The plaint prayed that the sale should be set aside, as being tainted with irregularity, illegality and fraud; and that possession of the mortgaged property should be given to the plaintiff. There was also in the alternative a claim for damages.

The defendants in their written statement contended that there was no cause of action; that the plaintiff's objections under s. 311 of the Code of Civil Procedure having been overruled, no regular suit founded on the same objections would lie; that the sale proceedings were regular, and that there was no fraud on their part.

On the contentions of the parties issues were fixed, of which the following only are material to this report:—

"Whether the plaintiff having formerly taken objections under s. 311, this regular suit would lie?

"Whether any fraud was committed by the defendants in the proceedings connected with the auction-sale?"

The Subordinate Judge overruling the first objection of the defendants held that the suit would lie, and also found that the fraud alleged by the plaintiff was established. He also held, on an objection taken at the hearing, though not raised in the defendants' written statement, that the suit was not barred by s. 244 of the Civil Procedure Code. He therefore gave the plaintiff a decree.

From this decision the defendants appealed.

Mr. *Evans*, Dr. *Rash Behari Ghose*, and Baboo *Jogesh Chunder Dey*, for the appellants.

[141] Mr. *Woodroffe*, Baboo *Mohini Mohun Roy*, and Baboo *Jaggat Chunder Banerjee*, for the respondent.

JUDGMENT.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was delivered by

MACPHERSON, J. (who after stating the facts as above, continued):— A further point, though not raised in the written statement of the defendants, was raised in argument before the Subordinate Judge, namely, that the plaintiff's objections to the validity of the sale ought to have been preferred and dealt with under s. 244 of the Code of Civil Procedure by the Court executing the decree, and that no separate suit to set aside the sale would lie. This contention the Subordinate Judge overruled.

The same objection has now been taken before us, and the decision of a Full Bench of this Court in *Mohendro Narain Chaturaj* v. *Gopal Mondul*(1) is relied on. The facts of that case are similar to those of the present case: indeed they are more favourable to the plaintiff than they are here, because no application to set aside the sale had been made or dealt with prior to the regular suit which was instituted for the purpose of setting it aside. The question referred to the Full Bench was:—"Whether, when circumstances affecting the validity of a sale have been brought about by fraud of one of the parties to a suit, and give rise to a question between

---

(1) 17 C. 769.

those parties such as, apart from fraud, would be within the provisions of s. 244, a suit will lie on the ground of fraud notwithstanding the provisions of that section?" The Full Bench decided that no such suit would lie.

1890 JULY 10.

APPELLATE CIVIL.

18 C. 139.

It has been attempted to distinguish the present case from the case which was before the Full Bench in this way. It is said that the sale in the present case was not an ordinary sale of attached property in execution of a decree; that it purports to be a sale in execution of a mortgage decree which directs the sale of the mortgaged property in accordance with the provisions of ss. 88 and 89 of the Transfer of Property Act; but that there is no such decree in existence, as only a decree *nisi* had been made, and not a decree absolute directing the sale. It was further argued that **[142]** until a decree absolute is made for the sale of the mortgaged property, the right to redeem exists, and that this might be regarded as a suit to redeem.

The answer to the above contentions is that no such objection was taken till the present moment; and it is now too late to take it. We are not in a position to say that the decree or order absolute for sale of the mortgaged property was not made. We cannot suppose that the sale was held without an order directing it; and if there was an order that would, we think, be sufficient authority under s. 89 of the Transfer of Property Act, even if the order did not take the form of a decree such as is prescribed for a decree absolute in the case of a suit for foreclosure, the contention that this suit may be regarded as a suit to redeem is obviously untenable. Even if there is no order absolute, the decree *nisi* directing the sale is in existence; and if the right to redeem be still alive, it cannot be enforced by a separate suit. We are unable to distinguish the present case from the case which was before the Full Bench, the decision in which we are bound to follow; and we must hold that the suit is not maintainable, and that the plaintiff's proper course was to have the matter brought before the Court and disposed of under s. 244 of the Code of Civil Procedure.

It has been strongly pressed upon us that we should treat this suit and the decree which has been made in it as an application and an order under s. 244, on the ground that no question of jurisdiction arises; that the case has been tried by the Court which would have disposed of the objections under s. 244; and that the only question is one of costs, as to which the plaintiff is ready to submit to any terms which the Court may impose.

We do not see our way to take this course, as we think that the matter has already been disposed of by the Court executing the decree. The plaintiff objected before that Court to the validity of the sale, on the ground that the sale proclamation had not been duly published. The objection was disallowed and the sale was confirmed. As the judgment-debtor was the person whose property had been sold, and the auction-purchaser was the decree-holder, both were parties to the suit, and the question raised was one relating to the execution of the decree which the Court **[143]** executing the decree must dispose of under s. 244. The petition of objection does not show that it was made specifically under s. 311, and the decision of the Judge dealing with it does not show that it was disposed of under that section. But it matters not if it was, and it may be conceded that the parties treated it as an application under s. 311. It matters not, because the question raised was one of those provided for by s. 244, and one which would be properly disposed of under that section. If the additional ground which has now been raised, namely, that there

1890 JULY 10. — APPELLATE CIVIL. — 18 C. 139.

was irregularity in connection with the bidding at the auction-sale, was not raised in the objections which the plaintiff previously took to the sale, the answer is that it ought to have been raised. It is not even alleged in the present case, that the fraud now charged was not known to the plaintiff at the time when he applied to have the sale set aside. Under any circumstances all the irregularities which he now urges ought to have been urged when he objected to the sale. We cannot see, therefore, that there is any hardship or any injustice to the plaintiff in our refusing to deal with the matter in the way suggested by him. He had his opportunity and he failed to take advantage of it. We are, for the reasons which have been given, precluded from so dealing with it.

As to the prayer for damages, it is enough to say that this was never pressed in any way, and that the suit has been treated throughout as one in which the sale ought to be set aside on the grounds set out in the plaint.

The result is that the preliminary objection that the suit is not maintainable must prevail; the appeal must be decreed with costs; the decree of the Subordinate Judge set aside, and the suit dismissed.

J. V. W. *Appeal allowed.*

---

18 C. 144.

[144] ORIGINAL CIVIL.

Before Mr. Justice Wilson.

IN THE MATTER OF THE PROPOSED SUIT OF WATTS & CO. *v.* BLACKETT. [23rd September, 1890.]

Small Cause Court, Presidency Towns—Jurisdiction—Small Cause Court—Presidency Towns Act (XV of 1882), s. 18—*Army Act*, 1881 (44 *and* 45 *Vic.*, c. 58), s. 151—*Army (Annual) Act*, 1888 (51 *Vic.*, c. 4), s. 7—*Leave to sue.*

The jurisdiction given to Presidency Small Cause Courts by Act XV of 1882, s. 18, is not affected by 51 Vic., c. 4, s. 7.

[N.F., 1 P.R. 1893; Appl, 18 C. 372 (376).]

THIS was an order under s. 622 of the Code of Civil Procedure, sending for the record of an application made before the Chief Judge of the Calcutta Court of Small Causes.

The facts of the case were as follows:—

Messrs. Watts & Co., saddlers, applied to the Chief Judge of the Small Cause Court for leave to bring a suit in that Court against Captain Blackett, an officer in the Rifle Brigade, who was then stationed at Bareilly, to recover on a promissory note for goods sold and delivered. The Chief Judge refused leave on the ground that s. 151 of the Army Act of 1881, as amended by s. 7 of the Army (Annual) Act of 1888, excluded his jurisdiction. He considered that the amendment contained in s. 7 of the Army Act of 1888 was introduced in consequence of the decision of the Court in *Wallis* v. *Taylor* (1), and was intended to deprive the Small Cause Court of the jurisdiction which when *Wallis* v. *Taylor* was decided, it was supposed to have, but which it was never in reality intended to possess. The learned Judge accordingly held that he could not give leave to sue, as he had not jurisdiction to try the suit.

---

(1) 13 C. 37.

The applicants then moved the High Court under s. 622 of the Code of Civil Procedure for an order directing the Chief Judge of the Small Cause Court to grant them leave to sue under s. 18 of Act XV of 1882.

1890 SEP. 23.

ORIGINAL CIVIL.

18 C. 144.

[145] Mr. *O'Kinealy*, for the applicants.

JUDGMENT.

The following judgment was delivered by

WILSON, J.—The point which I have to decide is whether the Calcutta Court of Small Causes can give leave to bring, and, after giving such leave, has jurisdiction to try, a suit against a military officer, not resident within the local limits of its jurisdiction, in respect of a cause of action which has arisen wholly or in part within those limits. Section 18 of the Presidency Small Cause Courts Act, 1882, clearly gives such jurisdiction, in the case of military officers as well as others, unless its effect is restrained by other legislation. The learned Chief Judge has held that s. 7 of the Army Act, 1888, 51 Victoria, ch. 4, excludes the jurisdiction. A similar question arose under the Army Act, 1881, in *Wallis* v. *Taylor*(1). Section 151 of that Act said: "In India all actions of debt and personal actions against persons subject to military law, other than soldiers of the regular forces, within the jurisdiction of any Court of Small Causes, shall be cognizable by such Court to the extent of its powers." It was held that there was nothing in these words to exclude the jurisdiction of the Calcutta Court of Small Causes in a case similar to the present. The Army Act, 1888, s. 7, recites the words in the Act of 1881 just referred to, and recites that "doubts have arisen as to whether the words 'within the jurisdiction of any Court' refer to persons resident within the jurisdiction;" and it proceeds to remove those doubts by altering the language of s. 151 so as to make it run thus:—"In India all actions of debt and personal actions against persons subject to military law, other than soldiers of the regular forces, resident within the local jurisdiction of any Court of Small Causes, shall be cognisable by such Court to the extent of its powers." This alteration of the language imposes stricter limits upon the jurisdiction based upon residence which the section purports to give; but I do not see how the words can be construed as taking away the other kind of jurisdiction, based upon other considerations, which the Small Cause Court Act gives. And the question, of course, is not whether the section, as altered, gives the jurisdiction, but whether it takes it away. The reasons for the decision in *Wallis* v. *Taylor* apply, in my opinion, as strongly to the new [146] enactment as to the old. The result is that the matter will go back to the learned Chief Judge, who will exercise his discretion as to granting the leave asked for. In exercising that discretion it will be well to bear in mind the case of *Collet* v. *Armstrong* (2) as well as *Wallis* v. *Taylor*.

Attorneys for the applicants: Messrs. *Sanderson & Co.*

H. L. B.

(1) 13 C. 37. (2) 14 C. 526.

1890
SEP. 16.

APPELLATE CIVIL.

18 C. 146.

18 C. 146.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Hill.

RAM CHURN SINGH AND OTHERS (*Plaintiffs*) *v.* DHATURI SINGH AND OTHERS (*Defendants*).* [16th September, 1890.]

Sonthal Pergunnahs Settlement Regulation (*III of* 1872), *ss.* 11, 25—*Suit regarding matter decided by Settlement Court—Settlement Officer, finding of—Jurisdiction of Civil Court—Right of suit—Suit to set aside settlement and for possession.*

Where a suit was brought to establish—by avoiding the instrument under which he held—that the defendant was not a tenant of the lands in dispute, and to oust him from possession, and he had been recorded in the record of rights made by the Settlement Officer as a tenant of such lands, *held* that the suit was "one regarding a matter decided by a Settlement Court" within the meaning of s. 11 of the Sonthal Pergunnahs Settlement Regulation (III of 1872), and was therefore not maintainable.

The introductory words of cl. 4 of s. 25 of the Regulation which impose a personal limitation on the jurisdiction of the Civil Courts apply to suits of all the three classes to which the clause relates; so that the bar to the jurisdiction can take effect on a suit in the third of the three classes only when it is both a "suit to contest the finding or record of the Settlement Officer," and involves also the determination of "the right of zemindars or other proprietors as between themselves."

[**F.**, 17 C.L J. 599 (601) = 20 Ind. Cas. 503; **Rel. on.**, 19 Ind. Cas. 874 (876); **D.**, 22 C. 473 (475).]

THE facts necessary for this report are sufficiently stated in the judgment of the High Court.

[147] Mr. *R. E. Twidale*, Baboo *Mohini Mohun Roy*, and Baboo *Kali Kissen Sen*, for the appellants.

Baboo *Hem Chunder Banerjee*, Baboo *Abinash Chunder Banerjee*, Baboo *Taruck Nath Palit*, Baboo *Golap Chunder Sirkar*, and Baboo *Raghoo Nundun Pershad*, for the respondents.

The judgment of the Court (PRINSEP and HILL, JJ.) was as follows:—

JUDGMENT.

This appeal is from a decree of the Deputy Commissioner of the Sonthal Pergunnahs.

The suit was brought in the Court of the Sub-divisional Officer of Godda (vested with the powers of a Sub-Judge) by the present appellants for possession of an 8 annas share of mouzah Dumria Kalun, and the avoidance of a mokurari pottah and a kobala, under the former of which the first defendant had held the lands in suit from the year 1857, until he, on the 29th January 1881, sold his rights therein by the kobala to the 2nd, 3rd and 4th defendants.

Mouzah Dumria formerly belonged to one Raja Ajil Baram, who died many years ago without male issue. He had been twice married, and both his wives survived him. By his elder wife he had two daughters—Mussammut Parbutti and Mussammut Padmabutti. The 1st and 2nd plaintiffs are the sons, and the 3rd and 4th plaintiffs the grandsons through

* Appeal from appellate decree No. 242 of 1889 against the decree of R. Carstairs, Esq., Deputy Commissioner of the Sonthal Pergunnahs, dated the 11th of December 1888, affirming the decree of F. Grant, Esq., Sub-divisional Officer of Godda, dated 16th of April 1888.

1890 SEP. 16. — APPELLATE CIVIL. — 18 C. 146.

a deceased son, of Mussammut Parbutti. The 5th, 6th and 7th plaintiffs are grandsons also through a deceased son of Mussammut Padmabutti.

The younger wife of the Raja, whose name was Bhulanbutti, was childless. She, however, many years after her husband's death adopted a son to him. This son, Chunder Dyal Baram, who is still in his minority, is the 8th plaintiff.

As to the facts of the case there is little dispute. In the year 1857, it seems Rani Bhulanbutti granted a mokurari pottah of the lands in suit to Baboo Dhaturi Singh, the 1st defendant. In the year 1876 she died, shortly after her adoption of Chunder Dyal. In the same year these lands were brought under settlement, under the provisions of Reg. III of 1872, and Chunder Dyal, who was then under the guardianship of the Court of Wards, was represented by it in the settlement proceedings. In the record [148] of rights which was framed and published in the same year, 1876, the entry made with respect to these lands was as follows :—" Zemindar, Chunder Dyal Baram ; Mokurardar, Dhaturi Singh 8 annas share."

Not long after the death of Rani Bhulanbutti, the 1st, 2nd and 5th plaintiffs, and the father of the 3rd and 4th plaintiffs sued the Court of Wards as the representative of Chunder Dyal, for recovery of a 12 annas share of the moveable and immoveable property left by Raja Ajit Baram, and to set aside the adoption of Chunder Dyal. Ultimately the suit was settled on the 19th January 1878 by a compromise, by which it was agreed that the then plaintiffs were to be the proprietors of the Raja's property to the extent of 12 annas, and Chunder Dyal the proprietor of the remaining 4 annas.

It is necessary only to add that on the 29th January 1881, Dhaturi Singh, as already indicated, transferred whatever rights he had in the lands in suit to his present co-defendants.

It was under these circumstances that the present suit was instituted, and the lower Courts have concurred in holding that it is barred by the provisions of the Regulation referred to above, and have dismissed it accordingly. The Court of first instance has concisely stated its view, in which the lower appellate Court has agreed, in these terms :—" I dismiss the case simply on the ground that it is barred by the special Sonthal Reg. III of 1872, s. 25."

This view is, however, in our opinion not correct.

The fourth clause of the section in question gives jurisdiction to the Civil Courts to find and determine the rights of zemindars and other proprietors as between themselves in suits which are classed as suits pending when the Regulation was passed ; suits referred under s. 5 ; and suits to contest the finding or record of a Settlement Officer. Suits of the third class are, however, barred by the operation of the 5th clause of the section if not instituted within three years from the publication of the record of rights. And it was to this last-mentioned clause, no doubt, that the Courts below referred when they held the suit to be barred by s. 25.

[149] But the bar thus constituted does not operate unless the suit falls under the third class of suits dealt with by the fourth clause ; and to bring it within that clause it must satisfy two conditions—one as to the character of the parties, and the other as to the nature of the suit, for according to the grammatical construction of the clause, the introductory words which impose a personal limitation on the jurisdiction of the Civil Courts must apply to suits of all the three classes to which the clause relates, so that the bar to the jurisdiction can take effect only when

1890 SEP. 16. — APPELLATE CIVIL. — 18 C. 146.

the suit is a suit to contest the finding or record of a Settlement Officer, and involves also the determination of the rights of the zemindars or other proprietors as between themselves. Now the present suit fulfils neither of these conditions. It is not a suit between zemindars or other proprietors, for although the plaintiffs may claim in one or other of these characters, yet the defendants are the recorded tenants of the land. Nor is it a suit to contest the finding or record of a Settlement Officer, the claim being for "direct" possession of the land, and for the avoidance of the instruments mentioned above. The grounds, therefore, on which the lower Courts have disposed of the case are not sustainable.

But while this is so, we think, nevertheless, that the suit is, with reference to the provisions of s. 11 of the Regulation, unmaintainable. That section is as follows:—"Except as provided in s. 25, no suit shall lie in any Civil Court regarding any matter decided by any Settlement Court under these rules, but the decisions and orders of the Settlement Courts made under these rules regarding the interests and rights above mentioned shall have the force of a decree of Court."

Some difficulty arises in putting a construction on the terms "the decisions and orders of the Settlement Courts," here used, but we think it is to be inferred, not only from the nature of the suits which are made exceptions to the rule laid down by the section, but also from other parts of the Regulation, that the "findings of Settlement Officers," which ordinarily constitute the basis of the record of rights, were intended to be included under the "decisions and orders of Settlement Courts," and that consequently suits "regarding" the matter of such finding fall generally within the prohibition of the section. A reference to s. 25 makes it **[150]** apparent that suits falling under the third class of cl. 4 of that section are alone within the exception to s. 11, and they are suits to contest the finding or record of the Settlement Officer. And then turning to those sections which relate to the object and scope of a settlement and the machinery for carrying it into effect, the above conclusion receives, we think, further support. Section 9 declares the purpose of a settlement to be to ascertain and record the various interests and rights in the lands. The 10th section provides for the appointment of officers to carry out the settlement, and of the other officers who are to exercise over them appellate and revisional powers. The 12th and 14th sections deal in detail with the matters which fall within the jurisdiction of the Settlement Officer. Then again by the 10th section the Lieutenant-Governor is empowered to make rules for the procedure of Settlement Officers and their appellate and revisional superiors, in the investigation into rights in the land and the hearing of suits. And then the 2nd clause of the same section, without discriminating between these two classes of functions, gives the Lieutenant-Governor power to revise any case decided in any Settlement Court, so that the terms "Settlement Court" would here seem to be used in a sense large enough to embrace the Settlement Officer, whether dealing with a suit, or exercising his more ordinary function of investigating rights in land. If we are correct in this view, then not only does the consequence follow to which we have already referred, but these "findings" acquire by virtue of s. 11 the character of decrees of Court.

Now in the present instance what we have is this. The 1st defendant is recorded in the record of rights as a tenant of the lands in dispute, which involves a finding by a Settlement Officer that he fills that character. The suit is brought to establish, by avoiding the instrument under which he holds, that he is not a tenant and to oust him of his possession.

And we think, therefore, that it must be held to "regard" a matter decided by a Settlement Court in the sense of s. 11, and to be consequently unmaintainable. The appeal is therefore dismissed with costs.

J. V. W. *Appeal dismissed.*

---

18 C. 151 (P.C.) = 17 I.A. 123 = 5 Sar. P.C.J. 586.

[151] PRIVY COUNCIL.

PRESENT:

Lord Watson, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

JOGENDRO BHUPATI HURROCHUNDRA MAHAPATRA, A MINOR UNDER GUARDIANSHIP, AND OTHERS (*Defendants*) v. NITYANAND MAN SING (*Plaintiff*). [1st May, 1890.]

Hindu Law—Inheritance—Impartible Estate—Mitakshara Law—Right of illegitimate son among Sudras—Survivorship.

For determining who is to be heir to an impartible estate, the same rules apply which also govern the succession to partible estates, though the estate can be held by only one member of the family at a time.

Under the Mitakshara, among Sudras, where a father left a son by a wedded wife, and an illegitimate son, the ordinary rule of survivorship incidental to a family co-parcenary was held to apply; and the illegitimate son, having survived the legitimate, was held entitled by survivorship to succeed to the family estate, which was impartible and appertained to a raj, on the death of his brother without male issue.

Sadu v. *Baiza* (1) referred to, and approved.

[**F.**, 31 A. 457 (476) **P.C.** = 6 A.L.J. 767 = 11 Bom.L.R. 890 = 10 C.L.J. 216 = 13 C.W.N. 1073 = 4 Ind. Cas. 25 = 19 M.L.J. 605 (616) = 12 O.C. 304; 31 C. 224 (227); 25 M. 519 (524) = 11 M.L.J. 399; 6 C.P.L.R. 144 (152); 6 A.L.J. 753 (756) = 3 Ind. Cas. 907; **R.**, 21 A. 99 (102) = A.W.N. (1898) 170; 34 A. 79 (87) = 8 A.L.J. 1251 = 12 Ind. Cas. 915; 19 C. 91; 28 C. 194 (204); 38 C. 182 (186) = 13 C.L.J. 203 = 15 C.W.N. 49 = 7 Ind. Cas. 806; 15 M 307 (314); 17 M. 316 (334); 20 M. 167 (182); 22 M. 538 (549); 25 M. 429; 29 M. 453 (458) = 16 M.L.J. 339 = 1 M.L.T. 272; 30 M. 454 (457) = 17 M.L.J. 367; 32 M. 429 = 2 Ind. Cas. 18 = 19 M.L.J. 401 (409); 16 C.L.J. 335 = 17 C.W.N. 442 = 17 Ind. Cas. 276; 5 Ind. Cas. 193 (196); **R.**, 15 Ind Cas. 412 = 23 M.L.J. 79 = 12 M.L.T. 245 (249) = (1912) M.W.N. 790 (795); **Expl.**, 22 M. 383 (397) (**P C.**) = 1 Bom. L.R. 277 = 3 C.W.N. 415 = 26 I.A. 83 = 7 Sar. P.C.J. 481; **D.**, 24 M.L.J. 271 (284) = 21 Ind. Cas. 724 (727).]

APPEAL from a decree (2nd June 1885) of the High Court, affirming a decree (29th March 1883) of the Subordinate Judge of Cuttack.

The suit was brought for a declaration of the plaintiff's title to the raj and impartible zemindari of Killa Sukinda in the Cuttack district, the plaintiff claiming as the surviving son of the last Raja but one, by a lawfully married though inferior wife, married according to what was known in the district as the "phulbibahi" form of marriage (2).

Both the Courts below found that the plaintiff was an illegitimate son; and the question now raised was, whether among brothers of a Sudra family a "dasiputra," or illegitimate son by a female servant, as both the Courts found the plaintiff to be, would be a coparcener with his legitimate brother in the ancestral estate, and would take by survivorship.

---

(1) 4 B. 37.
(2) See the third note at p. 61 of Macnaghten's Hindu Law, Chap. V.

1890
MAY 1.
—
PRIVY
COUNCIL.
—
18 C. 151
(P.C.) =
17 I.A. 128 =
5 Sar. P.C.J.
596.

[152] The zemindari of Sukinda was one of several estates, known as killajat zemindaris, the owners occupying forts. By Reg. X of 1800 these estates were excepted from the operation of Reg. II of 1793, and it was declared that where a custom of impartibility was shown to have existed, they should continue to descend to a single heir without division. The impartibility of Sukinda was not in dispute, and the zemindari was not one of these similar estates which were by the 13th section of Reg. XIII of 1805 excepted from the operation of that Regulation, and placed under "the Superintendent of the Tributary Mehals in zilla Cuttack." The plaintiff claimed that a precept requiring possession of the zemindari to be delivered to him should be issued to the Collector, who had attached the raj and zemindari under Reg. V of 1799, s. 5 and Reg. V of 1827, on the death of the last Raja without male issue.

The defendants were at first the three widows of the last Raja who died on the 5th March 1878, leaving only a daughter. The three widows set up the defence that Jogendra Bhupati having been adopted by the late Raja on the 18th April 1887 was the rightful successor. He accordingly was made a defendant (as also was Abhin Roy Singh, another illegitimate son of the former Raja), and he now, by Rani Komola Patmadei, one of the three Ranis, was appellant. The defendants also alleged the illegitimacy of the plaintiff, he having been born to the last Raja but one, of what was termed a dasi or female servant, so that, according to their case, even if the adoption were not proved, the heirs would be the widows and daughter of the deceased, and not the plaintiff.

Issues having been fixed on the above allegations, the Subordinate Judge of Cuttack decreed in favour of the plaintiff. As to the law, he gave his opinion thus :—

"Under the Hindu law, both brothers were, on the death of their father, jointly entitled to the disputed property, and that they did not then so succeed was owing only to a special custom, in the family, under which the succession was restricted to one. The possession, under the circumstances, of the legitimate brother could not possibly make what was joint his separate property, nor could it extinguish the title of the plaintiff. The plaintiff's title was, I hold, simply in abeyance during the period of such possession, and [153] as the legitimate brother is now dead, there is nothing, as far as I can see, to prevent the plaintiff from asserting that title and claiming the property as his on the ground of survivorship, and I would accordingly so find.

"Subject, of course, to my finding on the next issue, the plaintiff certainly has that right; for the Mitakshara, I observe, gives one in his position preference over all but the immediate male descendants of the deceased co-parcener."

The next issue was as to the adoption, which was negatived.

The judgment of the High Court (GARTH, C.J., and BEVERLEY, J.) which is reported in the Indian Law Reports, 11 Calc., at p. 703, affirmed the decision of the Court below. The Judges held that the plaintiff was so far a co-parcener with his legitimate brother in the joint impartible estate, as to be entitled, on his death without male issue, to succeed in virtue of survivorship.

On this appeal,

Mr. *C. W. Arathoon*, for the appellant, argued that the High Court was wrong in deciding that an illegitimate son was entitled to take by survivorship under the Mitakshara, which, he contended, left such a son to take a share only by the father's permission. Thus the illegitimate

son acquired at birth no right to a share as a legitimate son did: Mitakshara, chap. 1, s. 12. The plaintiff had also failed to prove the allegation made in his plaint that he lived jointly with his brother, the late Raja, till his death. Indeed, as found by the Subordinate Judge they lived apart, and by the Hindu law the plaintiff would never have been entitled jointly with the late Raja to the family estate, even if it had not been impartible. There was no sufficient authority for holding that an illegitimate son could take by survivorship. He referred to *Krishnayyan* v. *Muttusami* (1) as showing that the conception of co-parcenership pre-supposed sapinda relationship and a legal marriage. He also referred to *Nissar Murtojah* v. *Dhunwunt Roy* (2), *Sartaj Kuari* v. *Deoraj Kuari* (3), *Sadu* v. *Baiza* (4), *Ranoji* v. *Kandoji* (5), and to Dattaka Chandrika, chap. 5, s. 31.

1890 MAY 1. — PRIVY COUNCIL. — 18 C. 151 (P.C.) = 17 I.A. 128 = 5 Sar. P.C.J. 596.

[154] Mr. *T. H. Cowie*, Q. C., Mr. *R. V. Doyne*, and Mr. *J. D. Mayne*, for the respondent Nityanand, were not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The plaintiff in this case sued to establish his title to the raj and zemindari of Killa Sukinda in the district of Cuttack. The plaintiff's father, Raja Upendra Bhupati, died on the 23rd October 1857, leaving a son, Nundkishore, by his Rani Nilmoni; a son by a woman called Rambha, the plaintiff; and a third son, Abhin Roy Singh, by a woman called Asili. He was succeeded in the raj by his legitimate son Nundkishore. Nundkishore died on the 5th March 1878, leaving no son, but leaving three widows—Ranis—and a daughter by one of them. The plaintiff claimed to succeed to Nundkishore on the allegation that his mother was the lawful phulbibahi wife of Upendra. It has been found by the Subordinate Judge and by the High Court that his mother Rambha was not the lawful wife as alleged by the plaintiff, and that the plaintiff must be treated as the illegitimate son of Upendra. It has also been found that Raja Upendra and his family were Sudras.

On these facts the question which has been urged before their Lordships arises, *viz.*, whether according to the rules of Hindu law, having regard to the fact, which was admitted, that the law of the Mitakshara is applicable, the plaintiff is entitled by right of survivorship to succeed to the raj upon the death of his half-brother Nundkishore, the legitimate son.

Now it may be well first to dispose of a point arising out of the fact that this is an impartible raj, which it is admitted to be. According to the decision in the *Shivagunga* case (6), which, as their Lordships understand, is not now disputed, the fact of the raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to be looked at, and therefore the question in this case is, what would be the right of succession, supposing instead of being an impartible estate it were a partible one?

The case was decided in the plaintiff's favour by the Subordinate Judge, and there was an appeal to the High Court, in which the **[155]** learned Judges of the High Court, after noticing certain decisions that had been quoted, held, on the authority of the case of *Sadu* v. *Baiza* (4) decided by the Bombay High Court, that the plaintiff was entitled to succeed to the Raj.

(1) 7 M. 407. (2) Marshall 609. (3) 15 I.A. 51 = 10 A. 272.
(4) 4 B. 37. (5) 8 M. 557. (6) 9 M.I.A. 539.

1890
MAY 1.
PRIVY
COUNCIL.
18 C. 151 (P.C.) = 17 I.A. 128 = 5 Sar. P.C.J. 596.

The case in the Bombay High Court appears to have been very similar to the present. There the two sons, the legitimate and the illegitimate, survived the father, and upon the death of the legitimate son the question was whether the illegitimate son was entitled to succeed to the whole of the estate. The Mitakshara in chap. I, s. 12, deals with the rights of a son by a female slave in the case of Sudras, which is the present case, and the first verse is :—"Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share, and one who has no brothers, may inherit the whole property in default of daughter's sons." The second verse is :—"The son begotten by a Sudra on a female slave obtains a share by the father's choice, or at his pleasure. But after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share; that is, let them give him half (as much as is the amount of one brother's) allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But if there be such, the son of the female slave participates for half a share only." Now it is observable that the first verse shows that during the lifetime of the father, the law leaves the son to take a share by his father's choice, and it cannot be said that at his birth he acquires any right to share in the estate in the same way as a legitimate son would do. But the language there is very distinct, that "if the father be dead the brethren should make him partaker of the moiety of a share." So in the second verse the words are that the brothers are to allow him "to participate for half a share," and later on there is the same expression:—"The son of the female slave participates for half a share only." The learned Chief Justice of the Bombay High Court notices these passages, and after observing that the Mitakshara makes no special provision for the case of the death either [156] of the legitimate or of the illegitimate son after the death of their father and before partition, he says :—"But the effect of what he has said being, as we think, to create a co-parcenary between the son of the wedded wife and the son of the female slave, we understand him as tacitly leaving such a case to the ordinary rule of survivorship incidental to a co-parcenary, and that accordingly the survivor would take the whole if the other died without leaving male issue." It appears that in the course of the argument the question was put to the learned Counsel by the Chief Justice as to what would be the case if, instead of the legitimate son being the one who had died, the illegitimate son had died, and the legitimate son survived, and it was apparently admitted that in such a case the legitimate son would take the share of the illegitimate son by survivorship. If that be so, their Lordships cannot see any reason for holding that the illegitimate son would not take by survivorship in the case of the death of the legitimate son. It cannot be a different right—in the one case a right by survivorship, and in the other, no right by survivorship. There is not only the judgment of the Chief Justice and two other Judges of the High Court of Bombay, but the case came before them by appeal, there being a difference of opinion between the two Judges before whom it came in the first instance, and one of those learned Judges was a Hindu, Mr. Justice Nanabhai Haridas, who carefully examined the authorities, and came to the same conclusion. It is not necessary to quote more of his judgment than this passage :—"I would therefore hold that the plaintiff and Mahadu, being male members of an undivided Hindu family governed by the Mitakshara law, the

former"—that is, the illegitimate son—" upon Mahadu's death without male issue, became entitled to the whole of the immoveable property of that family, there being no question about any moveable property in this special appeal." Therefore their Lordships have before them the well-considered judgment of the High Court of Bombay upon this question, as well as that of the High Court at Calcutta, and it appears to them that the learned Judges of those Courts put a right construction upon the law as stated in the Mitakshara.

1890
MAY 1.

PRIVY COUNCIL.

18 C. 151 (P.C.) = 17 I.A. 128 = 5 Sar. P.C.J. 596.

Their Lordships are of opinion in the present case that the plaintiff was entitled to succeed to the raj by virtue of survivorship, **[157]** and that the judgment of both the lower Courts should be affirmed. They will therefore humbly advise Her Majesty to dismiss the appeal. The appellants will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Wrentmore & Swinhoe.*
Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

---

18 C. 157 (P.C.) = 17 I.A. 194 = 5 Sar. P.C.J. 586 = Rafique and Jackson's P.C. No. 121.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Sir B. Peacock and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

MADHO PARSHAD (*Plaintiff*) *v.* MEHRBAN SINGH, (*Defendant*).* [25th April and 25th June, 1890.]

Hindu Law—Joint family—Ancestral estate held jointly by family under the Mitakshara—Sale attempted by one member of his share—Effect of partition—On death of vendor, right by survivorship of other members—Equity of purchaser to have a lien against survivor.

As to ancestral estate under the Mitakshara, so long as the estate is undivided and the share of a member of the family is indefinite, he cannot dispose of it without the consent of his co-parceners. *Held*, that, in a joint family, a nephew, having taken by survivorship the undivided share of an uncle deceased, was entitled to recover that share from a purchaser, to whom the uncle in his lifetime had sold it without the consent of his co-parceners, and without necessity; *held*, also, that the purchaser could have no lien on the share for return of the purchase money.

As soon as partition is made;—actual partition not being in all cases essential, as for instance where the family has agreed to hold their estate in definite shares, or a member's undivided share, in execution of his creditor's decree, has been attached:—that will be regarded as sufficient to support the alienation of a member's interest, as if it had been his acquired property.

As regards members of a family living at the time when their alienation was set aside at the instance of another member, the Court, in *Mahabeer Persad* v. *Ramyad Singh* (1), justly ordered that the property should be thenceforth possessed in defined shares, and that the shares of the members who had joined in the sale should be subject to a lien for the return of the purchase-money. But that case must be distinguished from the present. Here, the accrued right of survivorship precluded any such course. The nephew not being responsible for the personal debts and obligations of his **[158]** uncle, what might have been an enforcible equity against the interest of the latter, while it existed, could not affect the interest which had passed to a surviving co-parcener.

---

(1) 12 B.L.R. 90.

1890 JUNE 25.

PRIVY COUNCIL.

18 C. 157 (P.C.)= 17 I.A. 194= 5 Sar. P.C.J. 586= Rafique & Jackson's P.C. No. 121.

[F., 15 A. 339 (P.C.)=20 I.A. 116=6 Sar. P.C.J. 313; 20 A. 325=(1898) A.W.N. 59; 5 C.L.J. 80 (85)=11 C.W.N. 163; 18 Ind. Cas. 819; 103 P.R. 1894; R., 31 A. 176 (209)=6 A.L.J. 263=1 Ind. Cas. 479; 16 B. 29 (38); 21 B. 797; 34 C. 372 (377)=11 C.W.N. 462; 13 C.L.J. 664 (667)=15 C.W.N. 748=9 Ind. Cas. 1034 (1036); 12 C.P.L.R. 63 (66); 14 C.W.N. 552=2 Ind. Cas. 986: 11 Ind. Cas. 291 (294); 13 Ind. Cas. 466=14 O.C. 295; D., 19 C. 401; 25 M. 690 (710); 13 C.W.N. 815 (824)=1 Ind. Cas. 670; 6 Ind. Cas. 582; 150 P.R. 1907.]

APPEAL from a decree (26th January 1888) of the Judicial Commissioner, affirming a decree (23rd November 1886) of the District Judge of Lucknow, reversing a decree (28th September 1886) of the Subordinate Judge of Unao.

The question now raised was whether the sale by a deceased member of a joint family of his share in ancestral estate, which the Courts below had set aside at the instance of a minor suing by his guardian, should not have been on the terms of this appellant, the purchaser, having a lien on the interest sold for the return of the purchase-money.

Ancestral shares in three zemindari villages, Parthiawan, Salehnainpur, and Aziznagar, in the Unao district, were jointly held by an undivided family to which belonged Sobha Sing, father of Mehrban Sing, plaintiff and respondent, and Zalim Sing, brother of Sobha. Madho Prasad, defendant, appellant, after the death of Sobha bought from Zalim his share in each of the above villages, receiving from him (and from Mussamat Chitta, described as his wife) three registered deeds of sale, dated 9th January 1885. These deeds stated that a share consisting of 1 anna 9 pies 33½, "out of the entire 20 biswas, or 16 annas of the zemindari hakkiat" of each of the three villages were sold, then being in the joint possession of Zalim Sing, and Mehrban Sing, a minor, the latter holding an equal share with Zalim, as shown by the khewat of regular settlement. The purchase-money for the share in the first was Rs. 6,000, and for the two other shares Rs. 2,000 each.

Zalim died on the 16th January 1885. This suit was brought on the 2nd January 1886, by his nephew, Mehrban Sing, through his mother and guardian, against Madho Parshad and Chitta, for cancellation of the deeds of 9th January 1885, and for possession, by right of survivorship, of Zalim's share.

Madho Parshad's defence was that Zalim and the plaintiff were separate in estate, and the former had a right to transfer his share.

[159] The Subordinate Judge's decree was in favour of the defendant. Zalim in his opinion had been separate from Sobha. He found that the village administration papers permitted transfers by co-sharers of their shares, subject to pre-emption by other co-sharers.

This decree was reversed by the District Judge, who found that Zalim Sing and Mehrban Sing had been joint in estate. Under the Mitakshara which governed the parties, one joint-owner could not sell his share, and the administration papers did not control this, not referring to unpartitioned estate, or shares in it.

The Judicial Commissioner affirmed this judgment, finding no evidence that partition had ever taken place between Sobha and Zalim, who held in equal rights, according to entries in the khewat of settlement, the total share inherited by them from their father Newal Sing; and that a sharer in an undivided estate could not sell his share without the consent of his co-parceners.

1890
JUNE 25.
PRIVY COUNCIL.
18 C. 157 (P.C.) = 17 I.A. 194 = 5 Sar. P.C.J. 586 = Rafique & Jackson's P.C. No. 121.

Mr. *J. D. Mayne*, for the appellant, after referring to other points in the case, argued that, although the plaintiff might be entitled, by survivorship, to the share which Zalim had purported to transfer, the purchaser might, upon an equitable view, nevertheless receive a charge for the amount of the purchase-money which he had paid upon the share. He cited *Mahabeer Persad* v. *Ramyad Singh* (1). Reference was also made to *Deendyal Lal* v. *Jugdeep Narain Singh* (2), and *Suraj Bansee Koer* v. *Sheo Parshad Singh* (3).

The respondents did not appear.

On a subsequent day, June 25th, their Lordships' judgment was delivered by

JUDGMENT.

LORD WATSON.—In this case, which was heard *ex parte*, the appellant did not impugn the findings of fact upon which the judgments he complains of are based; and his argument was addressed to a single question of law.

The respondent, plaintiff in the suit, and his paternal uncle Zalim Sing, were the members of an undivided Hindu family, and, as such, were co-sharers of land in three villages situated in [160] the district of Unao, in Oudh. Zalim died childless in January 1885. Seven days before his death he and Mussamat Chitta, therein described as his wife, executed and delivered three deeds of sale to the appellant of his undivided share and interest in each of these villages, at prices amounting in all to Rs. 10,000, which were duly paid by the appellant. These sales were made by the deceased for his own personal benefit, without the consent of the respondent, and without legal necessity.

The suit was brought by the respondent in January 1886, for cancellation of these three deeds of sale, with an alternative conclusion for pre-emption in the event of their validity being sustained. The Subordinate Judge held that they were valid, upon the ground, now admitted to be untenable, that by a village custom each co-sharer was entitled to sell or mortgage his undivided interests; and, on payment by the respondent to the appellant of Rs. 10,000 within a time limited, he decreed pre-emption and possession, otherwise the suit to stand dismissed. On appeal, the District Judge reversed his decision and decreed cancellation of the sale-deeds, holding that the alienation by Zalim was void, according to the law of the Mitakshara. The decree of the District Judge was affirmed, for the same reasons, by the Judicial Commissioner.

The appellant conceded in argument that the rules of the Mitakshara law which prevail in the Courts of Bengal are applicable in Oudh to the alienation of interests in a joint family estate. He likewise conceded that the sales by Zalim Singh, being without the consent of his co-parcener, and not justified by legal necessity, were according to that law invalid; but he maintained that the transactions being real, and the prices actually paid, the respondent could only recover the shares sold, subject to an equitable charge in his favour for the Rs. 10,000 which were received by Zalim.

The second point ruled by a Full Bench of the High Court at Calcutta, in *Sadabart Prasad Sadu* v. *Foolbash Koer* (4), arose in circumstances somewhat resembling those of the present case. The facts stated were that a member of a joint family had executed an ordinary mortgage in respect of his undivided [161] share of a portion of the family property,

(1) 12 B.L.R. 90.
(2) 4 I. A. 247 = 3 C. 198.
(3) 5 C. 148 = 6 I.A. 88.
(4) 3 B.L.R F.B. 31.

1890 JUNE 25. — PRIVY COUNCIL. — 18 C. 157 (P.C.)= 17 I.A. 194= 5 Sar. P.C.J. 586= Rafique & Jackson's P.C. No. 121.

in order to raise money for himself, and not for the benefit of the family; and the point submitted for decision was, whether, after the death of the mortgagor, a surviving member of the joint family could recover possession from the mortgagee without redeeming. Sir Barnes Peacock, who delivered the judgment of the Bench, after a full examination of the authorities bearing upon the question, held that, according to Mitakshara law, the mortgagor "had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint-family property, in order to raise money on his own account and not for the benefit of the family;" but that the facts were not sufficiently stated to enable the Court to say whether the mortgaged interest could be recovered without redemption.

The appellant referred to three subsequent decisions as illustrating and supplementing the doctrine laid down by the Full Bench in *Sadabart's* case. In dealing with these authorities, which appear to their Lordships to be perfectly consistent with that doctrine, it is necessary to keep the following considerations in view. Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand, and for his own purposes; but, as soon as partition is made, he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property. Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution.

Two of the cases referred to were decided by this Board. In *Deendyal Lal* v. *Jugdeep Narain Singh* (1), a judgment-debtor of the father of a joint Hindu family under an attachment of his title and share exposed the whole family property to judicial [162] sale, at which it was knocked down to a purchaser who obtained possession and the usual certificate of title. The son of the judgment-debtor then brought a suit for recovery of the estate thus sold against the purchaser, joining his father as a defendant. Their Lordships, distinguishing between the cases of purchase by private bargain and at an execution sale, held that the son was not entitled to recover that portion of the estate which represented the undivided share of the father, and declared that the purchaser had the right to take such proceedings as he might be advised for having the judgment-debtor's share and interest ascertained by actual partition. In *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (2), the circumstances in so far as these related to the interest of the judgment-debtor were the same, with this important exception, that the latter died before the sale of his undivided share took place. It was pleaded for his minor sons that, at the time of the sale, the interest of the deceased had passed to them by survivorship; but their Lordships affirmed the right of the purchaser on the ground that, before their father's death, the execution proceedings had gone so far as to constitute, in favour of the judgment-creditor, a valid charge upon the joint estate, to the extent of the undivided interest of the deceased, which could not be defeated by that event. At the same time, their Lordships held it to be clear upon the authorities that, if no proceedings had been

(1) 4 I.A. 247=3 C. 198. (2) 6 I.A. 88=5 C. 148.

taken to enforce the debt in their father's lifetime, "his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands." 1890 JUNE 25.

These two decisions lend no assistance to the argument of the appellant. He has not taken, and cannot now take, any proceedings against Zalim Sing, whose undivided interest, according to the law expressly laid down in the second of these decisions, passed on his death to the respondent, free from any claim at the instance of personal creditors of Zalim. PRIVY COUNCIL.

18 C. 157 (P.C.) = 17 I.A. 194 = 5 Sar. P.C.J. 586 = Rafique & Jackson's P.C. No. 121.

The appellant hardly disputed that the interest of Zalim passed by survivorship to the respondent; but he relied on the case of *Mahabeer Persad* v. *Ramyad Singh* (1), decided by the High [163] Court of Calcutta in 1873, as an authority for the proposition that the prices paid by him ought to form an equitable charge upon that interest, in a question with the respondent. In that case, the father of a Hindu family, with the knowledge and acquiescence of his elder son, mortgaged the joint property, without legal necessity, and without consent of a minor son, who was the other co-parcener. The mortgagees obtained a decree on their bond, in execution of which they, notwithstanding the objections of the minor coparcener and his brother, caused the property to be sold, and themselves became the purchasers. In a suit against them at the instance of the two sons, the Court in the interest of the minor set aside the alienation, but directed that, on recovery of the property, it should be held and enjoyed in defined shares, and that the shares of the father and his elder son should be jointly and severally subject to the lien thereon of the mortgagees for the sum advanced by them with interest until repayment. The reasons assigned by Phear and Ainslie, JJ., for ordering partition, and making the loan an equitable charge upon the shares other than that of the minor, were shortly these, that a decree, without such qualification, would have had the effect of restoring their property to the father and son, and leaving them at the same time in possession of the money which they had borrowed on its security, a result which the learned Judges justly considered would be contrary to equity and good conscience.

Their Lordships are unable to see that any analogy exists between that case and the present. It is unnecessary to decide whether, if Zalim Sing had been still alive, and so entitled to resume his undivided share on cancellation of the sale deeds, it would have been possible to order partition and to charge Zalim's divided share with the Rs. 10,000 paid to him by the appellant. That course is rendered impossible by his death. It might have been quite consistent with equitable principles to refuse to Zalim restitution of the interest which he sold, except on condition of its being made at once available for repayment of the price which he received. But the respondent is not affected by any equity of that kind. He took in his own right by survivorship, and is not liable for the personal debts and obligations of his uncle Zalim; and it appears to their Lordships, that an equity which might have [164] been enforced against Zalim's interest whilst it existed cannot be made to affect that interest when it has passed to a surviving coparcener, except by repealing the rule of the Mitakshara law.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Young, Jackson, & Beard.*

(1) 12 B.L.R. 90.

1890
JULY 19.

PRIVY COUNCIL.

18 C. 164 (P.C.) = 17 I.A. 201 = 5 Sar. P.C.J. 507.

18 C. 164 (P.C.) = 17 I.A. 201 = 5 Sar. P.C.J. 507.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

UMES CHUNDER SIRCAR (*Plaintiff*) *v.* ZAHUR FATIMA AND OTHERS (*Defendants*).* [20th and 21st November, 1889, and 19th July, 1890.]

Mortgage—Redemption of prior mortgage by puisne mortgagee—Sale, at his suit, of mortgaged property, on what terms, and with payment of what incumbrances—Purchases before and during mortgagee's suit, and after decree therein how affected by it—Interest on mortgage debt, when reducible by the decree from its date; and when continuing payable at the contract rate—Execution of decree—Civil Procedure Code, s. 266—Attachment of future estate—Construction, according to Mahomedan Law, of grant of such estate.

Upon a claim by a pusine mortgagee to redeem prior incumbrances, and in the alternative for a decree ordering a sale of the property mortgaged, the sale was decreed, with application of the purchase-money to pay incumbrances in their due order; and with redemption by the plaintiff of a prior mortgagee, who was to have an option to redeem.

Previously to the mortgage, a fractional interest in the property (which interest was purchased by the plaintiff at a judicial sale) had been the subject of a settlement by a Mahomedan on his wife, under the condition that if he should have no child by her, his two sons by another wife should each have an estate therein. He died without other children. *Held*, that the two sons had taken definite interests capable of being attached within s. 266 of the Civil Procedure Code, not being mere expectancies. *Held*, also, that a judicial sale of property, purporting to be of all the interests of a judgment-debtor, carries with it any enlargement thereof that may have occurred after the attachment and before the sale; and that, accordingly, the above-mentioned settlor having died without a child by that wife, between the date of the attachment and the sale, the son's augmented interests passed thereby.

[165] The plaintiff in this suit had succeeded to four, out of five, mortgages, subsequent to his own, which had been executed before a decree obtained by a mortgagee. This decree had been purchased by the first defendant, who also brought the property at the execution sale. The plaintiff had also succeeded to several mortgages executed pending the suit in which the decree was made. *Held*, that a distinction must be made in respect of whether the mortgages so transferred to the plaintiff had been executed before or after the bringing of the above suit. As regards the mortgages executed before it, the plaintiff, not having been a party to that suit, was entitled to redeem the first defendant who was purchaser of the decree. As regards the mortgages executed after that suit was brought, the plaintiff was bound by the decree, and his interest in the mortgages, transferred *pendente lite*, passed to the purchaser. On the other hand, persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit, between the prior mortgagee and the mortgagor, to which they have not been made parties.

As regards the Court's power to regulate the interest, *held*, that although, in the decree for sale, the rate of interest on the debt, payable to the mortgage decree-holder, was reducible from the date of the decree from the rate stipulated, to the Court rate, an order to that effect could only be made for the benefit of the judgment-debtor as a party to the suit. The plaintiff, seeking to redeem a mortgage prior to the suit, must pay the interest at the rate agreed upon in the mortgage; there being no authority, either under s. 10 of Act XXIII of 1861, or under the Civil Procedure Code, s. 209, to reduce it to the Court rate.

[F., 32 B. 172 = 9 Bom. L.R. 1152 (1155); 22 C. 33; 4 C.W.N. 297 (303); 5 Ind. Cas. 916 = 7 M.L.T. 194; 8 Ind. Cas. 153 (155) = 8 M.L.T. 409; 17 Ind. Cas. 291 = 23 M.L.J. 284 = (1912) M.W.N. 1119; 19 Ind. Cas. 614 = 6 S.L.R. 227; 143 P.L.R. 1905; 31 M. 258 = 18 M.L.J. 344 = 4 M.L.T. 293; 2 Ind. Cas. 865; **Rel. on,** 15 Bom. L.R. 817 (819) = 21 Ind. Cas. 39 (40); **R.,** 13 A.

432 (F.B.); 17 B. 503; 28 B. 153=5 Bom. L.R. 892 (900); 34 B. 604 (612)= 12 Bom. L.R. 341=6 Ind. Cas. 513; 36 B. 214 (255)=13 Bom. L.R. 717= 12 Ind. Cas. 225; 30 C. 599 (605, 606) (F.B.); 31 C. 737 (742); 6 Bom. L.R. 625 (627); R., 9 Bom. L.R. 295 (300); 1 C.L.J. 531 (537); 5 C.L.J. 315 (322) =11 C.W.N. 403; 13 C.W.N. 281=8 C.L.J. 478=4 Ind. Cas. 92; 17 C. P.L.R. 38 (40); 9 Ind. Cas. 513=21 M.L.J. 213 (224)=9 M.L.T. 431=(1911) 1 M.W. N. 165; 16 Ind. Cas. 877 (879); 4 N.L.R. 168; 1 O.C. 53 (61); 1 O.C. 109 (111); D., 2 C.L.J. 202 (217).]

1890 JULY 19. — PRIVY COUNCIL. — 18 C. 164 (P.C.)= 17 I.A. 201= 5 Sar. P.C.J. 507.

APPEAL from a decree (10th September 1885) of the High Court varying a decree (7th September 1883) of the District Judge of Gaya.

The appellant, who was plaintiff, having made all interested parties, claimed in the right of a puisne mortgagee of twelve annas of mauza Sirdilla in the Gaya district, having also obtained transfers of other mortgages upon the same estate, and having bought at judicial sales fractional parts of it. The defendants had also acquired mortgage interests in the mauza, and they were now sued by the plaintiff, who sought to redeem prior incumbrances, so as to make his own charges the first on the property. In the alternative, he claimed to have a direction made for the sale of the mortgaged property, and an order that out of the proceeds the mortgage money due to all parties should be paid according to their several priorities.

The first Court, substantially, decreed the latter claim; and from that decree the only defendant who appealed to the High [166] Court was Zahur Fatima, now one of twelve respondents here. The questions now raised related to points on which the Courts below had differed, and were, in effect, as to the ownership, disputed between the parties, of a fractional share, *viz.*, seventeen dams, of the twelve annas of Sirdilla, and as to the right to redeem, on the plaintiff's part, another share of two annas. The priority of transfers and the right of mortgagees to redeem and to transfer were involved; also the terms on which redemption was to be made, and the quantum of interest on the mortgage debts.

By a butwara made in 1867, Sirdilla was partitioned, the shares amounting to nearly twelve annas, being thus distributed, *viz.*, to Saiyed Sultan Ali five annas thirteen dams six cowries; to his two sons Farzand Ali and Farkut Ali, two annas each; Mussamut Hosseini, wife of the latter, two annas two dams four cowries. On the 26th January 1871 Sultan Ali granted a mokarari lease of one anna fourteen dams for life, at a rent of one rupee to his wife Amani Begum, step-mother of Farzand Ali and Farkut Ali, with the condition that if she should not bear any child to him that share should not go to his two sons; that if she should have a child living at his death, such child should take the share. Soon afterwards a series of mortgages, some executed by the two sons and Hosseini jointly, and others by the sons jointly or singly, commenced and continued to be made during a period of about eight years, down to near the death of Sultan Ali, which occurred on 29th April 1879, no child having been born of Amani Begum.

The mauza Sirdilla being situated in the Nawada sub-division of the Gaya district, it was considered necessary, in order to bring the mortgages within the registration area of the Sub-Registrar of Gaya, to include in each mortgage some property within that jurisdiction. A house at Sahebgunge, belonging to the family, but undivided at the butwara, answered the purpose. The primary object in including a kothri of it in some of the bonds and in mortgaging, in four of the mortgages, the entire house, was, as in the first Court found, to enable the parties to complete the transaction in Gaya. First, were mortgaged on the 14th April 1871

1890 JULY 19. — PRIVY COUNCIL. — 18 C. 164 (P.C.) = 17 I.A. 201 = 5 Sar. P.C.J. 507.

a four-anna share of the twelve annas and a room in the house at Sahebgunge to Hossein Ali to secure Rs. 8,000 and interest thereon. Then [167] followed a mortgage of 29th July 1873 to Arshad Ali by the two brothers and Hosseini of two annas of the sixteen annas of Sirdilla; and this was part of the title made by Zahur Fatima to her interest in the two annas. It was referred to, in their Lordships' judgment, as the mortgage bond marked B2.

Other mortgages followed; some to Arshad Ali, and others to Sheochurn Lal, the interests in all of which came by assignment to the plaintiff. Arshad Ali having died, his widow, Akhtar Fatima, became solely entitled to his rights as mortgagee, which she exercised by suing the mortgagors on the mortgage of 29th July 1873, and she obtained an *ex parte* decree on 23rd June 1875, with an order for the sale of the mortgaged property. Zahur Fatima, the present respondent, inherited the rights of Akhtar; and it was as to the effect of the sale under this decree that arose one of the differences of opinion between the Court of first instance and the High Court. A series of mortgages, direct to the plaintiff, came after that decree, and on the 15th September 1876, the brothers and Hosseini mortgaged to him for Rs. 4,000, to be repaid in 1878, the whole sixteen annas of their family interest in Sirdilla. Also on the 16th March, 14th August and 26th September 1877, similar mortgages to the plaintiff were executed by them; the whole of the twelve annas share in Sirdilla, subject to the mortgages thereon, having become vested in the latter, after the death of Sultan Ali on the 29th April 1879.

As to these incumbrances, the following was stated in the judgment of the First Court:—"There were in all twenty-six mortgages of the whole, or part, of the Sirdilla estate between the 15th December 1874 and the 25th February 1879. Of these thirteen were to the plaintiff direct, and seven to the mahajun, Sheochurn Lal. The plaintiff thus became the assignee, by purchase, of all the bonds of Sheochurn Lal, and was thus the holder of twenty mortgages on the estate subsequent to the mortgages to Mahomed Hossein Khan and Arshad Ali. On the 24th September 1880, plaintiff also became the assignee of a bond, dated 19th March 1874, by purchase from an heir of Arshad Ali. Of the remaining bonds, one was given to Lalan, mortgaging a one anna share; one to Gonesh Lal, defendant No. 5, mortgaging two annas; one to Iswardyal, mortgaging a one anna share; one to Zahur Fatima, [168] one to Asgur Ali Khan, defendant No. 6, and one to Mahomed Hakh, defendant No. 7, each mortgaging a one-anna share."

On the following dates the plaintiff became transferee of the undermentioned, *viz.*, on 15th April 1879, a three-annas share; 15th September 1879, a two annas share; 17th July 1879, a one-anna share; 15th July 1880, whole interest of Farzand Ali not transferred at previous sales; 15th July 1881, the share of Farhat Ali inherited from his father Sultan Ali; and 15th July 1881, the share of Farzand Ali inherited from his father, with the exception of seventeen dams, excluded on the objection of Zahur Fatima. The other purchasers were—15th May 1879, Moulvi Fazlul Bari, two annas; 15th December 1879, Zahur Fatima, three annas; 15th May 1880, seventeen dams of the inherited share of Farzand Ali, as to which arose the above questions of construction and priority; 15th May 1880, the entire house at Sahebgunge; 15th May 1880, defendants Nos. 8 and 9, one-anna share; 15th March 1880, defendant No. 7, one-anna share.

The question relating to the seventeen dams contested on this appeal being originally half the share granted in mokarari by Sultan Ali to his wife Amani, arose thus. The respondent, Zahur having obtained a decree against Farzand Ali alone on the mortgage which had been executed to her by Farzand Ali alone on the 18th July 1878, which was in the lifetime of Sultan Ali, of a one-anna share of Sirdilla, caused the attachment and sale, not only of that one anna, but also of the seventeen dams, the moiety of the proprietary interest which had been retained by Sultan Ali, and which had descended on his death to Farzand Ali. The respondent also brought to sale the entire house at Sahebgunge. At this sale she became the purchaser of the interest of the judgment-debtor in those seventeen dams.

1890 JULY 19. — PRIVY COUNCIL. — 18 C. 164 (P.C.) = 17 I.A. 201 = 5 Sar. P.C.J. 507.

Iswardyal, who was one of those who afterwards assigned his interests to the appellant, obtained a mortgage, on the 27th March 1878, from Farzand Ali, of one anna out of sixteen annas of the family estate in Sirdilla to secure repayment of Rs. 500 with interest. On the 14th April 1879, a few days before Sultan Ali died, Iswardyal applied for execution of a decree upon this mortgage against one anna mortgaged, and against another seven annas, the interest of the debtor which was not mortgaged, *i.e.*, in **[169]** all the moiety of the family share in Sirdilla, which Iswardyal by his application alleged to belong to Farzand Ali. Attachment issued, accordingly, after the 23rd April, when the report of the office was made, but it did not show whether this was before or after the death of Sultan Ali. The sale took place on 17th July 1879 after his death, and Iswardyal became the purchaser of the whole interest so attached and sold, including the seventeen dams in dispute. This was found by the High Court in concurrence with the first Court. The interest so acquired was sold by Iswardyal afterwards to the plaintiff, who claimed against Zahur Fatima under this title.

The other question as to which the Courts differed arose thus. As has been stated, on the 29th July 1873 the two brothers and Hosseini mortgaged two annas of the entire sixteen annas of Sirdilla together with one room of the house in Sahebgunge to Arshad Ali, the interest in which passed on Arshad Ali's death to his widow, Akhtar Fatima, who obtained a decree on the 23rd June 1875 against the mortgagees for sale of the mortgaged share, the interest in which decree on the death of Akhtar Fatima passed to the respondent, Zahur Fatima, as her heiress. The latter took out execution of this decree, and caused the sale by the Court on the 15th December 1879 of what was described in the execution proceedings as "two annas out of sixteen annas of Sirdilla belonging to the debtors."

The description by number and amount of revenue in the Collectorate books was the same as that of the twelve annas estate. A question arose as to whether Zahur Fatima had purchased two annas of Sirdilla as a whole, or only a two-anna share of the twelve-anna share; as well as a question in regard to the effect of her purchase of either of these fractional parts, whichever it might have been.

The first Court, as to the whole case, was of opinion that any one who was entitled to an equity of redemption had a right to redeem, so as to have his own interest released from the mortgage, on payment of the mortgage debt; that the mortgagor by mortgaging the property to second mortgagees, made them his assigns, and as between him and them, the latter had the preferable right to redeem; that if there were several

1890 JULY 19. — PRIVY COUNCIL. — 18 C. 164 (P.C.) = 17 I.A. 201 = 5 Sar. P.C.J. 507.

successive mortgagees, the right [170] of a prior incumbrancer to redeem was preferable to that of a subsequent one; and that, where the plaintiff had only a partial interest, a decree had to be made, reserving the equities of the other persons interested. In applying these principles to this case, the first Court held that, so far as the prior mortgage was concerned, the execution purchaser stood exactly in the position of the prior mortgagee; so far, also, as regards the subsequent incumbrancer's right to redeem. The first Court was not of opinion that the subsequent incumbrancer's right of redemption was liable to be defeated by the circumstance that, although aware of the sale about to take place in realization of the prior mortgage debt, he had neglected to come in and redeem by paying up the amount of the judgment-debt. It was the main argument on behalf of the defendant, Zahur Fatima, that the plaintiff should have done so. But this the first Court did not allow to prevail.

It found that Akhtar Fatima and Zahur Fatima had actual notice of the plaintiff's mortgages. But it held that this did not affect the question, which was governed by the following consideration, *viz.*, that whenever a mortgage lien passed over to a purchaser in execution of a decree against a mortgagor, it passed over subject to the same equities as against the purchaser, to which the mortgagee himself was subject. That being so, the purchaser was obliged to take it as liable to the contingency of redemption by persons holding outstanding interests in the equity of redemption. Neither could he claim a greater interest in the equity of redemption than that held by the judgment-debtor. Upon the first of the questions now in dispute, *viz.*, as to the seventeen dams, the first Court held that the plaintiff's purchase was prior to that of Zahur Fatima, and his title was better than her's. Upon the second question, *viz.*, as to what was acquired by the mortgagee of the two-annas share, the first Court held that as assignee of the mortgages of the 17th March 1874, of the 11th May 1875, and of the 4th June 1875, by which each brother mortgaged his entire share; also by the effect of the two mortgages of the 15th May by which the shares of Sirdilla (as well as the house in Sahebgunge) were mortgaged to Sheochurn Lal; also under the mortgages by which the two brothers and Hosseini had mortgaged to the plaintiff the entire family share, the plaintiff [171] was a puisne mortgagee of the two annas purchased by the respondent. The mortgage of the house in Sahebgunge was held to be a valid one, and "to confer the legal consequences resulting therefrom."

Having decided that the plaintiff was entitled to redeem, the first Court held that an order for sale should be substituted, that being the usual practice when the mortgagor did not appear to pay off incumbrances, the net proceeds of the sale being ordered to be divided among them according to their priority. It was added that the following directions should be observed in taking the accounts:—

(1)—Parties deriving title under an execution sale will be allowed a lien on the property hypothecated in the bond, and purchased in execution of the decree on that bond. There is no lien in respect of property of the debtor, other than that pledged in the bond, purchased in the execution of the decree.

(2)—The lien so allowed will only be for the amount of the mortgage debt for which the property was sold. For this purpose it is quite immaterial whether the purchase-money fell short of, or was in excess of, the amount of the judgment-debt. In either case, the purchaser acquired the judgment-creditor's mortgage lien together with the debtor's interest

in the equity of redemption. A portion of the price paid would represent the value of the latter; the purchaser has no lien for it, but as a proprietor to that extent he will have the right to share in the surplus sale-proceeds after paying off all incumbrances. The lien here allowed to the auction-purchaser is only on so much of the sale-proceeds as represent the mortgaged share.

1890 JULY 19. — PRIVY COUNCIL. — 18 C. 164 (P.C.) = 17 I.A. 201 = 5 Sar. P.C.J. 507.

(3)—Where the party has been in possession of his purchased share of the estate, he is not entitled to interest on the amount secured by his lien, it being presumed that the mesne profits are a fair equivalent for further interest. Where the party has not been in possession, interest on the amount secured by the lien, is only to be allowed at 6 per cent. per annum from date of purchase.

(4)—With respect to bonds now sued upon for the first time, interest will be allowed on the secured debt at the rate stipulated in the bond down to date of suit, and from that date to sale at 6 per cent. per annum.

[172] The decree that followed, dated 17th September 1883, directed a sale of the entire estate, free of all incumbrances. The upset price to be fixed at a sum equal to the aggregate amounts of the purchase-money paid by defendants, Fazlul Bari and Zahur Fatima, being the value of their proprietary right and mortgage liens, but without interest, they having been in possession of their shares, plus costs of suit and costs of sale. Both parties to have liberty to buy at the sale, of which the proceeds were to be applied in discharge of the incumbrances found by the accounts in order of their priority. Any surplus to go to the proprietors in the proportion of their shares. Of the seventeen dams, the right and possession of the plaintiff were maintained against Zahur, whose purchase was declared invalid. The purchase by the plaintiff of the two-anna share on the 15th April 1879, was confirmed, and he was declared entitled to a lien on the property, mortgaged in fourteen bonds, with interest. The decree directed the taking of accounts, stating the order in which charges were to be paid with regard to the above judgment.

The High Court (PRINSEP and GRANT, JJ.) holding it to be settled law that all puisne incumbrances at the time of the institution of a suit on a prior mortgage, to enforce payment by sale of the mortgaged property, are entitled to redeem in a proceeding to which they are properly made parties, adverted to the fact that the plaintiff, claiming to be a puisne incumbrancer at the time of Zahur Fatima's suit, decreed in 1875, was no party thereto. He could, therefore, in the present suit, claim the right to redeem that mortgage, or to have the property sold. But they were of opinion that although the plaintiff had a valid mortgage of Sultan Ali's entire share, which the plaintiff was entitled to insist upon, in the hands of the mortgagors, the respondent could make out her title thus. She was entitled, notwithstanding the above, as a *bona fide* purchaser for valuable consideration without notice of the appellant's mortgage over the seventeen dams; and thus she had a title superior to that of the plaintiff. The High Court, therefore, dismissed the suit as to the seventeen dams. It dealt with the two annas' share in the same way, holding that the plaintiff had not satisfactorily shown that this share had been included in the earlier mortgages assigned to him, under which he claimed.

[173] In other respects, the judgment of the first Court was affirmed, and the decree for the sale remained, except so far as it affected the

1890 JULY 19. — PRIVY COUNCIL. — 18 C. 164 (P.C.) = 17 I.A. 201 = 5 Sar. P.C.J. 507.

seventeen dams, and the two annas' shares of the twelve annas of Sirdilla as to which it was reversed.

The plaintiff having appealed on the points on which the judgment of the High Court had been adverse to him—

Mr. *R. V. Doyne* for the appellant, argued that the High Court should not have varied the decree of the first Court. The sale of the house at Sahebgunge had, however, been omitted from the decree, and should be ordered. This had been pointed out in the cross-objections filed by the plaintiff in the High Court. In regard to the seventeen dams share, the first Court was right in holding that the plaintiff has the prior and better title. On the proper construction of the deed of 26th January 1871, the interest of Farzand Ali was a definite one, and on Sultan Ali's death without addition to his family, became vested in the judgment-debtors beyond the possibility of displacement. He referred to s. 266 of the Civil Procedure Code, 1877 and 1882. The sale was after Sultan Ali's death, and passed the whole interest that had become vested in Farzand. Even if the plaintiff had not been entitled as a prior purchaser, his suit should not on that account have been dismissed as to the seventeen dams. He was at least entitled to treat Zahur Fatima as a mortgagee, and to redeem, or to have the seventeen dams sold, with distribution of the proceeds according to the several priorities of the incumbrancers. That was so, on the understanding that the Courts were correct in ordering a sale, but as to this it might be doubted whether redemption was not the only proceeding which should have been directed. As regards the other question upon which the Courts had differed, the first Court was right in holding that the plaintiff was a mortgagee, both directly and by assignment, of the two annas share, and of the room mortgaged therewith.

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the respondent Zahur Fatima, argued that the High Court had rightly reversed so much of the judgment of the first Court as related to the seventeen dams share, which had erroneously decided that the burden of proof that this share had not been attached, and had not been sold in execution of Iswardal's decree, was on **[174]** Zahur Fatima. The first Court ought to have held that the seventeen dams in question were neither attached nor sold to the plaintiff. The purchase by Zahur was proved, and took place without notice of any claim by the plaintiff. His claim, in fact, was an afterthought, and was not made till 1882, after the sale to the respondent Zahur had taken place. The seventeen dams had not been included in the property attached, the judgment-debtor not having had any definite interest, but only an expectancy, not legally liable to attachment. Not having been attached, the seventeen dams were not affected by the death of Sultan Ali between the date of the attachment and the sale. Extension of his interest happening to Farhut on this event would not alter the effect of the previous attachment. The claim to redeem set up was supported only by analogies taken from the English law of mortgage. But the Indian law, founded on the legislation of 1806, differed from the English in this respect. The sale which took place in 1879 had the effect of shutting out the mortgagees, who at that time had notice and stood by. On the other hand, Zahur Fatima was a *bona fide* purchaser without notice, and as against her the plaintiff had no right in respect of the mortgage under which he claimed. This applied to the conflicting interest put forward in respect of the two-annas share. The plaintiff had notice of the sale at which Zahur Fatima bought, and

1890 JULY 19. PRIVY COUNCIL. 18 C. 164 (P.C.)= 17 I.A. 201= 5 Sar. P.C.J. 507.

she was led to believe that she purchased the two-annas share. Reference was made to—*Brajaraj Kissori Dasi* v. *Mohammed Salem* (1); *Lutf Ali Khan* v. *Futteh Bahadur* (2); *Shringanpure* v. *Pethe* (3); *Kasandas Laldas* v. *Pranjivan Asharam* (4); *Sheo Prosun Singh* v. *Brojoo Shaha* (5); *Balwant Singh* v. *Gokaran Prasad* (6); *Rajnarain Singh* v. *Sheera Mean* (7); *Emam Momtazoodeen Mahomed* v. *Rajcoomar Dass* (8); *Gupinath Singh* v. *Shai Sahai Singh* (9).

Mr. *B. V. Doyne* replied.

[175] Their Lordships' judgment was delivered on a subsequent day (19th July 1890), (a brief statement of their opinion having been given at the conclusion of the arguments of counsel) by

JUDGMENT.

LORD HOBHOUSE.—Their Lordships are of opinion that the house in Sahebgunge should be included in the direction to sell, and they will now express their opinion as to the question of the seventeen dams of property as to which the plaintiff and the defendant Zahur each claims to be the absolute owner. The question is who acquired the ownership first in point of time. The plaintiff's claim depends on his purchase of the 17th July, completed on the 22nd September 1879. If that is a valid purchase, it is prior to the purchase of the defendant, which did not take place till the year 1881; and the plaintiff is entitled to that share of the property.

The purchase took place under these circumstances. On the 14th April 1879 one Iswardyal, who for this purpose is identical with the plaintiff, having got a decree on a mortgage, applied to enforce it by attachment and "sale of the immoveable properties owned by the judgment-debtor" (the judgment-debtor being Farzand Ali, the mortgagee), "as specified in the inventory mentioned below." The inventory mentioned below specifies 1 anna out of sixteen annas of mouza Sirdilla, the property mortgaged in the bond; and also seven annas out of sixteen annas of Sirdilla owned by the judgment-debtor, which was property not mortgaged in the bond. That application includes eight annas of the family property. Eight annas was a larger share than Farzand Ali was actually entitled to, because he and his brother held equal shares in the property, and their sister-in-law Hosseini had a share also; but the circumstance that the description of the property includes more than the judgment-debtor was actually entitled to would not tend to exclude the seventeen dams in question from that description.

The sale took place, and the certificate was granted on 22nd September 1879, and it is there certified that the decree-holder has been declared as the purchaser of the judgment-debtor's right in one anna out of sixteen annas which was mortgaged, and so forth, and by another certificate there is a similar declaration as to the seven annas. So that it is quite clear that the intention was [176] to attach and to sell whatever right and interest the judgment-debtor Farzand had in the eight annas of the property. The question is, what interest had he as regards these seventeen dams. That depends upon the construction of the deed of the 26th January 1871. In that deed there may be some obscurity as to the

(1) 1 B.L.R. A.C. 152.
(2) 16 I.A. 129=17 C. 23.
(3) 2 B. 662.
(4) 7 B H.C.A.C. 146.
(5) 7 W.R. 232.
(6) 1 A. 433.
(7) 7 W.R. 67.
(8) 14 B.L.R. 408.
(9) B.L.R. Sup. Vol. 72=1 W.R. 315.

1890 JULY 19. — PRIVY COUNCIL. — 18 C. 164 (P.C.) = 17 I.A. 201 = 5 Sar. P.C.J. 507.

exact interest that the children of Sultan Ali and his wife Amani Begum were to take, but as applied to the events that have happened there is no obscurity about it. Sultan Ali, the then owner of one anna and fourteen dams, grants that share in mokurari farm to his wife, Amani Begum on this condition, that if she has a child by him the grant shall be taken as a perpetual mokurari. Whether descendible to children or taken by children in remainder does not matter now (the deed is rather obscure on that point), but it is to go to the child of Sultan Ali and Amani Begum in perpetual inheritance. In case of no child being born then it is only to be a life-mokurari, and after the death of Amani Begum the property is to come to the possession of the settler's two sons Farzand and Farhut. There is to be paid the Government revenue on the share of the estate and one rupee to the settler. At the time of the attachment Sultan Ali was still living, and at all events in contemplation of law there might be a child to take; but the deed confers upon the sons Farzand and Farhut a definite interest, like what we should call in English law a vested remainder, only that it was liable to be displaced by the event of there being a son of Sultan Ali by Amani Begum. Between the attachment and the sale—very soon after the attachment—Sultan Ali died, and then the contingency, such as it was, was entirely put an end to. It is quite true the parties might not know whether Amani Begum was with child by Sultan Ali or not, but the fact was determined at that time, and there was no longer any contingency in the eye of the law. It does not, in their Lordships' view, very much signify whether Sultan Ali was alive or dead at the time of the sale, but they wish to guard themselves against being supposed to concur in an argument that was presented at the bar, to the effect that if between the time of attachment and the time of sale events should happen which would have the effect of accelerating or enlarging the interest of the judgment-debtor as it stood at the time of attachment, that [177] augmented interest would not pass by the sale which purports to convey all that the judgment-debtor has at the time. But taking the case most strongly against the plaintiff, supposing that he could get nothing but that which was capable of attachment, and was actually attached on 14th April 1879, their Lordships hold that this interest in remainder is a property which was capable of being attached, and which was intended to be attached. It is said that by s. 266 this property was not liable to attachment, because it is there provided that:—"The following particulars shall not be liable in attachment;" and among them is:—"an expectancy in succession, by survivorship or other merely contingent or possible right or interest." It seems to their Lordships that in all probability the High Court, who held that the seventeen dams were not attached, must have had this section in their view, though they do not refer to it, because they treat the case as if the two sons had no interest during the life of their father, but as if, upon the father's death, they inherited the property from him. But that is not the case, excepting as regards the one rupee which for this purpose may be thrown out of consideration altogether. Except as regards that one rupee they inherited nothing from him. He had in his lifetime parted with the whole property, either to Amani Begum his wife and her children by him, or to his two sons. That interest given to the two sons appears to their Lordships not to fall within the description of an expectancy or of a merely contingent or possible right or interest. Their Lordships therefore hold that as regards the seventeen dams the plaintiff has the priority, and that the decree of the High Court is erroneous to that extent.

The next question, on which also the Courts below have differed, is whether the plaintiff has a right to treat the defendant Zahur as being only a mortgagee of the share of the property which was purchased by her in execution, and on that footing to redeem her mortgage. The District Judge thought that the plaintiff had that right, and gave him a decree accordingly. The High Court thought otherwise, and varied the decree by dismissing the plaintiff's suit so far as regards the two annas in question.

1890 JULY 19. — PRIVY COUNCIL. — 18 C. 164 (P.C.) = 17 I.A. 201 = 5 Sar. P.C.J. 507.

By the mortgage bond marked B2, dated the 29th July 1873, Farzand Ali, who owned four annas of Sirdilla, Farhut his brother, who owned four annas, and Hosseini their cousin, who owned about [178] two annas four dams, mortgaged two annas of the whole mouza to Arshad Ali, the predecessor in title of Zahur, to secure Rs. 2,000 with interest at 24 per cent.

On the 26th May 1875, the then owner of the mortgage brought a suit against the three mortgagors, and obtained a decree on the 23rd of June 1875. The decree was for "the amount of the suit" with costs and interest for the period of pendency of the suit, and for future interest at the rate of Rs. 6 per cent. per annum, and for sale of the mortgaged property.

The decree was not executed till the 15th December 1879, when the property described as two annas of Kushba Jurra was put up for sale to realize Rs. 3, 582-5-1 the decretal amount, and was purchased by Zahur, who then owned the mortgage, for Rs. 4, 700.

Between the date of Zahur's mortgage and the suit brought to realize it, five other mortgages were executed, two by the three mortgagors, two by Farzand and Farhut, and one by Farhut alone, each mortgaging undivided shares (not further identified) in Sirdilla; and four of these mortgages became vested in the plaintiff. Afterwards a number of other mortgage-deeds were executed, some by one of the owners of Sirdilla, some by another, making altogether about 30 mortgages of undivided shares, most of which became vested in the plaintiff.

In deciding that the plaintiff had become mortgagee of the property comprised in Zahur's mortgage, and was therefore entitled to redeem her, the District Judge allowed no distinction between the mortgages prior to the suit of the 26th May 1875 and those subsequent to it, or those subsequent to the decree of the 23rd June 1875. He appears to think that because at any time before actual sale the mortgagor himself and anybody to whom he may have transferred the property can come in and redeem the property by paying the debt, therefore it follows that after sale the mortgagor's transferee, if not a party to the proceedings, can do the same thing. But if the transfer took place *pendente lite*, the transferee must take his interest subject to the incidents of the suit; and one of those is that a purchaser under the decree will get a good title against all persons whom the suit binds.

Their Lordships think that the High Court were right to confine their attention to the mortgages made prior to Zahur's suit, [179] for the purpose of deciding whether the plaintiff is entitled to redeem Zahur. But the High Court thought that it was necessary for the plaintiff to show that the whole of the two annas comprised in Zahur's mortgage passed under the subsequent mortgages to the plaintiff, and calculations of great nicety have been entered into for the purpose of showing that the whole did not pass. Their Lordships do not follow the calculations, because

1890 JULY 19. — PRIVY COUNCIL. — 16 C. 164 (P.C.) = 17 I.A. 201 = 5 Sar. P.C.J. 507.

they are founded on an erroneous view. After effecting the joint mortgage, each of the three mortgagors had a right to redeem the mortgage, and each could transfer his interest, and with it that right. And it is sufficient to say that by mortgage B7, dated the 11th May 1875, Farhut transferred to the plaintiff's predecessor in title a share in the property which he had not got without taking in his share comprised in Zahur's mortgage. Probably by earlier mortgages, certainly by that mortgage, the right to redeem Zahur in a properly constituted suit was acquired; and it has never been lost, because the plaintiff was no party to Zahur's suit.

It was indeed argued by Mr. Mayne that the sale in 1879 had the effect of shutting out all puisne incumbrances. But their Lordships consider that the right view on this point has been taken in both the Courts below. Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties.

Mr. Doyne then contends that the decree is wrong in directing a sale of the whole property, and leaving the rights of the parties to be worked out against the purchase-money, and he claims to treat the suit as a redemption suit. To this it is sufficient to answer that the plaint asks for a sale, and that the plaintiff has not till the hearing of this appeal suggested that the Court should deal with the property in any other way. The decree is right in ordering a sale, and the respective rights of the plaintiff and Zahur in the purchase money must be adjusted on the footing that the plaintiff has the right to redeem Zahur's two annas.

Next comes the question on what terms the redemption is to be made. The District Judge has laid down certain rules to guide the course of the accounts. One of them (No. 3) is that a possession **[180]** of a mortgage shall be taken as equivalent to interest. This rule, which appears to be just and convenient, and is not objected to by either party, will relieve Zahur from giving an account of her receipts, and will deprive her of interests, from some time in the year 1880, when it appears that she took possession. Under rules 1 and 2 she will be entitled to a lien on the property mortgaged to her for the amount of the mortgage debt for which the property was sold, without regard to the amount paid by her on the purchase. But nothing is said as to the amount of interest to which she is entitled prior to her possession, probably on the ground that possession was given to her immediately after the sale. And the question has been discussed at the bar to what rate of interest she is entitled. Their Lordships suppose that up to the date of the decree of the 23rd June 1875, interest was computed according to the rate allowed by the mortgage deed, *viz.*, 24 per cent. After that date the decree gives interest at 6 per cent.

The Court's power to regulate interest is given by s. 10 of Act XXIII of 1861, which answers to the 209th section of the present Civil Procedure Code. That power is given when a plaintiff sues for money due to him, and it is a discretionary power to give such rate as the Court may think proper by decree. The decree can only operate between the parties to the suit, and those who claim under them. The plaintiff getting the security of a decree has his interest reduced in the generality of cases. But the plaintiff in this case comes to take away from Zahur the benefit of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of it. His case is, that as to him Zahur is still but a mortgagee, and if so, she should be allowed such benefit as her mortgage gives her. If Zahur had not got a decree, and the plaintiff had come to redeem her mortgage, he must have

paid whatever interest her contract entitled her to, and the Court would have had no jurisdiction to cut it down; and that is the position in which the parties are placed by the decree in this suit. There is a penal rate of interest (120 per cent.) imposed by the mortgage, but it is clear that in 1875 that was not claimed. Nor do their Lordships conceive that it can now be claimed. Setting that aside, the justice of the case demands that Zahur should be able to claim such interest as her [181] contract gives her, up to the time when she took possession of the mortgaged property.

1890 JULY 19. — PRIVY COUNCIL. — 18 C. 164 (P.C.) = 17 I.A. 201 = 5 Sar. P.C.J. 507.

Supposing the redemption effected by the plaintiff, what is Zahur's position? She was mortgagee of the two-annas of the old mouza Sirdilla or Jurra, the touzi number of which was 1013, and the sudder jumma Rs. 797. She then purchased the ownership, subject to the plaintiff's mortgage or mortgages, of two-annas of Kusba Jurra, which bears another touzi number and a smaller sudder jumma, and which was formed out of twelve-annas of the former mouza Sirdilla or Jurra, belonging to the family of the mortgagors. She has therefore a right to redeem the plaintiff as regards these two-annas, on paying such sum as he can properly claim against them in respect of the four mortgages effected prior to the 26th of May 1875. What that sum may be it is impossible to tell on the present materials, but it can and should be ascertained by inquiry, and a reasonable time should be allowed to Zahur to elect whether or no she will redeem.

Their Lordships will humbly advise Her Majesty to discharge the order of the High Court passed on the 10th September 1885, and instead thereof to order as follows:—

Declare that the plaintiff is entitled to redeem the mortgage of the 29th July 1873 upon payment to Zahur of the principal and interest moneys secured thereby, reckoning interest at the rate of 24 per cent. per annum up to the day on which possession of the mortgaged property was awarded in execution to Zahur, and no later.

Declare that if the plaintiff exercises such right of redemption, then on payment by Zahur to him of all moneys paid by him for redemption of the mortgage of the 29th July 1873, and of such costs of this suit, including the costs of the appeal to the High Court, and of this appeal, as are properly chargeable on the property comprised therein, and of all other moneys, if any, which are due to him on the security of the property comprised in the mortgage of the 29th July 1873 in respect of the other mortgages which were effected prior to the 26th May 1875, and which afterwards became vested in him, Zahur is entitled to redeem the share of Kusba Jurra which was purchased by her under the decree of the [182] 23rd June 1875, and possession of which was awarded in execution to her by the Court in the same suit.

Let the Court make such inquiries and take such accounts as are proper for carrying the above declarations into effect, and fix reasonable periods of time within which the plaintiff and Zahur respectively shall exercise the rights of redemption hereby declared to belong to them.

Declare that if the plaintiff and Zahur respectively do not exercise their rights of redemption within such time as the Court by its final order in that behalf may direct, they shall respectively be foreclosed and debarred from all right of redemption.

In all other respects let the decree of the 17th September 1883 stand affirmed.

1890 JULY 19. — PRIVY COUNCIL. — 18 C. 164 (P.C.) = 17 I.A. 201 = 5 Sar. P.C.J. 507.

Order Zahur to pay to the plaintiff the cost of the appeal to the High Court. Zahur must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Wrentmore & Swinhoe.*
Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

---

18 C. 182.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Ghose.

KISHEN PERSHAD PANDAY (*Petitioner*) *v.* TILUCKDHARI LALL AND OTHERS (*Opposite-party*).* [15th August, 1890.]

Appeal—Letters Patent, cl. 15—*Appeal from order of Judge in Privy Council Department refusing to extend time for furnishing security for costs—" Judgment," meaning of—Rule* 33, *Rules of* 1st *September* 1877—*Code of Civil Procedure* (*Act XIV of* 1882), s. 602.

No appeal will lie from an order of a Judge in the Privy Council Department refusing to extend the time prescribed by law within which an appellant is required to furnish security for the costs of the respondent, and directing the appeal to be struck off by reason of such security not having been given within the prescribed time.

Such an order is not a "judgment" within the meaning of cl. 15 of the Letters Patent of 1865.

[183] *Held*, upon a review of the authorities, that where an order decides finally any question at issue in the case or the rights of any of the parties to the suit, it is a "judgment," under cl. 15 of the Letters Patent, and is appealable, but not otherwise.

[R., 17 A. 438 (441) = 17 A.W.N. 89; 22 C. 928 (929); 33 C. 1323 = 10 C.W.N. 986 (989); 35 M. 1 (18) = 8 Ind Cas. 340 = 21 M.L.J. 1 (18) = 8 M.L.T. 453; 1 O.C. 205 (209) (B).**]**

THIS was an appeal under cl. 15 of the Letters Patent of 1865 against an order of Mr. Justice Macpherson, sitting in the Privy Council Department. The order appealed from was as follows:—

"In this case the security bond was admittedly filed some days after the expiry of the time specified in s. 602 of the Civil Procedure Code, and rule 33 of the Rules of this Court, dated the 1st September 1877. I have undoubtedly the power, upon good and sufficient cause being shown, to extend the time; but in the present case no reasonable cause has been shown. There is no affidavit, and there is nothing but a bare statement on the part of the appellant of ignorance or misconception, regarding a rule which has been in existence since 1877. Under these circumstances I cannot hold that any reason for extending the time has been shown. The application for leave to appeal to Her Majesty in Council must therefore be struck off the file."

Rule 33 corresponds with r. 244 of Belchambers' Rules and Orders (p. 433).

Baboo *Mohini Mohun Roy*, for Baboo *Nil Kant Sahai*, appeared for the appellant.

---

* Letters Patent Appeal in Privy Council Appeal No. 9 of 1889, against the order of Mr. Justice Macpherson, dated the 4th of December 1889.

Mr. *Pugh* (with him Baboo *Durga Mohun Das* and Baboo *Tarruck Nath Palit*) appeared for the respondents. 1890 AUG. 15.

At the hearing a preliminary objection was taken by Mr. *Pugh* on behalf of the respondents that no appeal would lie under cl. 15 of the Letters Patent. The Judgment of the Court (PETHERAM, C. J. and GHOSE, J.) was delivered by :— APPELLATE CIVIL.

18 C. 182.

JUDGMENT.

GHOSE, J.—This is an appeal under cl. 15 of the Letters Patent from an order passed by Mr. Justice Macpherson sitting in the Privy Council Appeal Department, refusing to extend the time prescribed by law within which an appellant is required to furnish security for the costs of the respondent, and directing that the appeal to Her Majesty in Council be struck off the file, by reason of such security not having been given within the prescribed time.

[184] A preliminary objection is raised on behalf of the respondent to the effect that no appeal lies under cl. 15 of the Letters Patent against the order complained of.

Clause 15 of the Letters Patent is as follows :—"And we do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal, from the judgment, not being a sentence or order passed or made in any criminal trial of one Judge of the said High Court, or of one Judge of any Divisional Court, pursuant to s. 13 of the said recited Act, and that an appeal shall also lie to the said High Court," and so on.

The question which we have to consider is, whether the order passed by Mr. Justice Macpherson is a "judgment" within the meaning of cl. 15 of the Letters Patent.

The question as to the true construction of this clause has frequently been both before this Court and the Judicial Committee of the Privy Council. In the case of the *Justices of the Peace for Calcutta* v. *Oriental Gas Company* (1), Sir Richard Couch, the then Chief Justice, sitting with Mr. Justice Markby, expressed himself as follows :—"We think that 'judgment' in cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary or interlocutory ; the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

Then in a subsequent case, *Kalisunderi Debi* v. *Hurris Chunder Chowdhry* (2), another Division Bench of this Court, in construing the same section with reference to an order made by Mr. Justice Pontifex refusing to transmit an order of the Privy Council to the lower Court for execution, because, in his opinion, the person applying for execution of the decree was not entitled to execute it, held that Mr. Justice Pontifex had exercised a judicial discretion, and had come to a decision that the applicant was not entitled to execute the decree, and that therefore the order passed by him was a "judgment" within the meaning of cl. 15 of the Letters Patent.

[185] The principle followed in this case was approved of by the Privy Council in *Hurrish Chunder Chowdhry* v. *Kalisunderi Debi* (3). Their Lordships observe as follows (p. 493) :—"Those learned Judges,"

(1) 8 B. L. R. 433 (452). (2) 6 C. 594. (3) 9 C. 482.

1890 AUG. 15. — APPELLATE CIVIL. — 18 C. 182.

namely, Mr. Justice White and Mr. Justice Mitter, "held (and their Lordships think rightly) that, whether the transmission of an order under s. 610 would or would not be a merely ministerial proceeding. Mr. Justice Pontifex had in fact exercised a judicial discretion, and had come to a decision of great importance, which, if it remained, would entirely conclude any rights of Kalisunderi to an execution in this suit."

In the case of *Manly* v. *Patterson* (1) it has been held (Garth, C.J. and McDonell, J.) that no appeal lies to this Court under cl. 15 against an order of the Judge in the Privy Council Department, refusing an application for leave to appeal to the Privy Council.

And in the recent case of *Lootf Ali Khan* v. *Asgur Reza* (2), where the question was whether an appeal lay against an order of a Judge granting a certificate to the effect that the case was a fit and proper one for appeal to the Privy Council, the learned Judges (Wilson and Pigot, JJ.) before whom the appeal came on for hearing, held that there was no appeal under s. 15 ; and they observed, with reference to the case of *Kalisunderi Debi* v. *Hurrish Chunder Chowdhry* (3) which was quoted before them, as follows (p. 458) :—" That is a very different case from the present, where the order against which this appeal is brought is not one deciding finally or otherwise any question at issue in the case or the rights of any of the parties to the suit. It is merely a step taken to enable the parties to go before the Privy Council, and obtain from that tribunal a decision on the merits of the case."

The principle that is to be gathered from the cases which I have referred to is this, that where an order decides finally any question at issue in the case, or the rights of any of the parties to the suit, it is appealable to this Court, otherwise not.

Now, the order complained of in the present instance is to this effect, that the applicant has failed to show sufficient cause for **[186]** extending the time within which security is required to be furnished ; and therefore the application for leave to appeal should be struck off the file. It should be borne in mind that at the time when this order was made the appeal had not been admitted, but only a certificate had been granted to the applicant, that the case was a fit one for appeal to Her Majesty in Council. The applicant was bound under s. 602 of the Code of Civil Procedure to furnish security within six weeks from the date of such certificate. He failed to do so, and he failed to satisfy the Judge in the Privy Council Department that there was sufficient reason for extending the time in his favour. The learned Judge in these circumstances was not in a position to allow any further proceedings being taken in the matter. He was not in a position to declare under the provisions of s. 603 of the Code of Civil Procedure, that the appeal be admitted; and we think that, practically, he had no other alternative left to him than to direct that the application be removed from the file—for that is what the order really amounts to. It is an order which would follow as a matter of course upon the order he had made refusing to extend the time for furnishing security. We think that this order does not determine any question of right between the parties to the suit, and is not a "judgment" within the meaning of s. 15 of the Letters Patent. It follows, therefore, that no appeal lies to this Court ; and, accordingly, we reject this appeal with costs

Appeal dismissed.

A. A. C.

(1) 7 C. 339. (2) 17 C. 455. (3) 6 C. 594=9 C. 482.

18 C. 186.

1890 OCT. 14.

CRIMINAL REFERENCE. 18 C. 186.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Wilson.

HIRAMAN DE *v.* RAM KUMAR AIN.* [14th October, 1890.]

Practice--Reference to High Court—District Magistrate, Competency of, to refer—Criminal Procedure Code (Act X of 1882), s. 438.

When a case has been decided by the Sessions Judge on appeal from a Sub-divisional Magistrate, the District Magistrate should not refer the case to the High Court on the ground that the Sub-divisional Magistrate acted [187] without jurisdiction. If he desires to move in the matter, he should proceed through the Legal Remembrancer.

Observations of Straight, J., in *Queen-Empress* v. *Shere Singh*(1) referred to with approval.

[R., 11 Cr. L.J. 327 = 6 Ind. Cas. 358 = 8 M.L.T. 88.]

THIS was a reference by the District Magistrate of Mymensingh under s. 438 of the Code of Criminal Procedure. The accused was convicted by the Sub-divisional Magistrate of Netrokonah, under s. 448 of the Indian Penal Code, and sentenced to two months' rigorous imprisonment and a fine of Rs. 10. While in jail he appealed to the Sessions Judge, who summarily rejected the appeal. Another appeal appears then to have been filed through a pleader. That appeal was admitted and the Sessions Judge enlarged the prisoner on bail. A few days later the District Magistrate received a letter from the Sessions Judge, asking him to re-arrest the accused and commit him to jail, as the appeal had been rejected. The District Magistrate, however, considered that the sentence passed by the Sub-divisional Magistrate was without jurisdiction and illegal, and he accordingly enlarged the prisoner on bail and referred the matter to the High Court under s. 438 of the Criminal Procedure Code with a recommendation that the conviction should be quashed.

No one appeared on the reference.

JUDGMENT.

The judgment of the Court (PRINSEP and WILSON, JJ.) was delivered by

PRINSEP, J.—We decline to consider this reference as a Court of Revision. The Sessions Judge as the Court of Appeal has rejected the appeal, and the District Magistrate has afterwards, notwithstanding the finality of that order by a superior Court, raised the objection as to the jurisdiction of the Subordinate Magistrate. An objection in this form is not sustainable. If the District Magistrate is inclined to move further in the matter, he should proceed through the Legal Remembrancer.

We would direct his attention to the observations of Straight, J., in *Queen-Empress* v. *Shere Singh* (1).

The District Magistrate not being competent to refer such a case under s. 438 had no authority to admit the accused to bail. He should therefore be remitted to jail.

H. L. B.

---

* Criminal Reference No. 244 of 1890 made by A. T. Gupta, Esq., Magistrate of Mymensingh, dated the 12th of September 1890.

(1) 9 A. 362.

1890
SEP. 16.

APPEL-LATE CIVIL.

18 C. 188.

18 C. 188.

[188] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

KISHORY MOHUN ROY AND OTHERS (*Defendants*) v. MAHOMED MUJAFFAR HOSSEIN AND ANOTHER (*Plaintiffs*).* [16th September, 1890.]

Sale in execution of Decree—Effect on sale when confirmed, of the absence of attachment—Lis pendens—*Suit resulting in proceedings unexpected from its nature and the relief sought—Possibility of appeal—Compromise of suit*—Bona fide *purchaser without notice—Estoppel.*

After a sale has been confirmed and a sale-certificate granted to the purchaser, the sale is not to be considered as a nullity, merely by reason of the absence of any attachment. *Sharodo Moyee Burmonee* v. *Wooma Moyee Burmonee* (1) followed; *Mohadeo Dubey* v. *Bhola Nath Dichit* (2) dissented from.

The plaintiffs in execution of decree against the estate of the deceased husband of *A*, attached among others certain properties as to which *A* put in a petition of objections on 11th July 1872, claiming them as her own by right of purchase from her husband in lieu of her dower, and her claim was allowed, and the properties released from attachment on 28th December 1872. Subsequently in May 1873, *A* mortgaged the properties to *R*. An appeal was preferred (but whether before or after the mortgage to *R* was not clear) against the order of 28th December 1872, and the appeal was, on 30th May 1874, settled by a compromise between the plaintiffs and *A*, by which among other conditions time was granted to *A* to pay off the decree, and a 12-anna share of the properties claimed was released from attachment, the attachment being continued against the other 4-anna share: the order of the Court was simply that "the case be struck off." The decree not being satisfied, the plaintiffs took out execution, and the properties were put up for sale and purchased by the plaintiffs on 27th November 1882. Subsequently in execution of the decree *R* held against *A*. the properties were again put up for sale and purchased by *R* on 14th November 1884. In a suit against *R* and *A* for declaration of the plaintiffs' title and for possession of the properties, *Held*, that the order of the Court and the compromise in the claim suit were not such proceedings as from the nature of the suit and the relief prayed *R* could have expected would result, and that he was therefore not bound by them as [189] a purchaser *pendente lite*: *Kailash Chunder Ghose* v. *Ful Chand Jahari* (3); and *Kaseemunissa Bibee* v. *Nilratna Bose* (4) referred to. *Semble*, neither the possibility of an appeal nor the consent decree were proceedings by which *R* as a purchaser *pendente lite* would be bound. *Held* also, that, under the circumstances, *R* had a good title as *bona-fide* mortgagee and auction purchaser without notice, and that the plaintiffs were estopped from questioning that title. *Poresh Nath Mukherji* v. *Ananth Nath Deb* (5) followed.

[**Affirmed**, 22 C. 909 (**P.C.**) = 22 I.A. 129 = 6 Sar. P.C.J. 583 = 5 M.L.J. 101; **F.**, 21 C. 639 (641); **Rel.**, 28 C. 23 = 4 C.W.N. 740 (743); **R.**, 34 C. 787 = 11 C.W.N. 745 (750); 11 C.W.N. 756 = 5 C.L.J. 696; 34 M. 417 = 8 Ind. Cas. 429 = 21 M.L.J. 928 = 9 M.L.T. 152 = (1910) M.W.N. 662; 13 C.L.J. 243 (249) = 9 Ind. Cas. 918 (922); 17 C.W.N. 413 = 18 Ind. Cas. 177 (180); 5 Ind. Cas. 798 = 13 O.C. 43 (47); 8 Ind. Cas. 288 = 6 N.L.R. 140; 18 Ind. Cas. 498 = 24 M.L.J. 70 = 13 M.L.T. 207 = (1913) M.W.N. 136; 30 M. 255 = 17 M.L.J. 201 = 2 M.L.T. 167; 10 C.L.J. 150 = 1 Ind. Cas. 264 (270); **D.**, 29 M. 426 (432) = 16 M.L.J. 372 (**F.B.**) = 1 M.L.T. 145; 6 Ind. Cas. 750 = 13 O.C. 98.]

THE suit out of which this appeal arose was brought by the plaintiffs to recover possession of two properties, namely, a 4 annas share of mehal Chuck Nokash, and a 4 annas share of mehal Aga Fuzly Ali's Bazar, on the strength of their title as purchasers at a sale in execution of decree.

---

* Appeal from Original Decree, No. 284 of 1887, against the decree of Baboo Benimadhub Mitter, 1st Subordinate Judge of Dacca dated the 16th September 1887.

(1) 8 W. R. 9. (2) 5 A. 86. (3) 8 B.L.R. 474.
(4) 8 C. 79. (5) 9 C. 265.

1890 SEP. 16. — APPELLATE CIVIL. — 18 C. 188.

It appears that these properties originally belonged to their maternal grandfather, Abdul Ali, and that along with other properties they were attached in execution of a decree held by them against Abdul Ali. Amirunnessa, the widow of Abdul Ali, objected on the ground that they had been purchased from her husband. Her claim was allowed by the first Court on the 28th of December 1872, but the Appellate Court directed further investigation, and after remand the case was settled between the parties on the 30th May 1874, time being granted to the judgment-debtors to satisfy the decree, and the attachment subsisting. In spite of various objections by Amirunnessa, the decree not being satisfied, the properties were sold and were purchased by the plaintiffs on the 27th November 1882, in execution of their decree. The plaintiffs stated that they thereupon obtained symbolical possession, but that though these properties did not belong to Amirunnessa, the principal defendants (who may be shortly styled the Roys) caused them to be resold in execution of a money decree against Amirunnessa, and themselves became the purchasers on the 14th of November 1884, also obtaining symbolical possession. The objections raised by the plaintiffs having been disallowed they were compelled to bring this suit.

The defence of the Roy defendants, so far as it is necessary for this appeal, was that the sale at which the plaintiffs purchased was illegal, that the properties were not attached in May 1872, nor was any attachment in force when the plaintiffs purchased; that the properties in dispute did not belong to the estate of Abdul Ali, at the [190] date of the plaintiffs' purchase, but had long before been conveyed to Amirunnessa in part satisfaction of her dower by two deeds of sale, dated the 29th of Pous 1266 (12th February 1860) and 25th of Kartick 1269 (9th November 1862), and she was in possession; that after they had been released from attachment by the District Judge upon the claim of Amirunnessa, she mortgaged them on the 14th Joishto 1280 (21st May 1873) to the Roy defendants, and that in execution of the decree obtained on this mortgage the properties were sold to the Roys, who were consequently put into lawful possession. The defendants further stated that Abdul Ali in his life-time had recognized the right and possession of Amirunnessa, and that the plaintiffs had also admitted the same.

The further facts, so far as they are material to this report, are sufficiently stated in the judgment of the Court.

The decision of the Lower Court was in favour of the plaintiffs, and from that decision the Roy defendants appealed to the High Court.

Mr. *J. T. Woodroffe*, Baboo *Doorga Mohan Dass*, Baboo *Sarada Churn Mitter*, Baboo *Jogendro Chunder Ghose*, Baboo *Tarit Mohun Dass*, and Baboo *Monmotho Nath Mitter*, for the appellants.

Dr. *Rash Behary Ghose* and Baboo *Basanta Coomar Bose*, for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was (after a short statement of the facts as above) as follows :—

JUDGMENT.

Amirunnessa, though made a defendant, has made no defence. Her son Abdul Hye, another defendant, has set up his own right as one of the heirs of his brother Wahed Ali, to whom he states his father Abdul Ali made a gift of the properties in suit. This part of the case it will be unnecessary to consider, as no question of Abdul Hye's right has been raised before us.

1890 SEP. 16. — APPELLATE CIVIL. — 18 C. 188.

The Lower Court has given the plaintiffs a decree, holding that the conveyances to Amirunnessa set up by the Roys were not real but *benami*; that the properties in dispute continued in Abdul Ali's possession, and at his death formed portion of his estate up to the date of the plaintiffs' purchase, and that consequently they passed to the plaintiffs.

[191] Against that decree the Roys have preferred this appeal, and the points urged on their behalf are—

First, that the plaintiffs have acquired no title by their purchase at the execution sale, as that sale was invalid by reason of there having been no attachment.

Secondly, that the Court below was wrong in holding that the Roys were bound by the result of the claim case instituted by Amirunnessa, or, in other words, that the doctrine of *lis pendens* was applicable here.

Thirdly, that the plaintiffs, on whom lay the burden of proof, have not made out the *benami* character of the conveyances from Adhul Ali to Amirunnessa, but, on the contrary, it was established by evidence that they were real, *bona fide*, and valid; and that in the determination of this matter the Court below has referred to documents which were inadmissible in evidence.

Fourthly, that even if the said conveyances were *benami* and fictitious, still the Roys, who had advanced money to, and taken the mortgage from, the ostensible owner, Amirunnessa, in good faith, without any notice of Abdul Ali's secret title, are entitled to succeed as against the plaintiffs who are the representatives of Abdul Ali; and

Fifthly, that the Court below was in error in holding that the plaintiffs were second mortgagees in respect of the properties in suit.

We shall consider these points in the order in which they have been stated above.

We do not think there is much force in the first contention of the appellants. To prove the fact of attachment, the plaintiffs have put in attested copies of prohibitory orders of the Judge, dated the 3rd May 1872 (Ex. III-A), of an order of the Judge, bearing the same date, directing the affixing of the notice of attachment in the Collectorate (Ex. II); and of the reports of the serving peons (Ex. I and IV), stating that the properties have been duly attached; and they have examined the serving peon, Dagu Singh. It is true that the peon could say nothing as to the service of the processes from memory; and the reports having been neither written nor read by him, and he being able only to attest his signatures to those documents, he could not be allowed, under [192] s. 159 of the Evidence Act, to refresh his memory by referring to them. But whatever defect there may be in evidence of the peon is fully cured by the statement of Amirunnessa, the predecessor in title of the Roys, made before the execution of the mortgage to them in her petition of objections, dated the 11th July 1872 (Ex. E), in which she admitted that the properties in dispute had been attached. It is argued, however, that the subsequent order of the Judge, dated the 28th December 1872 (Ex. Z-4), releasing the properties, had the effect of removing the attachment, and as it was never afterwards renewed, the sale in execution of the plaintiffs' decree took place without any attachment. But then it should be borne in mind that the order of the Judge was set aside on appeal, and the case was remanded for further investigation; and it was settled between the plaintiffs and their judgment-debtors on this amongst other

conditions that the properties now in dispute should continue under attachment until the satisfaction of the decree. We do not say that the appellants are bound by that arrangement; that is a point which requires further consideration, and we shall come to it presently. All we now say is that that arrangement which was certainly binding as between the parties to the execution proceedings would be a sufficient answer to the appellants' objection, that the sale in execution of the plaintiffs' decree was not valid even as a sale of the right, title and interest of their judgment-debtors, by reason of want of previous attachment.

Nor are we satisfied that a sale in execution of decree after it is confirmed and after a sale certificate is granted to the purchaser, is nevertheless to be regarded as a nullity by reason of absence of attachment. In *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee* (1), Jackson, J., held that an attachment was not an essential preliminary in an execution sale. In *Luchmiput* v. *Lekraj Roy* (2), the Court held that a sale without attachment was irregular; but as that was a case of sale of moveable property, and the suit was one for damages, the Court was not called upon to decide whether the sale should be regarded as a nullity. In *Macnaghten* v. *Mohabir Prosad* (3), the question whether want of proper service of the [193] notice of attachment would affect the sale was raised, but was not gone into, as the point had been given up in the first Court. A Full Bench of the Allahabad High Court has, it is true, held in the case of *Mahadeo Dubey* v. *Bhola Nath Dichit* (4) that a regular attachment is an essential preliminary to a sale in execution of a money decree; but with all respect for the learned Judges who decided that case, we think we ought to follow the view taken by this Court in *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee* (1). We quite agree with Jackson, J. in thinking that an attachment is a measure resorted to for the protection of the decree-holder and the purchaser against intermediate alienations, and we see no sufficient reason why its absence should render a sale void after it has been duly confirmed and a sale certificate granted to the purchaser.

The second contention of the appellants, that they are not bound by the compromise entered into between the plaintiffs and Amirunnessa in the claim case, is, we think, perfectly sound. The facts bearing upon it stand thus: The plaintiffs having in execution of the decree held by them against Abdul Ali's estate, attached the properties now in dispute along with other properties, Amirunnessa, the widow of Abdul Ali, and one of his heirs, put in a petition of objection, on the 11th of July 1872, claiming those properties as her own, by right of purchase from her husband in lieu of her dower; and her claim was allowed by the District Judge, and the properties ordered to be released from attachment on the 28th December 1872. After that order was passed, Amirunnessa, on the 14th of Joist 1280, corresponding to some time in May 1873, by a registered deed mortgaged the properties in dispute to the Roys. An appeal was preferred against the Judge's order of the 28th December 1872, but whether before or after the mortgage to the Roys it is not quite clear. In the view we take of the matter, as will appear presently, the exact date of filing the appeal, however, becomes immaterial. On the hearing of the appeal the case was, on the 10th of July 1873, remanded to the first Court for further investigation (see Exh. 35); and after remand the case was, on the 30th of May 1874, settled by a com-

(1) 8 W. R. 9. (2) 8 W. R. 415. (3) 9 C. 656.
(4) 5 A. 86.

1890 SEP. 16. — APPELLATE CIVIL. — 18 C. 188.

promise between the plaintiffs and Amirunnessa, by which, amongst other [194] conditions, time was granted to Amirunnessa to pay off the decree, a 12-annas share of the properties claimed was released from attachment, and a 4-annas share thereof (including the properties now in dispute) was continued under attachment and declared to be liable under the decree; the properties, however, being described both by the plaintiffs and by Amirunnessa in their respective petitions as having been obtained by Amirunnessa from her husband, under the two kobalas, dated the 29th Pous 1266 and the 25th Kartick 1269; and the order of the Court was simply that the case be struck off. The decree not being satisfied, the plaintiffs took out execution, and after some fruitless opposition by Amirunnessa, the properties now in dispute were on the 27th of November 1882 sold and purchased by the plaintiffs. It is worthy of notice here that in the sale proclamation prepared at the plaintiffs' instance and pursuant to which the properties were sold, those properties were described as subject to the mortgage created by Amirunnessa in favour of the Roys (see Ex. Z2).

Upon these facts it was contended for the plaintiffs that the Roys, whose mortgage was created during the pendency of the claim case, were bound by the result of that case; and consequently by the execution sale which eventually took place and at which the plaintiffs have become the purchasers. On the other hand, it was urged on behalf of the Roys that they were not so bound, *first*, because at the date of their mortgage the claim case had terminated by the release of the properties by the first Court, and there was nothing to show that any appeal against the first Court's order was then pending; *secondly*, because the proceedings terminated by a compromise and not by a decision of the Court; and *thirdly*, because the final order of the Court was that the case be struck off, and the compromise, if it is to be regarded as the result of the claim proceedings, was not such a result as might be expected to take place from the nature of the case.

There is some conflict of authority touching the soundness of the first two reasons; see *Inderjeet Koer* v. *Pooti Begum* (1), *Chunder Kumar Lahori* v. *Gopee Kristo Gossamee* (2), *Gobind Chunder Roy* v. *Guru Charan Karmokar* (3), and Sugden on [195] Vendors and Purchasers, p. 758, upon the question whether the possibility of an appeal is a sufficient *lis pendens* so as to bind a transferee by the result of the appeal; and *Nadarunnessa Bibee* v. *Azhur Ali Chowdhury* (4), *Raj Kissen Mukerjee* v. *Radha Madhub Haldar* (5), *Monohur Chowdhury* v. *Hurryhur Dutt* (6), and *Vythinadayyan* v. *Subramanya* (7) upon the question whether a purchaser *pendente lite* is bound by a consent decree. If the matter had been untouched by authority, we should have felt inclined to answer both these questions in the negative. As, however, the appellant's contention is, in our opinion, fully borne out by the third reason advanced in support of it, we do not think it necessary to pronounce any decision as to the correctness of the other two reasons. In *Kailash Chunder Ghose* v. *Full Chand Jahari* (8), Couch, C.J., in considering the liability of a purchaser *pendente lite*, observed:—"Then the question is by what proceedings in the suit is he bound? Is he bound by the proceedings which arose from the nature of the suit, and from the case set up, and the relief prayed in the bill, or is he to be bound by any order which the Court may be induced

(1) 19 W R. 197. (2) 20 W.R. 204. (3) 15 C. 94.
(4) 7 W.R. 103. (5) 21 W.R. 349. (6) 3 Shome 23.
(7) 12 M. 439. (8) 8 B.L.R. 474.

by the parties to make in the course of the suit? I can find no authority which goes to the extent of saying that because he does not think fit to become a party to the suit, he is to be bound by any order whatever that may be made. It seems to me that he ought only to be bound by proceedings which from the nature of the suit, and the relief prayed, he might expect would take place." These observations were followed in the case of *Kaseemunnissa* v. *Nilratna Bose* (1), and we think they are applicable to the present case. Here the final order of the Court was that the case be struck off; and that in itself was perfectly harmless so far as the rights of the Roys were concerned. The compromise did not contain any admission that the 4 annas share of certain properties that was to continue under attachment, and to be answerable for the decree, formed part of the estate of Abdul Ali; on the contrary, it proceeded upon the basis of the said properties being the properties of Amirunnessa by purchase, and being liable to be sold in satisfaction of the plaintiff's decree only **[196]** by virtue of Amirunnessa's consent. Amirunnessa who claimed the properties in her own right, was also, as one of the heirs of Abdul Ali, a judgment-debtor under the decree; under the compromise she obtained time to pay off the decree; and in consideration of that and upon the immediate release from attachment of a 12-annas share of the properties claimed by her, she consented to the remaining 4-annas share being made liable under the decree. Such being the nature of the arrangement by which the claim case was settled, we do not think that the Roys as alienees *pendente lite* are bound by it.

[Their Lordships then considered the facts necessary for the decision of the third question which are immaterial to this report, and continued:—]

Upon all the foregoing grounds we think the conclusion arrived at by the Court below, that the kobalas in question are *benami* documents, is correct.

It remains now to consider the last two grounds urged on behalf of the appellants, and upon those two grounds we think they are entitled to succeed. It is not denied that the mortgage bond, dated the 14th Joishto 1280, in favour of the Roys (Ex. G), was duly executed by Amirunnessa; and that the money for which they obtained the decree, dated the 28th March 1878 (Ex. Z5), was really due. Amirunnessa was the ostensible owner of the properties in dispute. Her name was registered in the Collectorate in respect of one of these properties (see Ex. T), and Abdul Ali by a petition (Ex. 2) admitted before the Collector that she was the owner of it. And she mortgaged them as properties which she had acquired by purchase. There is nothing to show that they had any notice of the *benami* character of the conveyance in Amirunnessa's favour or of the secret title of Abdul Ali. On the contrary, the plaintiffs in the sale proclamation, prepared at their instance (Ex. Z2), caused to be inserted a notice that those properties were subject to the mortgage in favour of the Roys; and this affords the strongest possible evidence of the *bona fides* of the mortgage. On the 28th March 1878, the Roys obtained a decree on their mortgage; and in execution of that decree they purchased the properties in dispute, on the 14th November 1884. The decree was clearly a mortgage decree declaring the liability of the **[197]** mortgaged properties for the satisfaction of the judgment-debt. It was argued that as the plaintiffs had become second mortgagees of the same properties, under the compromise of the 30th May 1874, made in the claim case,

(1) 8 C. 79.

1890 SEP. 16. — APPELLATE CIVIL. — 18 C. 188.

they were necessary parties in the suit of the Roys upon their mortgage, and not having been made parties to it, they were not bound by the decree made in it. This argument would have been correct if the compromise had been duly registered or embodied in the decree. As that was not done, the plaintiffs cannot claim the position of second mortgagees; and as they had acquired no other interest in the properties before the date of the mortgage decree, the decree is not defective by reason of their not being parties to it.

That being the state of facts, as against Abdul Ali, who allowed Amirunnessa to hold herself out to the world as the owner of the properties in dispute and against persons claiming through him, the Roys have a good title, as *bona-fide* mortgagees, and auction purchasers, in execution of their mortgage decree (see *Ram Coomar Koondoo* v. *McQueen* (1) and *Luchmun Chunder Geer Gossain* v. *Kali Churn Singh* (2).

It has been argued that the plea of *bona fide* purchase for value without notice has neither been raised in the defence, nor made the subject of an issue; and so the appellants are not entitled to succeed upon it. But this objection is sufficiently answered by the case of *Luchmun Chunder Geer Gossein* v. *Kali Churn Singh* cited above. In that case the Judicial Committee observe .—" Now, the defendants had purchased under a deed representing that this property had been purchased out of the wife's *stridhan*. They knew nothing as to the real facts of the case; they stated what they believed the facts to be, taking the facts as they were represented at the time of the purchase. They believed the deed which represented that the purchase money was the wife's *stridhan*, and they believed the representations which had been made by the husband in his lifetime * * * * They stated in their defence what they found represented upon the purchase deed of the wife. They merely stated what they were led by the representation to believe, namely, that the property **[198]** was purchased by means of the *stridhan* funds of the wife; and that, consequently, it did not pass to the sons upon the death of their father; but that the wife, having purchased the property out of her *stridhan*, was entitled to sell it. It appears then to their Lordships that the pleadings were sufficient to raise the question." And then, after noticing the issue raised in the case, which was, whether the property belonged to the husband or to the wife, their Lordships go on to say:—" If the defendants were entitled to avail themselves of the estoppel in consequence of the misrepresentation of the husband, they are entitled to use that estoppel as matter of proof, and they use it to prove that the durputnee was not purchased out of the father's own property, but that it was obtained by the mother Ulpa with her own *stridhan*, and that she herself held possession of it. So they prove the issue on their part by means of the estoppel." We think these observations are fully applicable to the facts of this case as given above.

But then it was further contended that the plaintiffs, as execution purchasers of Abdul Ali's interest, were not his representatives and that an estoppel that would bind Abdul Ali would not necessarily bind them; and in support of this contention *Richards* v. *Johnston* (3) and *Lala Parbhu Lal* v. *Mylne* (4) were relied upon as authority. On the other hand, the case of *Paresh Nath Mukherji* v. *Anath Nath Deb* (5) was cited for the appellants, to show that a mortgagee who had purchased in

(1) 11 B.L.R. 46 = 18 W. R. 166 = L.R.I.A. Sup. Vol. 40. (2) 19 W. R. 292.
(3) 4 H. & N. 660. (4) 14 C. 401. (5) 9 C. 265.

execution of his decree on the mortgage was bound by an estoppel that was operative against the mortgagee. We may observe that *Richards* v. *Johnston* was cited in the argument before the Judicial Committee in the last mentioned case, but their Lordships did not apply the rule there laid down to that case. Now in the present case, though the plaintiffs were not mortgagees from Abdul Ali or his heirs, yet as their right to hold the properties in dispute liable for the decree resulted from compromise between them and Amirunnessa, we think their position is more analogous to that of the auction-purchaser in the case of *Paresh Nath Mukherji* v. *Anath Nath Deb* than to the position of the execution purchaser in *Lala Parbhu Lal* v. *Mylne*; and we therefore hold, upon the authority of *Paresh* **[199]** *Nath Mukherji* v. *Anath Nath Deb*, that the plaintiffs are estopped from questioning the title of the Roys in this case.

1890 SEP. 16.

APPELLATE CIVIL.

18 C. 188.

That the application of the doctrine of estoppel in this case does not lead to any injustice will be further seen from the following considerations. The heirs of Abdul Ali are undoubtedly estopped from denying the title of the Roys. As for the plaintiffs, they not only allowed Amirunnessa to state in her petition of compromise in the claim case, that the properties in dispute had been obtained by her from her husband by purchase, and accepted the compromise upon the basis of that statement; but in the sale proclamation pursuant to which they made their purchase, they caused a notice to be inserted that those properties were liable under the mortgage to the Roys; and that a decree had been obtained under that mortgage. They had the benefit of that notification, which obviously enabled them to purchase properties yielding, according to their own witness, Anand Mohun, upwards of Rs. 1,200 a year for the grossly inadequate sum of Rs. 900; and they cannot now be heard to say that the mortgage is not binding on them. They cannot be allowed to affirm and disaffirm the same transaction just as it suits their purpose.

The result is that this appeal must be allowed, and the decree of the lower Court reversed, and the plaintiffs' suit dismissed, with costs in both Courts.

J. V. W. *Appeal allowed.*

---

18 C. 199.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

BROJOLALL SEN *v.* MOHENDRO NATH SEN AND OTHERS.*
[5th January, 1891.]

Practice—Partition proceedings—Form of order for costs—Order for execution.

Where one of the parties to a partition suit bears all the costs of the proceedings subsequent to decree, and the other parties make default in payment to him of their respective shares of the costs, he is not entitled to **[200]** embody in his order against them for payment an order for execution. He must first obtain an order for payment, and, if payment be not obtained, application for execution may be made.

THIS was an application in a partition suit. On the 26th July 1886 a decree was made in the suit for the partition of the joint family estate which formed the subject matter of the litigation. By this decree it was declared that the plaintiff and the three defendants were each entitled to

---

* Application in Suit No. 423 of 1885.

1891 JAN. 5. — ORIGINAL CIVIL. — 18 C. 199.

one equal fourth part of the property, and it was ordered that a commission of partition should issue and the costs of the commission, etc., be borne by the parties in proportion to the value of their respective shares. The plaintiff took no further steps in the matter, but at the instance of Mutty Lall Sen, one of the defendants, the commission was issued and the estate partitioned. Mutty Lall Sen had the conduct of the partition proceedings, paid all the costs, and had the *allocatur* filed and served on each of the other parties to the suit. He then demanded from them payment of their respective shares of the costs incurred by him, and, as they made default in payment, obtained from the Court a rule calling upon them to show cause why they should not pay to him their proportionate shares of the costs, or why execution should not issue for the recovery of these sums.

Mr. *Avetoon* for Mutty Lall Sen.—The rule is correctly drawn up. Mr. Belchambers, at p. 361 of his 'Practice,' lays down, on the authority of an unreported decision, that in such a case as this the mode of proceeding to compel payment is by execution, preceded by a rule *nisi*, in which the amount claimed is specified. This must mean that the rule should be made absolute and execution should issue at once.

The other parties were not represented.

WILSON, J.—You are entitled to an order absolute for payment of the moneys mentioned in your affidavit, and for payment of the costs of this application. You cannot now get an order for execution. There must first be an order of Court for payment, and, if payment be not obtained, application for execution may be made.

Attorney for the appellant: Baboo *Okhoy Chunder Chowdhry*.

H.L.B.

---

18 C. 201 (P.C.) = 17 I.A. 159 = 5 Sar. P.C.J. 607.

[201] PRIVY COUNCIL.

PRESENT:

Lord Watson, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

KALI KISHORE DUTT GUPTA MOZUMDAR (*Plaintiff*) *v.* BHUSAN CHUNDER *alias* BEPIN CHUNDER DUTT GUPTA (*Defendant*).
[2nd, 3rd, 4th and 26th July, 1890.]

Evidence—Burden of proof—Right to begin—Proof of loss and admission of secondary evidence, of a document alleged to have been executed—Evidence of execution of documents—Civil Procedure Code, ss. 141, 142 *and* 568.

A suit for possession by right of inheritance was brought by a claimant, alleging himself to be the heir, against the alleged adopted son of the last male owner, denying that an adoption, purporting to be made by the widow, had been duly authorised by the deceased. The Court of first instance called upon the defendant to prove his title as a son by adoption, notwithstanding that the plaintiff was out of possession, and could not have succeeded in the event of the defendant's failure to prove it, without first proving his own title as collateral heir by descent; thus, in effect, proposing to make the establishment of the plaintiff's title depend upon the failure or success of the defendant in proving the adoption.

The High Court pointed out the error of this proceeding, and the Judicial Committee affirmed its judgment, concurring also in its finding that the adoption had been proved.

It was found also that the loss of the *anumati-patra* had been established, so that secondary evidence of it was receivable.

[R., Rat. Unr. Cr. Cas. 786 (789).]

APPEAL from a decree (13th August 1887) of the High Court, reversing a decree (27th July 1886) of the Subordinate Judge of Goalpara. **1890 JULY 26. PRIVY COUNCIL. 18 C. 201 (P.C.) = 17 I.A. 159 = 5 Sar. P.C.J. 607.**

The question on this appeal was as to the right of the plaintiff, appellant, to succeed, as the nearest collateral heir, to a five-anna share in the zemindari of parganna Taria, in the Goalpara district. The last male owner of the estate, Jagat Chunder Dutt Gupta, died childless on the 5th April 1867, leaving as his heiress his widow Bamasunderi, who till her death on the 7th July 1877 was in possession of his estate. Under an alleged power from him, she had adopted the respondent, who was originally named Bhusan Chunder, but on adoption received the name of Bepin Chunder Dutt.

[202] A pedigree table was appended to the plaint, and on it the plaintiff relied, as showing that Mukhtaram Dutt was the paternal great grand-father of both the plaintiff and Jagat Chunder. The defendant, then a minor, defending by his guardian Ganga Narain Dutt Gupta, denied its correctness; alleging also that he had been validly adopted by Bamasunderi on 28th June 1877, under a power executed by her husband on 17th March 1867. In addition to alleging the execution of an *anumati-patra* on the date, the written statement alleged that the power was fully stated in, and evidenced by, Jagat Chunder's will executed two days after, on the 7th Cheyt 1877. The minor became of full age while this appeal was pending. The Courts below came to conclusions directly opposed, the one to the other, on the questions raised, which were—first, whether the plaintiff was or was not the next reversionary heir, and as such entitled to challenge the title of the defendant, who was in possession; secondly, whether the adoption was valid or not in regard to the authority for it. As to this last, the Subordinate Judge found the execution of the *anumati-patra*, said to have been executed by Jagat Chunder to Bamasunderi, when he was about to depart on a pilgrimage to Benares, had not been proved. He refused to allow to remain on the record a copy tendered, and also rejected the evidence of the will.

As to this the High Court (TOTTENHAM and BEVERLEY, JJ), in one of two interlocutory orders of 21st July 1887, said:—

"There is sufficient oral evidence on the record, if believed, to show that Jagat Chunder did execute an *anumati-patra*. There is evidence to show that after the death of Jagat Chunder, amongst the papers found in this house and taken possession of by the Police under the direction of the Magistrate, there was found an *anumati-patra* purporting to be signed by Jagat Chunder. There is evidence that this paper came into the possession of the Civil Court, and the copy in question is proved by the witnesses examined before the lower Court in 1885, to have been made from an original then in Court. That an original did exist, and that it was returned to one Pudma Lochun, who was manager of the estate left by Jagat Chunder, there is also evidence to show. The case set up by the defendant is that the document was stolen. On this fact the evidence is decidedly vague and inconclusive; but [203] we think that there is sufficient evidence that search had been made for it, and that the document is not now forthcoming.

"We think that, in a case appealable to a higher tribunal, the Court ought not to reject evidence essential to the case of either party, if it can possibly admit it. We think that the Court below was wrong in excluding some of the evidence bearing on the present question, and that if that evidence had not been excluded, the Court below probably would have been satisfied that secondary evidence of the *anumati-patra* ought to be received.

1890 JULY 26. — PRIVY COUNCIL. — 18 C. 201 (P.C.) = 17 I.A. 159 = 5 Sar. P.C.J. 607.

At any rate, when the Court has doubt upon the matter, and its decision is open to appeal, it is better to admit than to exclude doubtful documents."

The conclusion of the judgment of the same judges on a subsequent day, 13th August 1887, was that the adoption of the defendant was in every way valid; and they were not satisfied that, if it were not so, the plaintiff would be entitled to succeed to the property as heir to the last owner, Jagat Chunder.

On this appeal,

Mr. *J. Rigby*, Q C., Mr. *Boydell Houghton*, and Mr. *Herman Robinson*, for the appellant, argued that there was no sufficient evidence to show that Jagat Chunder executed an *anumati-patra* in favour of his wife Bamasunderi. The finding of the High Court that there was a valid adoption of the respondent by Bamasunderi was against the weight of the evidence. The evidence also showed that the appellant was the reversionary heir.

For the respondent, Sir *Horace Davey, Q.C.*, Mr. *R. V. Doyne*, and Mr. *J. D. Mayne* argued that the plaintiff had failed to prove his relationship to Jagat Chunder as alleged, and his consequent right to disturb the respondent's possession. The evidence for the respondent, on the other hand, had established that he was validly adopted under due authority from Bamasunderi's deceased husband.

Mr. *J. Rigby*, Q.C. replied.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This is an appeal from a decree of the High Court at Calcutta reversing a decree of the Subordinate [204] Judge of Goalpara, who was also Deputy Commissioner of that district, and from two interlocutory orders of the High Court in the appeal to that Court from the Subordinate Judge.

The plaintiff is the appellant, and the defendant the respondent. Each of the parties claims to be heir at law of Jagat Chunder Dutt Gupta Mozumdar, deceased, who was an inhabitant of Khagrabari, in the station of Dhubri, in the said district.

Jagat Chunder died on a pilgrimage in the year 1867 without issue, leaving a widow, Bamasunderi Gupta, as his sole heiress. The precise date of his death is disputed, the plaintiff's contention being that he died on a day in Falgoon 1273, corresponding with the 7th of March 1867, whilst that of the defendant is that he died on 24th of Cheyt 1273, corresponding with the 5th of April in the same year 1867.

The parties were not agreed as to the age of Bamasunderi at the time of her husband's death. The plaintiff makes her out to have been about 9 years of age, whilst the defendant puts her age at that time at 12 or 13. The point is not very material, and it may therefore be taken at 9, in accordance with the plaintiff's view.

Bamasunderi died on the 14th of Assar 1284, corresponding with 7th of July 1877, and that would make her about 19 at the time of the alleged adoption. The plaintiff's claim is that upon her death he succeeded to the property of Jagat Chunder as his second cousin and heir by collateral descent. The defendant claimed as an adopted son of Jagat Chunder, and in that capacity obtained, by means of his guardian and manager, possession of the property in suit which belonged to Jagat Chunder at the time of his death. On the 27th of June 1883 the plaintiff,

then a minor, by his guardian and next friend, filed his plaint, and, after alleging that he was in possession of certain portions of Jagat Chunder's property, claimed that the remainder, being that specified in the plaint, might be awarded to him after the establishment of his right thereto by inheritance. The 5th paragraph of his plaint contains the following allegation :—

"Gunga Narain Gupta was the manager of the properties left by Jagat Chunder, the deceased husband of the minor Bamasunderi, on her behalf, till the time of her death, and did many fraudulent acts, even during her lifetime, with the vain hope of [205] becoming the malik of the properties in dispute. Having failed in this he at last, after the demise of Bamasunderi, entered into a conspiracy and fraudulent combination with Ramanund Mozumdar, the brother of his father-in-law, and falsely set up his minor son, the defendant, as the legally adopted son of Bamasunderi, with a view to keep in his own hands the properties left by the deceased Jagat Chunder and Bamasunderi, depriving the real heir, the minor plaintiff. In fact, the minor defendant is not the adopted son of Jagat Chunder, and Bamasunderi never took him as her adopted son ; nor, indeed, had she any authority or right to adopt, nor had Jagat Chunder given her any permission to adopt."

The defendant, by his guardian, put in a written statement, in which amongst other things, he denied the plaintiff's right of inheritance, and set up his own title as an adopted son.

The important issues recorded for trial were—

1st.—Is the minor plaintiff Kali Kishore Dutt Gupta the heir of the late Jagat Chunder?

2nd.—Is the minor defendant Bhusan Chunder *alias* Bepin Chunder the legally adopted son of Bamasunderi, the deceased widow of the late Jagat Chunder?

At the trial the defendant was called upon to prove his title as a son by adoption, notwithstanding the fact that the plaintiff was out of possession and could not have succeeded in the event of the defendant's failure without proving his own title as collateral heir by descent. As remarked by the High Court :—

"From the judgment of the lower Court it appears that the Subordinate Judge almost assumed the first issue in the plaintiff's favour for, after setting out the facts of the case, he says :—'The whole question, therefore, turns upon the inquiry, was Bepin Chunder, defendant, really adopted by Bamasunderi under a legally valid power to adopt, conferred upon her *bona fide* by her husband Jagat Chunder, or not ? If there was such a *bona fide* adoption, based upon a power to adopt duly and formally conferred by Jagat Chunder on his wife, then clearly the plaintiff is at once out of Court. But if no adoption of the kind alleged ever took place, or if the form or outward ceremony of an adoption [206] took place without the indispensable basis of a formally conferred power to adopt emanating from Jagat Chunder Mozumdar, then the defendant is at once put out of Court, and the direct consequence is the establishment of the plaintiff's right and title.' In other words, he proposed to make the establishment of the plaintiff's title depend upon the failure or otherwise of the defendant in proving the validity of his adoption."

Five witnesses deposed to the fact of Jagat Chunder's having given his wife an *anumati-patra*. Biseswari Gupta stated that Jagat Chunder

1890 JULY 26. — PRIVY COUNCIL. — 18 C. 201 (P.C.) = 17 I.A. 159 = 5 Sar. P.C.J. 607.

read it out and placed it in a box, and handed it to his wife. The witnesses stated that the *anumati-patra* was executed in the month of Cheyt 1273, before Jagat left home on his pilgrimage.

It was clearly proved, and in fact it was not disputed, that Jagat Chunder in the year 1876 left home on a pilgrimage to Gya and Benares, and that he died in the district of Monghyr prior to arriving at his destination.

Soon after the death Chunder Nath Gupta, who had a small interest as a co-sharer with Jagat Chunder in the zemindari parganna Taria, gave notice of the death to the Government authorities, as he was legally bound to do; whereupon, in the month of May 1867, the property of Jagat Chunder was attached, and on that occasion a closed tin box containing documents, which was then in the residence of the deceased at Khagrabari, was taken possession of by the Sub-Inspector of Police of Gauripur and placed in an iron safe in his custody. The box and its contents remained in the custody of the police until the 6th of September 1867, when, acting under an order of the Civil Court made upon the petition of Bamasunderi, a document purporting to be an *anumati-patra*, signed by Jagat Chunder and attested by, amongst others, Chunder Mohun Das, found in the box was sent by the Sub-Inspector of Police to the Deputy Commissioner, with a return under the seal of the Sub-Inspector to the following effect:—

"Incarnation of justice!

"In obedience to the order received, Chunder Mohun Sen, the uncle of Bamasunderi Gupta, was brought (to the station), **[207]** and in his presence the closed tin box, which was attached, was opened, and on an inspection of the papers which it contained a closed cover to the address of the Registrar Saheb Bahadur was found. The Sen aforesaid stated that the cover contained the *anumati-patra* authorising the adoption; but as I could not believe his statement, I opened the cover in the presence of Babu Biseswar Roy, the Court Inspector entrusted with the charge of the sub-district, and found the *anumati-patra* signed by the deceased zemindar Jagat Chunder Mozumdar, engrossed on a stamp paper, authorising the Gupta aforesaid (Bamasunderi) to adopt. I send it to the Court along with this report after re-sealing the cover containing it with sealing-wax."

On the 11th of September 1867 the said document was sent by the Deputy Commissioner to the Civil Court, where it remained until the 6th of February 1870, when it was returned to Pudma Lochun Goswami, the then manager of Bamasunderi, a copy, proved to have been examined with the original by the mohurrir in the Collector's office and the mohafez in the ordinary discharge of their duties, having been filed in the Court.

Thus it appears that the document found in the box which was seized at the residence of the deceased remained in the custody of officers of Government from May 1867 to February 1870, when it was returned to the manager of Bamasunderi.

The witnesses above referred to who spoke to the *anumati-patra* were examined in the time of the predecessor of the Subordinate Judge, and were believed by the Judges of the High Court, who had as good an opportunity as the Subordinate Judge himself of forming an opinion as to their credibility.

The defendant proposed to prove the *anumati-patra* by a copy of the document which was filed in the Civil Court, and by proving the loss of the original by a certified copy of a deposition of Gunga Narain Gupta made in a former proceeding between the same parties.

1890 JULY 26. — PRIVY COUNCIL. — 18 C. 201 (P.C.) = 17 I.A. 159 = 5 Sar. P.C.J. 607.

The copy had been filed by the defendant in the Court of the Subordinate Judge on the 24th of April 1885, and on the same day two witnesses had been examined on the part of the defendant to prove that the copy was a true copy of the original. This [208] was in the time of a predecessor of the Subordinate Judge who decided the case.

The copy of the deposition of Gunga Narain was tendered by the plaintiff on the 17th of April 1886, as evidence intended to be used on his behalf. On the 1st of June the plaintiff's witness Chunder Mohun Das deposed to the signature of Gunga Narain to the original, and the document was then marked as an exhibit, and was admitted to the record as part of the plaintiff's evidence.

On the 21st of June 1886 the defendant put in a petition to the lower Court, stating that the original *anumati-patra* executed by the deceased had been stolen, and praying that an authenticated copy might be used as evidence. In support of the petition the defendant relied upon the above-mentioned deposition of Gunga Narain, which stated that, on the death of Pudma Lochun, the said Gunga Narain was appointed manager of the said estate, that on taking charge of the said estate after the death of the said Pudma Lochun he received the original *anumati-patra*, and that, on search amongst the papers of the said estate, the said *anumati-patra* could not be found, and that since that time he had searched in different ways for the said document, but that from credible sources he came to know that the said document had been stolen.

The Subordinate Judge refused to allow the deposition of Gunga Narain to be used as evidence of the loss of the original *anumati-patra*, as Gunga Narain was living and ought to be called, and he afterwards allowed the copy of the deposition to be withdrawn from the record by the plaintiff. He also rejected the copy of the *anumati-patra*, upon the ground that there was no evidence of the loss of the original, and it was removed from the record.

It would have been much better if, when the Judge rejected the copy of the deposition, Gunga Narain had been produced as a witness on behalf of the defendant, but that was not done. It is true that Gunga Narain was afterwards tendered for cross-examination, but it was held to be then too late, as the defendant's case had been closed.

Before the rejection of the *anumati-patra*, Chunder Mohun Das, who was in the employ of Jagat Chunder up to the time of his death, had been examined before the Subordinate Judge as a witness on behalf of the plaintiff, and deposed that one month [209] after the property was attached he was told by Chunder Gupta to sign his name to the *anumati-patra* and refused to do so, and that Chunder Mohun Sen, Mritunjoy Bose, and Pudma Goswami, who were then present, told him that they would cause his name to be written. This is a most improbable story, and is not at all in accordance with the plaintiff's case as stated in the 5th paragraph of the plaint. If this statement were true, Chunder Gupta, Chunder Mohun Sen, and Pudma Goswami must have been conspiring together, when, in fact, it appears from other parts of the evidence that they were hostile to each other.

The witness was disbelieved by the High Court, and their Lordships consider that his evidence was wholly unworthy of credit.

Amongst other things the witness swore that "when Jagat Chunder went on pilgrimage he did not, either at that time or before it, execute any will or *anumati-patra*, nor did he grant any," and further, "that he had heard that as there was no *anumati-patra* Chunder Nath, Mritunjoy

1890 JULY 26. — PRIVY COUNCIL. — 18 C. 201 (P.C.) = 17 I.A. 159 = 5 Sar. P.C.J. 607.

Bose, and Pudma Lochun consulted together to fabricate one." Their Lordships cannot but remark upon the fact of the Subordinate Judge's having recorded as evidence such worthless statements. It is also worthy of notice that the document which the defendant attempted to prove by the copy which was rejected was that which was seized by the police in the closed box and forwarded to the Civil Court, and which was in the custody of Government officers from the time of the attachment of the property in May 1867 to February 1870, and that the time at which Chunder Mohun Das states that he was requested to attest an *anumati-patra* was about one month after the property was attached, or in other words whilst the document relied upon by the defendant was in the custody of the police.

Another document, namely, a will of Jagat Chunder was tendered in evidence by the defendant and rejected by the Judge without referring to the evidence on the record in support of it. His reason for rejecting it, to use his own words, whatever may be the meaning attached to them, was, "Jagat Chunder's will was also put in, but refused admittance to the record on the ground of its inadmissibility under any definite section of the Evidence Act. It contains an allusion to an intention on the testator's part to **[210]** proceed on pilgrimage after having executed, or after executing, a deed of power to adopt; but worded as it is, there is nothing to show definitely that such a deed of power ever was actually executed as a matter of fact."

The will was as follows:—

"To—

"The abode of all bliss, Srijut Chunder Nath Gupta, a co-sharer zemindar of pargana Taria, hissa half anna, inhabitant of Khagrabari.

"I Jagat Chunder Dutt Mozumdar, son of Ramkant Mozumdar deceased, a co-sharer zemindar of parganna Taria, inhabitant of Khagrabari station Gauripur, in the district of Goalpara, do execute this will to the following effect:—

"I am starting for Gya and Benares for the purpose of performing the necessary sradhs of my ancestors, of offering pindas to them, and of doing religious acts on my own behalf, after giving you the power to realize the rents of my zemindari in the said parganna, of my invalid lakheraj property in kismut Uchita and others, and of my purchased brahmottur and mourasi jotes and other immoveable and moveable properties, to perform the sheba of the ancestral deities, to preserve the houses, to pay the debts and to collect the dues, to institute suits against any persons and to register my name in the sudder and mofussil and to sign the same. No son or daughter has yet been born unto me. The human body is transitory; no one can tell what may happen at any time. God forbid, but as I may die after going to the place of pilgrimage, I leave behind me an *anumati-patra* to my wife, to adopt a son in order to the preservation of the pindas of my ancestors and myself. You are also the husband of my uterine sister and have always been living with your family in the same mess with me, and for a long time have been doing me good service by way of caring for my zemindari, &c. And there is also an unmarried niece (sister's daughter). As it is necessary for me to maintain them and you, I execute this will of my own accord and in a sound mind, to the effect that should I die after reaching the place of pilgrimage, you will take possession of a 1-anna share out of the 5-annas share which I have in the zemindari, and of a 1-anna

1890
July 26.
Privy Council.
18 C. 201 (P.C.) = 17 I.A. 159 = 5 Sar. P.C.J. 607.

[211] share out of the 9-annas share which I have in the invalid lakheraj kismut Uchita and others, by registering your name in place of mine, and you shall enjoy the same down to son, grandson, daughter's son, &c., your heirs. With respect to my remaining 4-annas share in the zemindari and the 8-annas share in the invalid lakheraj, and with respect to the 3-annas share of the zemindari and the 3-annas share of the invalid lakheraj which I have obtained as a gift from my maternal grand-aunt Srijuta Bhairabi Chowdhrani, altogether with respect to the 7-annas hare in the zemindari andthe 11-annas share in the invalid lakheraj, and with respect to my purchased brahmottur, mourasi jotes and others which are in my possession and enjoyment, you shall, on my demise, cause a fit boy to be adopted from a good family or from out of my gyantis, by my wife Bamasunderi Gupta, and getting him recognized as heir, you shall manage the zemindari and all other properties till the minor attains his majority. If you or your son, grandson or daughter's son, &c., be not living, the 1-anna share of the zemindari and the 1-anna share of the invalid lakheraj and others, which I have given you, shall be obtained by me, or by my son, grandson, whoever may be in existence. If I or my wife, son, grandson be not living, then the zemindari, &c., left by me shall be obtained by you, or by your son, grandson, and daughter's son, &c., whoever may be in existence. To the above effect I execute this will.

"The 7th Cheyt 1273 B. S."

The will, if genuine, was a very important document, for it not only supported the evidence as to the *anumati-patra*, but amounted to an assertion by Jagat Chunder, through whom the plaintiff claims, that he had given power to his wife to adopt, which, in the absence of evidence to prove the revocation of the power, would, in their Lordships' opinion, have been sufficient to support the adoption. Further, the direction to Chunder Nath to cause a fit boy to be adopted by his wife would in itself, in the absence of an *anumati-patra*, amount by implication to a power to his wife to adopt a fit boy from a good family.

It is very improbable that if the will had been forged by Chunder Nath after the death of Jagat, he would have made the devise to himself of a one-anna share in the zemindari and a one-anna share of the invalid lakheraj dependent upon a condition which [212] he must have known had never been performed, namely, the reaching by Jagat Chunder of the place of pilgrimage, Jagat Chunder having died on the journey to that place in the district of Monghyr. That condition is also an answer to the objection made on behalf of the plaintiff that the will was never acted upon.

The Subordinate Judge then, having no evidence before him either of the original or of the copy of the alleged *anumati-patra*, or of the alleged will, proceeded to deal with the whole case, and in the result expressed himself in the following terms. He said :—

"Upon a review of the whole of the evidence, I must confess that my faith has been utterly shaken in the evidence of the witnesses adduced on the defendant's side, whereas I see no grounds whatever for discrediting those much-maligned Mymensingh witnesses, on the plaintiff's side, who were examined by commission upon the subject of the plaintiff's genealogical claims to inheritance. They are apparently permanent residents of the Mymensingh district, and to all appearances unbiassed by any *personal* interest in the results of the present suit.

1890 JULY 26. — PRIVY COUNCIL. — 18 C. 201 (P.C.) = 17 I.A. 159 = 5 Sar. P.C.J. 607.

"Of course, *either* of the genealogicalt ables might be a forgery and false concoction, without difficulty. But I see no good or reasonable grounds for condemning the Mymensingh table as such, whereas I *do* believe that the defendant's table is a fabrication in its suspicious brevity.

"In fine, I find no difficulty in arriving at the conclusion that the defendant's claims are absolutely *nil*, and that they are based, from first to last, upon fraud and forgery. That *some* sort of a mock ceremony, to act as a *quasi*-adoption, actually *did* take place, I am quite willing to believe. But that what took place was really an adoption of the defendant (then about *nine* years of age) by Bamasunderi, or that any real *bona fide* adoption by her would have been attended by no more respectable a concourse of the surrounding zemindars and other native gentry than the few who had any pretensions whatever to the claim of respectability, who are said to have been present on the occasion, is a most significant circumstance.

"My belief is that the unfortunate Bamasunderi was for a long time past utterly crushed, and made to live a living, lingering death by the iron rod of restraint wielded by Gunga Narain so pitilessly ; **[213]** and that, as far as the sham adoption is concerned, the unfortunate creature was wholly unconscious of what was going on around her, being in her last collapse, and about to breathe her last.

"There being no reason, therefore, for doubting the genuineness of the plaintiff's claim in this suit, I decree the suit in plaintiff's favour, with all costs."

The Subordinate Judge was silent as to the persons whom he considered to have been implicated in the fraud and forgery, or the witnesses upon whose evidence he relied in support of that finding. The judgment of the Subordinate Judge is very unsatisfactory.

There was no evidence to justify the belief which the Judge avowed, "that the unfortunate Bamasunderi was for a long time past utterly crushed, and made to live a living, lingering death by the iron rod of restraint weilded by Gunga Narain so pitilessly ; and that, as far as the sham adoption is concerned, the unfortunate creature was wholly unconscious of what was going on around her, being in her last collapse, and about to breathe her last." The Subordinate Judge did not even confine himself to the case before him, but went out of his way to declare his suspicions and throw out insinuations without the slightest evidence to warrant them. He said, "It is difficult to prevent one's suspicions of foul play from carrying one back as far as the time of Jagat Chunder's death, and suggesting to one's mind that very possibly he did not die a natural death. The ever convenient cholera was at once put forward as the cause of his end, and this might or might not have been so." The Judge does not condescend to particulars ; Gunga Narain Gupta, described by him as an utterly unscrupulous character, was not with Jagat Chunder on his pilgrimage or at the time of his death, nor was he the person who reported that the death was the result of cholera. Upon whom could his suspicions be supposed to rest, except upon those, or some of those, who were with the deceased at the time of his death, and who reported that he died from cholera ? Again, speaking of Bamasunderi, he says, "I do not feel much in the way of scruples myself in suggesting another and more probable cause of her illness and death, and that is slow poison, resulting from her obduracy in refusing to adopt the defendant." Again, "It is curious what a high rate of mortality appears to have been

1890 JULY 26. PRIVY COUNCIL. 18 C. 201 (P.C.)= 17 I.A. 159 = 5 Sar. P.C.J. 607.

amongst vitally essential personages, such as the late manager, Pudma Lochun, in [214] whose time the alleged unfortunate theft of the box said to contain the all-important deed of power to adopt is stated to have occurred; the attesting witnesses also to the important deed are all dead," and so on.

Hasty, uncalled for, and indiscreet expressions like these, casting suspicions of grave crimes against unnamed absent persons, without one tittle of evidence to support them, are wholly unwarrantable, and cannot but destroy respect for the judgment and discretion of the Judge, and lower the confidence which might otherwise attach to his decision upon the questions really before him.

The case was appealed to the High Court, and by two interlocutory orders of that Court made in the appeal the copy of the *anumati-patra* and of the deposition of Gunga Narain which was put in as part of the evidence for the plaintiff were restored to the record. Those orders are also included in this appeal. Their Lordships consider that the High Court was right in making them, and also in their finding that the *anumati-patra* was executed by Jagat Chunder, and that the copy produced was a copy of the original which found its way into the Civil Court in the manner already stated.

The will of Jagat Chunder, which was rejected by the Subordinate Judge, and as to the genuineness of which he expressed no opinion, was produced, and proved to the satisfaction of the High Court. They gave credit to one of the attesting witnesses, Krishna Nath Surma Roy, and other evidence in support of it, and their Lordships see no reason to disturb their finding.

The High Court appear to their Lordships to have dealt very properly with the arguments urged on behalf of the plaintiff, and the documents produced in support of the contention that both the will and the *anumati-patra* were fabricated after the death of Jagat Chunder. With regard to the contention that the *anumati-patra* and will were dated on days subsequent to the death of Jagat Chunder, it is impossible to believe, in the face of all the evidence in the case, that Jagat Chunder died in the month of Falgun 1273, and not on the 24th of Cheyt in that year, as alleged on the part of the plaintiff in the plaint. It was inconsistent on the part of the Subordinate Judge to admit evidence to prove that [215] Jagat Chunder died in Falgun 1273 after leave to amend the plaint had been refused.

On the argument before their Lordships much reliance was placed on the account at p. 93 of the record, dated 15th Bhadro 1274, or 30th of August 1867, in which a sum of Rs. 48-14 was charged for the expenditure for the half-yearly sradh of Jagat Chunder. It was contended that, if Jagat died on the 5th of April 1867, the time of the performance of the half-yearly sradh had not arrived on the 15th Bhadro 1274, whereas, if he died on the 24th Falgun 1273, or 7th of March 1867, as alleged by the plaintiff, the period for performing the half-yearly sradh was on the very day of the date of the account. Their Lordships do not attach any importance to that document. It seems that the half-yearly sradh may be performed at any time during the sixth month after the death, and calculating by lunar months five months and four days had elapsed since the 5th April 1867. The account is signed by Chunder Mohun Sen; but he was not the manager of Bamasunderi's estate, nor had he been appointed her guardian. The reason for his rendering an account is not explained.

1890 JULY 26. — PRIVY COUNCIL. — 18 C. 201 (P.C.) = 17 I.A. 159 = 5 Sar. P.C.J. 607.

The account is also signed by the Extra Assistant Commissioner, but it does not appear what he intended to vouch by his signature.

It is impossible to believe that, if the will and *anumati-patra* were forged, any of the persons interested in the forgery could have been ignorant of the date of the death, or would have forged documents dated a month later. Such an account as that now under consideration could never induce their Lordships to believe that Jagat Chunder died in Falgun, in the face of the statement in the plaint that he died on the 24th of April, and of all the other evidence in the cause to which the Judges of the High Court have adverted.

The High Court referred to a genealogical table produced in support of the plaintiff's title. They considered, for the reasons given, that it was not entitled to any credit. The original document is not on the record transmitted to this Board, and their Lordships are unable, therefore, to form any opinion respecting it, or to say that the High Court came to an erroneous conclusion respecting the plaintiff's heirship. They concur generally with the High Court in their findings upon the facts, and they will humbly **[216]** advise Her Majesty to affirm the judgment of the High Court and the interlocutory orders before referred to. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Tatham, Son & Lousada.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

---

18 C. 216 (P.C.) = 17 I.A. 181 = 5 Sar. P.C.J. 619 = Rafique and Jackson's P.C. No. 122.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Sir B. Peacock and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

BISHAMBAR NATH AND OTHERS (*Petitioners*) *v.* IMDAD ALI KHAN (*Objector*). [8th and 23rd July, 1890.]

Attachment—Civil Procedure Code, 1882, *s.* 266, *sub-s.* (*g*) *—Political pension—Payments due under the Oudh loans of* 1838 *and* 1842 *—Exemption from liability to attachment for debt.*

Although it is probable that the enactments of s. 266, Civil Procedure Code, 1882, were not meant to cover pensions payable by a foreign State when remitted for payment to their pensioner in India, they certainly include all pensions of a political nature payable directly by the Government of India. A pension guaranteed payable by the latter by a treaty obligation contracted with another sovereign power is in the strictest sense a political pension.

An allowance, payable by the Government of India under an arrangement made between the King of Oudh and the Governor-General in 1842, for the benefit of members of the King's family and household, and their respective heirs in perpetuity, and payable to one of such heirs, who has inherited it, as his share in the interest in the Oudh loan of 1842, is a political pension within the meaning of s. 266, sub-s. (*g*), Civil Procedure Code, 1882. The arrangement of 1842 cannot be treated as merely a provision out of the King's private estate for the maintenance of members of his family, there having been in a State like that of Oudh no distinction between State property and private property vested in the sovereign.

[**F.**, 26 M. 69 (71); 4 Ind. Cas. 145 (148) = 12 O.C. 323; 1 O.C. 170 (171); **R.**, 26 A. 617 = 1 A.L.J. 338 (343) = 1904 A.W.N. 144; 26 M. 423 (426).]

1890 JULY 23. — PRIVY COUNCIL. — 18 C. 216 (P.C.) = 17 I.A. 181 = 5 Sar. P.C.J. 619 = Rafique & Jackson's P.C. No. 122.

SIX appeals, consolidated by order (3rd April 1889), from orders (2nd September 1887), of the Judicial Commissioner, reversing orders (14th March 1887) of the District Judge of Lucknow.

The appellants, who were all judgment-creditors, respectively, of the respondent, raised the question whether a sum of money [217] receivable by him from the Government of India, in the form of an inherited share in the interest of the Oudh loan of 1838, augmented in 1842, was liable to be attached by a decree-holder in execution for his debt, or was a political pension within the meaning of s. 266, sub-s. (*g*). The latter enacts that stipends and gratuities allowed to military and civil pensioners of Government, and political pensions, shall not be liable to attachment or sale.

The share was inherited by the judgment-debtor from his grandmother, Nawab Malka Jehan, principal consort of Mohammad Ali Shah, formerly a King of Oudh. With the latter, Colonel Low, on behalf of the East India Company, entered into the engagements of 1838 and 1842 referred to in their Lordships ' judgment.

The first engagement (1) stipulated that the loan should bear interest at the rate of four per cent. per annum, and that, out of the total interest of Rs. 68,000, there "should be paid as pension in perpetuity, in four equal instalments, to the persons named in the 3rd Article, and to their heirs in perpetuity, on their receipts under their seals, the amounts set opposite their names." The first named of these persons was Malka Jehan, Queen of Mohammad Ali Shah, to whom, and her heirs in perpetuity, Rs. 400 per month, or Rs. 4,800 per annum, were thus made payable.

Of the proposal to the King in 1842 to advance to the East India Company a further sum of 12 lakhs, the result is thus stated by the Judicial Commissioner:—"The King readily acceded to this proposal, and sent in 12 lakhs of rupees to the British Minister, who issued promissory notes to the extent of 2 lakhs of rupees in favour of persons designated by the King. A few days afterwards the King proposed that instead of an ordinary subscription to the public loan, his twelve lakhs should be treated as a special loan, and that a paper of acknowledgment therefor should be drawn up, and that the Government note should not be negotiable, and that the interest accruing upon the loan should be paid as pension to his favourite Queen, Nawab Malka Jehan, and to her heirs for ever, and that the same should be treated as an augmentation of the small pension of Rs. 400 per mensem secured to her by the loan and treaty **[218]** (XLVIII) of 1838, and that the said pension should be payable monthly, at the Resident's Treasury, at Lucknow."

The promissory note was in the form of an ordinary Government Promissory note, payable on demand, after three months' notice, to Mohammad Ali Shah, his executors, or administrators, or order. The margin of the note contained a statement that "the interests on this note is to be paid to Nawab Malka Jehan, and her issue, under order of Government, Financial Department, dated 9th February 1842."

A suit was brought in 1884 by the heirs of Malka Jehan to obtain a decision as to the shares in which they were entitled to receive the pension inherited from her on her decease. This having been brought before the Judicial Committee in appeal [*Mariam Begum* v. *Mirza* (2),]

(1) Aitchison's Treaties, Engagements and Sanads, Vol. II, p. 141 of edition of 1876.
(2) 17 C. 234 = 16 I. A. 175.

1890 JULY 23. — PRIVY COUNCIL. — 18 C. 216 (P.C.) = 17 I.A. 181 = 5 Sar. P.C.J. 619 = Rafique & Jackson's P.C. No. 122.

their Lordships were of opinion that it was the intention of the King that, in the event of the death of any of the pensioners having issue, his, or her, heirs according of the Mahomedan (Shia) law of inheritance should receive payment of the pension in the proportions regulated by such law.

The interest payable on the note was paid to Nawab Malka Jehan until her death on 4th July 1881. She left four grandchildren, her heirs under the Imamiya law, of whom the present respondent was one. The shares of these descendants were finally settled by the decision above referred to. Pending the litigation, these appellants, as decree-holders, applied to have the respondent's share attached. An order was made accordingly attaching Rs. 14,354, then in the Government Treasury at Lucknow, and said to be this respondent's share. On the 15th January 1887, the latter filed his objections which were dealt with under s. 244, Civil Procedure Code. Notice was issued, and, on the appearance of the decree-holders, issues were recorded. Of these the first, which applied to all the decree-holders, was whether the pension fell within the provisions of s. 4, Act XXIII of 1871, the Pensions Act (1). The District Judge made his order (14th March 1887) **[219]** in favour of these appellants. He considered that payments issuing as the result of the loan of 1842, were not pensions within the meaning of the Act of 1871, and he pointed out that they were not referred to in the Oudh Wasikas' Act, 1886 (2).

The present respondent appealed to the Judicial Commissioner, resting his case for exemption upon s. 11 of the Pensions' Act, 1871. The order of the District Judge was reversed by the Appellate Court, and the attachments were removed. The Court held that the claim did not fall within the prohibition of the Pensions' Act, 1871, any more than it did within the Wasikas' Act, 1886.

The Judicial Commissioner, however, considered that, as far as the settlor Mohammad Ali Shah was concerned, the payment to the respondent and to his grandmother before him was a pension pure and simple made on political grounds. He therefore was of opinion that the sum lying in the Treasury and now in dispute was a "political pension" within the meaning of s. 266, Civil Procedure Code.

On this appeal,

Mr. *J. D. Mayne*, for the appellants, argued that the order of the District Judge ought be restored. The payment in question **[220]** was neither

---

(1) This Act provides in s. 4, "except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension, or grant of money, or land revenue, conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted." And in s. 11, "No pension granted or continued by Government on political considerations, or on account of past services or present infirmities, or as a compassionate allowance, and no money due or to become due on account of any such pension or allowance, shall be liable to seizure, attachment, or sequestration by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court."

(2) This Act (XXI of 1886) recites the creation of certain pensions arising out of loans made by members of the Oudh Royal Family to the East India Company in 1813, 1814, 1825, and 1838, which were known respectively as the Amanat, Zamanat, and Loan, Wasikas, and that doubts had arisen whether such wasikas were pensions within the meaning of the Pensions' Act, 1871. It then proceeded (s. 2) to declare that they were pensions within the meaning of the Pensions' Act, 1871, and that that Act should apply to them as if they were pensions of classes referred to in ss. 4 and 11 of that Act. No reference was made in the Act to the loan of 1842.

1890 JULY 23. — PRIVY COUNCIL. — 18 C. 216 (P.C.) = 17 I.A. 181 = 5 Sar. P.C.J. 619 = Rafique & Jackson's P.C. No. 122.

a pension within s. 11 of the Pensions' Act, 1871, as contended by the present respondent when appealing below, nor was it a political pension within s. 266 of the Civil Procedure Code, as the Judicial Commissioner had held it to be. Act XXI of 1886 by implication excluded money payable under the loan of 1842 from those pensions which were by that Act exempted from the ordinary civil process. The payment was in virtue of a settlement of the King's private estate, he having made the Government of India the instrument for carrying out an arrangement whereby he provided for his relations. This was not a political pension.

Mr. *R. V. Doyne*, for the respondent, argued that the construction already put by their Lordships on the agreement of 1842 was that the loan of that year was by way of augmenting the loan of 1838, and was brought, in effect, within the terms of the previous engagement. This at all events gave the sums paid under the latter as well as under the former loan the character of a political pension, within the meaning of s. 266, sub-s. (*g*), of the Civil Procedure Code.

Mr. *J.D. Mayne* was heard in reply.

On a subsequent day, 23rd July, their Lordships' judgment was delivered by—

JUDGMENT.

LORD WATSON.—These are consolidated appeals at the instance of judgment-creditors of the respondent, Nawab Ali Khan, one of the heirs, according to Mahomedan law, of the Malka Jehan, who was the principal consort of Mohammad Ali Shah, the last King of Oudh. In all of them the same question is raised for decision,—whether a monthly allowance payable to the respondent by the Indian Government, under an arrangement made between the King of Oudh and the Governor-General of India in the year 1842, is liable to be taken in execution for his debts ?

Mohammad Ali Shah had in 1838, advanced Rs. 17,00,000 to the Government of India, in pursuance of a formal treaty, by which the latter undertook to apply the interest of that sum in payment of allowances to certain members of the Royal family and household, including his spouse Malka Jehan, and their respective heirs in perpetuity. In the treaty, these allowances are described as [221] "pensions," and the persons entitled to them for the time being as "pensioners;" and on the failure of an original pensioner, and his or her heirs, the Government undertook to devote the lapsed pension towards the maintenance of a mosque selected by the King.

Mohammad Ali Shah subsequently advanced on loan to the Indian Government Rs. 12,00,000, which he intended to settle as an additional provision for Malka Jehan and her heirs. Being apprehensive that the lady or her heirs might, if the note or acknowledgment of the loan were issued in her name, be "persuaded at some future period, by evil advisers, to sell the note and squander away the money," His Majesty, by letter dated the 4th January 1842, requested the Governor-General, instead of issuing a promissory note in name of Malka Jehan, to "pay to her, and her issue in perpetuity, the interest at the rate of 5 per cent. per annum, that is, Rs. 5,000 a month, so long as 5 per cent. interest may be allowed, and afterwards such reduced interest as may be paid from time to time by the British Government." The letter made special reference to the guarantee or treaty of 1838, and the pensions thereby settled on the ladies of the Royal family, and represented that compliance with the request which it

1890 JULY 23. — PRIVY COUNCIL. — 18 C. 216 (P.C.) = 17 I.A. 181 = 5 Sar. P.C.J. 619 = Rafique & Jackson's P.C. No. 122.

preferred "will prevent any new guarantee being entered into, but will merely be the payment of a large sum of interest instead of a small one."

In reply to that communication the Governor-General, by a letter dated the 15th February 1842, intimated his pleasure "in concurring with the hearty desire and wishes" of His Majesty, and gave the assurance that an order would be duly passed for their execution.

A promissory note for repayment of the loan was issued in the name of Mohammad Ali Shah, which appears to have been renewed, in similar terms, as of date the 30th June 1854. The letters which constitute the arrangement between His Majesty and the Government of India with respect to payment of the interest to Malka Jehan and her heirs in perpetuity, contain no provision for disposal of the capital of the loan, in the possible event of their failure. Whether the capital would, in that event, be payable to the representatives of the King, or belong to the Indian Government, appears to their Lordships to be a question the decision of **[222]** which, one way or another, cannot affect the character of the right conferred on Malka Jehan and her heirs by the arrangement of 1842, under which the fund is at present held and administered by the Government.

The Civil Precedure Code of 1882, s. 266 (*g*), enacts that "Stipends and gratuities allowed to military and civil pensioners of Government, and political pensions," shall not be liable to attachment and sale in execution of a decree. If the share, inherited by the respondent, of the interest on the loan of 1842, originally payable to Malka Jehan, be a "political pension" within the meaning of that enactment, the case of the appellants necessarily fails.

The appellants argued, in the first place, that the allowance payable to the respondent by the Indian Government is not a pension; and, in the second place, that, assuming it to be a pension, it is not a political pension in the sense of the Civil Procedure Code, inasmuch as it is not a pension bestowed by the Indian Government in respect of political services, or for political considerations.

In support of the first of these propositions, it was maintained that the arrangement of 1842 was in its nature akin to a deed of settlement, by which the King made a provision, out of his private estate, in favour of members of his family who had a natural claim upon him for maintenance. The argument ignores the fact that, under a despotic government, like that of Oudh in 1842, there was really no distinction observed between State property and private property vested in the Sovereign, and that all the estate of which he was possessed passed, on his decease, to his successor in the throne.

Their Lordships had occasion in a recent case [*Marian Begum* v. *Mirza* (1),] to consider the character and effect of the arrangement constituted by the letters passing between the King of Oudh and the Governor-General in 1842. Sir Barnes Peacock, who delivered the judgment of the Board, there said :—"Their Lordships concur with the Judicial Commissioner in the opinion that the King intended in 1842 to provide an additional pension for Malka Jehan **[223]** of the same nature as that which he had already provided for her in the year 1838." Notwithstanding the argument addressed to them for the appellants, their Lordships see no reason to alter or modify the views thus expressed by Sir Barnes Peacock on their behalf.

---

(1) 17 C. 234 = 16 I. A. 175.

1890 JULY 23. — PRIVY COUNCIL. — 18 C. 216 (P.C.) = 17 I.A. 181 = 5 Sar. P.C.J. 619 = Rafique & Jackson's P.C. No. 122.

The Governor-General, in assenting to the King's letter of the 4th January 1842, expressly agreed to apply the interest arising upon the new loan in augmenting the pensions already secured to the Queen and her heirs by the Treaty of 1838, such augmentation being subject to the same conditions and under the same guarantee as the original pensions. In that view, it is impossible to say that the increase is not a pension, or that the heirs of Malka Jehan, the present recipients, have not been recognized as pensioners by the Government of India.

Then it is said that these payments by way of increment, although they may be pensions, are not political pensions within the meaning of the Code. The following passage, in the judgment already referred to, appears to their Lordships to be conclusive against this branch of the appellants' argument :—" It should be remarked that although a settlement in the terms of the King's letter of 1842, creating pensions in perpetuity, could not under the Mahomedan law be validly made by a private individual, the arrangement of 1842 takes effect as a contract or treaty between two sovereign powers."

It is probable (although the point is not one which it is necessary to determine in this case) that the enactments of s. 266 (*g*) of the Code were not meant to cover pensions payable by a foreign State, when remitted for payment to their pensioner in India ; but these enactments certainly include all pensions of a political nature payable directly by the Government of India. A pension which the Government of India has given a guarantee that it will pay, by a treaty obligation contracted with another Sovereign Power, appears to their Lordships to be, in the strictest sense, a political pension. The obligation to pay, as well as the actual payment of the pension, must, in such circumstances, be ascribed to reasons of State policy.

Being of opinion that the respondent's pension is protected from execution by the provisions of the Code, their Lordships consider it unnecessary to express any opinion with regard to his **[224]** pleas founded on "the Pensions' Act, 1871," and the "Oudh Wasikas' Act, XXI of 1886."

In one of these appeals a plea of *res judicata* was taken, upon the ground, apparently, that a ruling by the Judge in one application for execution ought to be held conclusive against the judgment-debtor in every other application for execution of the same decree. The plea requires no further notice, because the decree or order upon which it is rested has not been produced.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgments appealed from. The costs of the respondent in these appeals must be paid by the appellants.

Appeals dismissed with costs.

Solicitor for the appellants : Mr. *W. Buttle.*

Solicitors for the respondents : Messrs. *Young, Jackson, & Beard.*

1890
JULY 26.

PRIVY COUNCIL.

18 C. 224 (P.C.) = 17 I.A. 145 = 5 Sar. P.C.J. 628.

18 C. 224 (P.C.) = 17 I.A. 145 = 5 Sar. P.C.J. 628.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

JARAO KUMARI (*Plaintiff*) *v.* LALONMONI AND ANOTHER (*Defendants*). [10th and 26th July, 1890.]

Evidence—Admission in a mortgage as to amount of land excepted from its operation—Evidence Act (*I of* 1872) s. 83—*Takbast survey map—Statements recorded on such map.*

Debutter land within the limits of a revenue-paying mouzah, which had been mortgaged by the defendants to a predecessor in title of the plaintiff, was exempted from the mortgage, the deed specifying the number of bighas making the area of the debutter. Against a plaintiff, who made title to the mortgaged mouzah and claimed possession of all of it that had passed by the mortgage, the mortgagors set up that there was more debutter in the mouzah than the deed had specified the intention of the parties to the deed having been to exempt whatever debutter there actually was:—*Held*, that the statement in the deed as to the quantity of the debutter was a deliberate admission, imposing upon the mortgagors who had made it, the burden of proving that it was untrue, or that they were not bound by it; also that the Subordinate Judge's finding that the defendants had not given proof sufficient to discharge themselves of this, was correct.

[225] Among other evidence, adduced to counteract the effect of this admission, was a takbast map made at a revenue survey. The amin who made it had no authority to determine what lands were debutter, but only to lay down, and to map, boundaries:—*Held*, that this map could not be treated as raising a presumption of correctness within s. 83 of the Indian Evidence Act, 1872, on the question as to the amount of debutter land in one of the villages mapped.

Statements also, as to what lands were debutter appeared on the face of the map to have been made according to the pointing out of the agents of the proprietors of the mouzah, and the principal tenants in the presence of the agents of the holders of estates in the neighbouring mouzahs:—*Held*, that these statements were not evidence on the issue now raised.

[**N.F.**, 18 Ind. Cas. 799 = 63 P.R. 1913 = 113 P.L.R. 1913 = 112 P.W.R. 1913; **D.**, 10 C.L.J. 527 = 4 Ind. Cas. 442 (446); 13 C.W.N. 71 (72) = 1 Ind. Cas. 376; 22 Ind. Cas. 645.]

APPEAL from a decree (24th July 1885) of the High Court, modifying a decree (21st December 1882) of the Second Subordinate Judge of the Hooghly district.

The question was whether the lands, of which the plaintiff, now appellant, claimed possession, were included in a mortgage of the 6th October 1871, or were excluded by the terms of the mortgage deed, which exempted a certain number of bighas of debutter land from its operation. The ancestors of the defendants, respondents, were formerly zemindars of a ten-annas share of Mahomed Aminpore in the Hooghly district, and had dedicated to the maintenance of the worship of several Hindu deities a yearly sum of Rs. 7,824 out of the zemindari rents.

Before the decennial settlement, lands yielding about that sum were set apart from the malguzari villages of the zemindari; and in 1770 a chhar chitta was given by the officer representing the revenue authorities to the zemindar, stating the plots of debutter. In 1787 the settlement of the zemindari took place, excluding the lands which, according to that document, were debutter. A resumption suit claiming 9,141

1890
JULY 26.
PRIVY COUNCIL.
18 C. 224 (P.C.) = 17 I.A. 145 = 5 Sar. P.C.J. 628.

bighas, as liable to assessment and not assessed, was brought in the year 1839, lasting till 1845. In that suit, which was brought against Jogendra Chunder Roy, who was the husband of the first, and father of the second, of the present defendants and against his brother, the chhar chitta of 1770 was produced; and the proceedings ended in the confirmation of the debutter, and its release from all claim by the Government to assess it to the revenue. This same document was produced in a suit for rent brought in 1880 by the present appellant in which [226] the respondents intervened, but it was not forthcoming in this suit. Default having been made in payment of the mortgage debt, the mortgagee obtained, on the 10th April 1877, a consent decree for Rs. 2,27,589, in execution whereof the mortgaged lands were sold, on the 9th December 1878, to Luchmiput Singh, in the name of his son Chutturput Singh. They were then, on the 15th November 1880, with other estates, sold to the second plaintiff, the Maharaja Sir Jotendro Mohun Tagore, K.C.S.I., who granted a putni ijara of eight annas of the twelve annas of Mahomed Aminpore to Srimati Jarao Kumari, the first plaintiff, the present appellant, who was bound by the conditions of the ijara to protect the estate against encroachment.

This suit was at first brought to obtain possession of 39 plots, but no question remained on this appeal as to any parcel except the first, which was described in the schedule to the plaint as the Seoraphuli hât, or market, together with land belonging to it. The mortgage deed of 6th October 1871, which was in English, set forth the exception upon which the present litigation turned, which was, "save and except the debutter lands therein comprised, namely": then followed the names of the villages, with the amount of debutter land in each. Against Seoraphuli was set down the area of 87 bighas, that extent of debutter land being thus excluded. The plaintiff's contention was that Seoraphuli having been mortgaged, less its debutter lands, those lands were expressly limited to the area of 87 bighas, and that the rest of the village, over and above that total, was comprised in the mortgage, such having been the intention of the parties thereto, and also passed at the sale in 1878, and the subsequent sale. The defendants, on the other hand, alleged that their title to the debutter land in this village was not limited to the 87 bighas, but that they were entitled to have excluded from the mortgage all the debutter land, whatever its area, that the limits of Seoraphuli contained.

The Subordinate Judge, Babu Bhubanchunder Mukerjee, considered the evidence on which the defendants relied to be insufficient to outweigh the presumption raised by the admission in the mortgage deed of 6th October 1871 that the debutter land in Seoraphuli was only 87 bighas. He went through all the defendants' proofs, by [227] which they showed that the land in suit was part of their estate, but held these proofs insufficient to alter the alleged area of debutter land in Seoraphuli, or establish it as any more than the 87 bighas, admitted in the mortgage deed, a careful document. By the takbast survey map made in 1869, it appeared that the lands, measured as debutter of Seoraphuli, were 192 bighas. But that map was evidence of possession, not of title, and to report on the question now raised, the quantity of debutter was not within the amin's authorization. He referred also to the non-production of the chhar chitta of 1770.

Both parties appealed to the High Court, of which a Division Bench (MITTER and NORRIS, JJ.) in part allowed, and in part dismissed, the

1890 JULY 26. — PRIVY COUNCIL. — 18 C. 224 (P.C.) = 17 I.A. 145 = 5 Sar. P.C.J. 628.

appeals of both parties, with the result that the judgment was in favour of the defendants, as to the area of the debutter in Seoraphuli being the 192 bighas mentioned in the takbast map of 1869. The High Court held, that, on the proper construction of the mortgage deed, the intention of the parties was to mortgage only the zamindari lands excluding the debutter, and that "the specification of the quantity of the debutter land did not enlarge the actual area of the mal lands agreed to be hypothecated." In deciding what was debutter, the Judges were of opinion that the measurement chittas made in the course of the resumption suit of 1840—45 would, if they had been procurable, have been the most satisfactory evidence. But, as they could not be found, the next best evidence was the takbast survey map of 1869. This they held to have been wrongly rejected by the first Court, and they considered it to be presumably correct, under s. 83 of the Indian Evidence Act, 1872, it not having been shown to be inaccurate. As to the non-production of the chhar chitta of 1770, there was nothing to show that it was intentionally withheld by the defendants. Thus they arrived at 192 being the number of excepted bighas in Seoraphuli.

This appeal was preferred by the first plaintiff alone.

Mr. *T. H. Cowie*, Q.C., and Mr. *R. V. Doyne*, appeared for the appellant.

Mr. *J. H. A. Branson*, appeared for the respondents.

The principal points urged for the appellant were that the High Court was wrong in its construction of the mortgage deed, **[228]** and also in not giving the right effect to the evidence. The true construction was that all of mouzah Seoraphuli, except 87 bighas of debutter, was included in the mortgage. The High Court had not attributed due weight to the defendants' admission in the deed, and had erred in holding that the takbast map of 1869 was within s. 83 of the Evidence Act. The statements appearing on the map had been wrongly admitted as evidence on the issue between the parties.

For the respondents, it was argued that the High Court had rightly treated the mortgage deed as excluding the debutter in Seoraphuli. The insertion of the number of bighas forming the area was open to correction in a decree, upon evidence of its inaccuracy. The order in the resumption suit, the takbast map, and the other evidence, on which the judgment of the High Court had been based, supported the conclusion.

Mr. *T. H. Cowie*, Q.C., replied.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH.—By a mortgage dated the 6th of October 1871 to secure the repayment of Rs. 1,50,000 and interest, Srimati Lalonmoni Dasi conveyed all her share and interest, and Girindra Chunder Roy released, conveyed, and assured, all his share and interest, as well as confirmed the share and interest of Lalonmoni Dasi, unto Doorga Churn Law, his heirs and assigns, according to the nature and tenure thereof, of and in an undivided moiety or eight-annas share of and in a large number of mouzahs, of which the names were stated, which taken collectively were said to compose the zemindari called and known as kismut pergunnah Mahomed Aminpore, in the zillah or district of Hooghly, save and except the debutter lands therein comprised, namely (this word being followed by a

list of the mouzahs), and against the name of each the quantity in bighas and cottahs of land excepted, making a total of 4,992 bighas 3 cottahs. Amongst the mortgaged mouzahs is one called Sarapuli or Seoraphuli, and the quantity of debutter land set against its name is 87 bighas. A suit having been brought by the mortgagee against the mortgagor for realization of what was due to him, and a decree obtained, the property was attached and sold by auction, and was [229] purchased, in the name of his son, by Rai Luchmiput Singh, who obtained a sale certificate, and possession was given to him. He afterwards sold the property to Maharaja Jotendro Mohun Tagore, who granted a putni thereof to the appellant. The suit was brought by the appellant and the Maharaja, who has no immediate interest, against the mortgagors, to recover possession of parts of the mortgaged property, including Seoraphuli, of which the defendants were in possession, and the defence was that the properties claimed and mentioned in the schedule to the plaint were not mortgaged, and that certain of them, including Seoraphuli, were rent-free debutter properties.

1890 JULY 26. — PRIVY COUNCIL. — 18 C. 224 (P.C.) = 17 I.A. 145 = 5 Sar. P.C.J. 628.

The present appeal relates only to Seoraphuli, and the question in it is whether the debutter land in Seoraphuli exceeded 87 bighas. The mortgage deed conveyed all the land in the mouzahs which was not debutter, and the statement of the extent of the debutter land comprised in the mouzahs was a deliberate admission by the mortgagors, the defendants, which imposed upon them the burden of proving that it was untrue, or that they were not bound by it. It was admitted on behalf of the defendants that they had no original deed of endowment, and they relied on a resumption decree dated the 6th June 1845, from which it appeared that 5,618 bighas 16 cottahs debutter lands, situate in Burdwan, resumed by the Deputy Collector by his decree dated the 26th June 1837, were released as debutter to the ancestors of the defendants, on condition of their appropriating the proceeds thereof to deb-sheba. The decision in the resumption suit mainly rested on a chhar chitta of William Lushington, Esq., in 1770, and a letter of the Collector of the district of Nuddea in 1791, it appearing from the decision that the quantity of debutter lands of each village was mentioned on the back of the chhar. This had been filed in 1880 in a suit in the Small Cause Court at Serampore, and there was evidence of its having been returned to one of the defendants' servants in that year. The plaintiffs gave the defendants notice to produce various papers, including the chhar. It was not produced, and the Subordinate Judge held that, in its absence, he must adopt the area of the debutter lands as described in the mortgage deed as the real quantity of debutter lands excluded from its operation, and made [230] his decree accordingly. The decree included many properties, and both parties appealed to the High Court. That Court allowed the defendants' appeal as regarded Seoraphuli, called plot No. 1, and modified the decree of the lower Court, and the present appeal is against this decision. The judgment of the High Court appears to be founded upon a takbast map made in a survey in 1869, which the learned Judges said they were of opinion "should be taken as the basis of the decision" of the question of the identity of the debutter lands, unless it was displaced by any better evidence, and they appear to have held that it lay upon the plaintiff to rebut the evidence of the map. The statements in this map of lands being debutter appeared on the face of it to have been made as pointed out by agents on behalf of the proprietor of the mouzah and the principal tenants in the presence of the agents of the holders of estates in the neighbouring

1890 JULY 26 — PRIVY COUNCIL. — 18 C. 224 (P.C.) = 17 I.A. 145 = 5 Sar. P.C.J. 628.

mouzahs. The amin who made the map had to lay down boundaries, but had no authority to decide what lands were debutter. The value of the map must depend upon the inquiry which was made by the amin, and the statements of what lands were debutter may have been and probably were given by the defendants' agents, no one being present to question the accuracy of them. Section 83 of the Evidence Act has not the effect, which the High Court gives to it, of making those statements evidence. Their Lordships agree with the Subordinate Judge in the view which he took of the takbast map, and are of opinion that it was of no weight against the admission in the mortgage deed. Nor do they see that the decision of the Subordinate Judge proceeded upon an erroneous construction of the recital in the deed. The entire mouzah Seoraphuli, except debutter land, was conveyed, and it lay upon the defendants to prove that the 87 bighas set against Seoraphuli was a mistake, and that there was a greater quantity of debutter land in that mouzah. Whether or not they could have produced the chhar chitta and purposely refrained from doing so need not be inquired into. The evidence was not sufficient to show that their admission ought not to be taken as proof of the plaintiffs' case. Such an admission as that is entitled to great weight and should be met by satisfactory evidence. Their Lordships will humbly advise Her Majesty to reverse the decree of the High Court so far as it modifies the decree **[231]** of the Subordinate Judge, and dismisses the plaintiffs' suit, and orders the plaintiffs to pay costs, and to order the defendants to pay the costs of the appeal to the High Court and the costs of the suit in the Court of the Subordinate Judge as ordered by his decree. The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitors for the respondents: Messrs. *Watkins & Lattey.*

C. B.

---

18 C. 231.

CIVIL RULE.

Before Mr. Justice O'Kinealy and Mr. Justice Ghose.

SHOOSHEE BHUSAN RUDRO AND ANOTHER (*Judgment-debtors*), *Petitioners v.* GOBIND CHUNDER ROY (*Decree-holder*) AND OTHERS (*Auction-Purchasers*), *Opposite Parties.**
[15th December, 1890.]

Limitation—Bengal Tenancy Act (*VIII of* 1885), s. 174—*Extension of time when Court is closed.*

Where a tenure is sold for arrears of rent under the Bengal Tenancy Act of 1885, the judgment-debtor, under s. 174 of the Act, may apply to have the sale set aside on his depositing in Court for payment to the decree-holder the amount recoverable under the decree with costs, and for payment to the purchaser a sum equal to 5 per cent. of the purchase-money; and if the Court be closed on or before the last day of the period limited, the judgment-debtor may pay the said sum into Court on the 1st day the Court re-opens, notwithstanding the absence of express provision to that effect.

---

* Civil rule No. 1502 of 1890, against the order of Baboo Atal Behary Ghose, Munsif of Goalundo, dated 4th August 1890.

[F., 18 C. 631 (634); 21 M. 385 (387); 22 M. 179 (182)=8 M.L.J. 265; 3 C.L.J. 339 (340)=10 C.W.N. 535; 9 Ind Cas. 181 (183); R., 36 B. 268=13 Bom. L.R. 1153; 13 C.L.J. 467=10 Ind. Cas. 51 (53); 5 Ind. Cas. 416 (417); 6 Ind. Cas. 752=13 O.C. 103 (107); 12 Ind. Cas. 810=7 N.L R. 176; Com., 16 C.W.N. 721 =14 Ind. Cas. 173.]

1890 DEC. 15.

CIVIL RULE.

18 C. 231.

THE facts of this case were as follows :—

On the 20th of June 1890 a sale took place under the Bengal Tenancy Act of 1885, and the judgment-debtors on the 21st of July (more than 30 days after) applied to the Munsif to have the sale set aside on depositing in Court for payment to the decree-holder the amount recoverable on the decree with costs, and for payment to the purchaser a sum equal to 5 per cent. on the purchase-money, in accordance with the provisions of s. 174 of the Act. They contended that they were allowed 30 **[232]** days under the Act, and as the 30th day happened to fall on a Sunday, that they were entitled to come in on the first day on which the Court was open, *i.e.*, on the 21st July. The Munsif refused the application on the ground that there was no power to extend the time under s. 174; for if the Legislature had intended to give such power it would have expressly mentioned it as it had done in s. 66. Against this order the judgment-debtors moved the High Court under s. 622 of the Civil Procedure Code.

Baboo *Grija Sunkar Mozumdar*, for the petitioners.—The Munsif should not have refused to set aside this sale, as we were entitled to make our application under the circumstances on the 31st day after the sale. The Legislature gives us 30 days, and we are entitled to make our application at the end of the 30th day, and if on the 30th day the Court is closed, then we may make the application on the first day on which the Court re-opens. This must be so. For instance, if a sale took place on the 8th of September and the Court closed on the 10th for one month for the Doorga Pooja holidays, the judgment-debtor would only have one day in which to make his application, and he would thus be deprived of the privilege given him by s. 174. The Legislature has expressly laid it down in s. 66, where the limitation is 15 days, that if the Court be closed on the 15th day, then payment of the amount and costs of the suit may be made on the day on which the Court re-opens; but as it has not expressly laid it down in s. 174, the Munsif holds that we are out of time. The general principle is that if the delay be not caused by any fault of the parties, but by some act of the Court, such as the Court being closed, then the parties are entitled to come in on the first opening day [*Mayer* v. *Harding*(1) and *Hossein Ally* v. *Donzelle*(2)].

Baboo *Jogat Chunder Banerjee*, for the opposite parties.—The judgment-debtors are not entitled to come in on the 31st day after the sale and ask to have the sale set aside; they had 30 days to make their application in, and it was entirely their own fault that they could not utilize the 30th day. The section must be construed strictly. Had it been the intention of the Legislature to extend **[233]** the time, they would have done so expressly as they have done in s. 66. Section 174 has been very strictly construed in *Rahim Bux* v. *Nundolal Gossami* (3) and *Rajendro Narain Roy* v. *Phudy Mondul* (4), and should be so construed in this matter. The extension should not be given to the petitioners.

The judgment of the Court (O'KINEALY and GHOSE, JJ.) was as follows :—

(1) L. R. 2 Q. B. 410.
(2) 5 C. 906.
(3) 14 C. 321.
(4) 15 C. 482.

1890
DEC. 15.
CIVIL RULE.
18 C. 231.

JUDGMENT.

In this case a rule was issued calling upon one of the parties in the case to show cause why an order of the Munsif of Goalundo, dated the 4th August last, should not be set aside. The facts are shortly as follows. A sale took place under the Rent Act, and after the sale the judgment-debtor applied to the Munsiff to have the sale set aside. He deposited in Court for payment to the decree-holder the amount decreed with costs, and for payment to the purchaser 5 per cent. on the purchase-money. That application was made on the 21st July. The sale took place on the 20th June. So that more than 30 days, the time allowed by s. 74 of the Rent Act, had elapsed between the sale and the application. The application was made one day more than the law allowed, but the delay was not due to the applicant himself, but to the fact that the 30th day fell on a Sunday, and the Court was closed. The question, therefore, that arises for decision is, whether, when a fixed period is given to do a certain act, and the person bound to perform it is, from no act of his own, but from some act or order of the Court, prevented from carrying it out, he gets the advantage of the next open day. The same point has been the subject of frequent discussion both at home and here. In the case of *Mayer* v. *Harding* (1) the same question arose. There the Courts were closed from Good Friday until the following Wednesday, and it was held that the transmission of the record on Wednesday was a transmission within the period required by the Act, although the period had expired. That case was followed in the case of *Waterton* v. *Baker* (2), and this has since been considered as the leading case in regard to these questions. The broad principle there laid down is that although the parties themselves cannot extend the time for doing an act in Court, yet **[234]** if the delay is caused not by any act of their own, but by some act of the Court itself—such as the fact of the Court being closed—they are entitled to do the act on the first opening day. This, then, is the general principle; and it has been followed in this Court. In the case of *Hossein Ally* v. *Donzelle* (3) a tenant was sued under Act VIII of 1869, and a decree obtained against him in the terms of s. 52 of that Act, which provides that if the amount of arrears, interest and costs be paid within 15 days from the date of the decree, execution shall be stayed. Owing to the Court being closed it was impossible to carry out the express terms of the Act; but the amount was paid on the first opening day, and this Court, in conformity with the rules laid down in *Mayer* v. *Harding* (1) held that the payment was good. That principle has now been expressly incorporated in the new Act, and one of the questions we have to decide is, where there is an express mention of such a right in s. 66, and no express mention in s. 174, there was any intention of the Legislature to change the law as it was understood at the passing of the Act, we think not. Section 66 made no change. The law is the same now as it was before. Therefore, we think there is no intention on the part of the framers of the law to make any change in the general principle. The applicant will get the benefit of that provision of the law.

The rule is, therefore, made absolute with costr.

C. S. *Rule made absolute.*

(1) L.R. 2 Q. B. 410. (2) L.R. 3 Q.B. 173. (3) 5 C. 906.

18 C. 234.

1891 JAN. 2.

CIVIL REFERENCE.

18 C. 234.

CIVIL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Trevelyan.

SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*) v. FAZAL ALI AND ANOTHER (*Plaintiffs*).* [2nd January, 1891.]

Limitation Act (*XV of* 1877), *s.* 10, *and sch. II, arts.* 62 *and* 145—*Act XI of* 1859, *s.* 31 —*Suit to recover surplus sale-proceeds of a sale for arrears of Government revenue.*

Where A instituted a suit in November 1889 to recover from the Secretary of State for India in Council the surplus sale-proceeds of three [235] taluks sold for arrears of Government revenue on the 3rd of October 1877 and which were in the hands of the Collector, *held*, that the suit was governed by art. 62, sch. II of the Limitation Act, and was therefore barred.

Held, also, that s. 31 of Act XI of 1859 did not vest the surplus sale-proceeds in the Collector as trustee, that a deposit did not necessarily create a trust, and that therefore s. 10 did not apply.

Held, further that the Collector was not a depository of the money within the meaning of art. 145 of sch. II.

[Overruled, 20 C. 51 **(F.B.)** ; **R.,** 6 C.L J. 535 (538).**]**

THIS was a reference by the Officiating District Judge of Chittagong, under the provisions of s. 617 of the Code of Civil Procedure. The facts of the case which gave rise to the reference were as follows :—

The plaintiffs instituted a suit in the Small Cause Court to recover from the Secretary of State for India, the surplus sale proceeds of three noabad taluks which had been sold for arrears of Government revenue on the 3rd October 1877. The suit was instituted in November 1889, that is, more than 12 years after the money had come into the hands of the Collector. The Secretary of State contended that the suit was barred by art. 62, sch. II of the Limitation Act. The plaintiffs maintained that art. 145 governed the case, and that they were in time. The Munsiff was of opinion that "the Collector is the depository of the sale proceeds" and that art. 145 applied, and decreed the suit. Against this decree an appeal was preferred to the District Judge by the Secretary of State, who contended, as he had done before the Munsif, that the suit was barred by art. 62. As the question was one of difficulty as well as of great importance to the Secretary of State and the public alike, the District Judge, entertaining reasonable doubts regarding it, and as no further appeal would lie from his decision, referred the case to the High Court for its decision on the question "whether the suit was barred by limitation or not" with the following opinion :—

"First, does art. 145 apply? Is the Collector a 'depository' within the meaning of that article? Is it true that s. 31 of Act XI of 1859 enacts that 'the Collector shall apply the purchase-money, &c., holding the residue, if any, *in deposit* on account of the late recorded proprietor, &c.?" But the rulings on art. [236] 145 are conflicting. In *Radha Nath Bose* v. *Rama Churn Mookerjee* (1) it was held that the corresponding article of the earlier Limitation Act applied 'to a deposit which is recoverable in specie.' In *Upendro Lal Mukhopadhya* v. *The Collector of Rajshahye* (2) a different view appears to have been taken. In *Issur*

---

* Civil Reference No. 16-A of 1890, made by R. H. Anderson, Esq , Judge of Chittagong, dated the 15th August 1890.

(1) 25 W. R. 415.

(2) 12 C. 113.

1891 JAN. 2. — CIVIL REFERENCE. — 18 C. 234.

Chunder Bhaduri v. *Jiban Kumari Bibi* (1) it is decided to be 'clear from the contexts that the deposit meant is a deposit of goods to be returned in specie.' I submit the last ruling is correct. Therefore the Collector is not a depository, and art. 145 does not apply.

"But it has further to be considered whether or not s. 10 of the Limitation Act saves the suit from being barred. In the Tagore Law Lectures for 1881, p. 16, a trust is defined as 'an obligation imposed upon some person or persons having the ownership of property, whether moveable or immoveable to deal with such property for the benefit of some other person or persons or for charitable purposes.' Then in p. 17 it is said that 'it is not necessary that the confidence should be expressly reposed by the author of the trust in the trustee, for it may be raised by implication of law, &c.' In my opinion the surplus sale-proceeds of an estate sold for arrears of revenue are by the operation of s. 31 of Act XI of 1859 vested in the Collector in trust for the specific purpose of paying them to the late recorded proprietor, and consequently s. 10 of the Limitation Act governs the present suit."

The *Advocate-General* (Sir *Charles Paul*), Baboo *Hem Chunder Banerji*, and Baboo *Ram Churn Mitter*, for the Secretary of State.

Moulvie *Serajul Islam*, for the plaintiffs.

Moulvie *Serajul Islam* took the preliminary objection that the Judge had no power to make the reference under s. 617 of the Code, inasmuch as the suit involved the determination of title to interest in immoveable property, and was excepted from the jurisdiction of the Small Cause Court either by art. 11 or 13 of schedule II of Act IX of 1887, and an appeal would lie to the High Court from the decision of the Judge. This objection was overruled by the Court.

[237] The *Advocate General*.—This suit is barred by limitation, as it is governed by art. 62 of sch. II of the Limitation Act. It is a suit for money had and received, Bullen and Leake, 4th Ed., Part I, p. 280, *Harrison* v. *Paynter* (2); and three years' limitation bars it. Even if the limitation be six years, the suit is still barred. It is contended that it is governed by art. 145, and that the Collector is a depository of the monies in his hands; that is not so. In the case of *Radha Nath Bose* v. *Bama Churn Mookerjee* (3) it was held that art. 145 applied to deposits recoverable in specie. This decision of Jackson, J., has not been departed from. The cases of *Issur Chunder Bhaduri* v. *Jibun Kumari Bibi* (1) and *Upendro Lal Mukhopadhya* v. *The Collector of Rajshahye* (4) are distinguishable. The case of *Gobind Chunder Sein* v. *Collector of Dacca* (5) does not apply to this case, as in that case the money was deposited by the purchasers. Article 60 does not govern the present case, as it refers to a different matter. This case does not come under s. 10 of the Limitation Act, as that section only applies when there is a trust for a specific purpose, that is to say, an express trust; the section excludes implied trusts or such trusts as the law would infer merely from the existence of particular facts or fiduciary relations; *Kherodamoney Dasi* v. *Doorgamoney Dasi* (6), *Greender Chunder Ghose* v. *Mackintosh* (7). The trust must be one for a specific purpose, *i.e.*, an express trust, not upon any reference of law imposing a trust upon the conscience; *Cunnigham* v. *Foot* (8), p. 984, and *Sands* v. *Thompson* (9).

(1) 16 C. 25. (2) 6 M. & W. 387. (3) 25 W.R. 415. (4) 12 C. 113.
(5) 11 W.R. 491. (6) 4 C. 455. (7) 4 C. 897.
(8) L.R. 3 Ap. Ca. 974. (9) L.R. 22 Ch. D. 614.

If "deposit" means deposit in the sense of "to the account of" *A.B.*, the Collector is not a trustee; *Pott* v. *Clegg* (1) and *Foley* v. *Hill* (2). This suit is not against any particular Collector, but against the Secretary of State. A Collector is not a corporation, and his liabilities are not handed on to his successors in office; *Harrison* v. *Paynter* (2). It has been held that the Secretary of State is not a trustee; *Kinlock* v. *Secretary of State* (3). The words "on demand" in **[238]** s. 31 of Act XI of 1859 mean "at once" or "immediately." The terms of this section are very loosely drawn, and certainly do not vest the funds in the Secretary of State as trustee. Therefore s. 10 cannot possibly apply. This case is the same as a case of a first mortgagee holding surplus sale-proceeds belonging to subsequent mortgagees; he is not a trustee of the monies in his hands; *Banner* v. *Berridge* (4); nor is the Collector in this case. This is simply a case coming under the common law action of money had and received, and the claim is barred after three years; *Harrison* v. *Paynter* (2).

Moulvie *Serajul Islam*, for the respondents.—Article 62 does not apply. See the cases of *Gurudas Pyne* v. *Ram Narain Sahu* (5), which deals with the corresponding article of the Limitation Act of 1877; *Upendro Lal Mukhopadhya* v. *The Collector of Rajshahye* (6) and *Muhammad Habillah Khan* v. *Safdar Husain Khan* (7). The case is governed by s. 10, as the monies are vested in the Collector as trustee. Section 31 of Act XI 1859 makes the Collector a trustee for a specific purpose. It fixes on the Collector a statutory obligation to hold the money on account of the recorded proprietor and to apply it to a specific purpose. He is therefore a trustee for the recorded proprietor. *Kinlock* v. *Secretary of State* was decided on the warrant, and does not touch this case. A trust can be inferred from the circumstances under which the deposit was made; *Doorga Persad Roy Chowdry* v. *Tarra Persad Roy Chowdry* (8). A Collector must keep the money in deposit; he may not use it, and thus differs from a banker. The case of *Radha Nath Bose* v. *Bama Churn Mookerjee* (9) was not one of deposit, but of simple over-payment and is distinguishable. *Gobind Chunder Sein* v. *Collector of Dacca* (10) has nothing to do with this case. The English authorities cited are not applicable; *Banner* v. *Berridge* (4) is in my favour. If this case comes within any article, it comes within art. 120. My right to sue accrues when demand is made and **[239]** refused; *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (11). "On demand" does not mean "immediately." We are therefore within time, and this suit is not barred.

The *Advocate-General* in reply.—It is said that there is a statutory obligation. There is also another statutory obligation to sue when the cause of action accrues. You cannot have one without the other. This is not a case of agency. Therefore it comes under art. 62 for money had and received, and is barred.

The judgment of the Court (TOTTENHAM and TREVELYAN, JJ.) was as follows:—

JUDGMENT.

In this matter it was first objected that the Judge had no power to make a reference under s. 617 of the Code. This question depends upon

(1) 2 Cl.H.L.C, 28. (2) 6 M. & W. 387.
(3) L.R. 15 Ch.D. 1=on appeal L.R. 7 Ap. Ca. 619. (4) L.R. 18 Ch. D. 254.
(5) 10 C. 860=11 I. A. 59. (6) 12 C. 113. (7) 7 A. 25.
(8) 4 M. I. A. 452. (9) 25 W.R. 415. (10) 11 W. R. 491.
(11) 6 C.L.R. 470.

1891 JAN. 2. — CIVIL REFERENCE. — 18 C. 234.

whether the suit might have been brought in the Small Cause Court. It is undoubtedly a suit for money; and as the pleader who raised the objection has been unable to suggest under which article of the schedule to the Small Cause Act a suit of this kind is excluded from the jurisdiction of the Small Cause Court, we cannot allow the objection, and must proceed to determine the reference.

The plaintiff in this suit seeks to recover from the Secretary of State the surplus sale-proceeds of three taluks which were sold for arrears of Government revenue on the 3rd October 1877.

This suit was instituted in November 1889, *i.e.*, more than 12 years after the money came into the Collector's hands. The question which we have to determine is whether the suit is barred by limitation.

The residue of the purchase money of the taluk has remained in the hands of the Collector in accordance with the provisions of s. 31 of Act XI of 1859, which provides how the purchase-money of estates sold for the arrears of Government revenue is to be applied. That section runs as follows:—"The Collector shall apply the purchase-money, first, to the liquidation of all arrears due upon the latest day of payment from the estate or share of an estate sold; and secondly, to the liquidation of all outstanding demands debited to the estate or share of an estate in the public accounts of the district, holding the residue, if any, in deposit on account of the **[240]** late recorded proprietor or proprietors of the estate or share of an estate sold or their heirs or representatives to be paid to his or their receipt on demand in the manner following; to wit, in shares proportioned to their recorded interest in the estate or share of an estate sold, if such distinction of shares were recorded or, if not, then as an aggregate sum to the whole body of proprietors upon their joint receipt. And if before payment to the late proprietor or proprietors of any surplus that may remain of the purchase-money the same be claimed by any creditor in satisfaction of a debt, such surplus shall not be payable to such claimant, nor shall it be withheld from the proprietor except under precept of a Civil Court." The words of this section which are important to the present case are:—"Holding the residue, if any, in deposit on account of the late recorded proprietor or proprietors of the estate or share of an estate sold or their heirs or representatives to be paid to his or their receipt on demand in manner following." It is upon this provision that the determination of the case mainly depends. The Judge who has referred this case considers that the Collector is a trustee of the money for the parties interested, and that under the terms of s. 10 of the Limitation Act the suit is not barred.

It has been contended that the monies were deposited with the Collector in the sense intended by art. 145 of the Limitation Act. The Crown contends before us that the right article applicable is art. 62.

It has further been suggested that the limitation applicable is to be found in art. 120, which provides for cases to which the other articles do not apply.

We think it clear that s. 10 of the Limitation Act has no application to this case. We do not think that the money was in any sense vested in the Collector. He has no control over it personally. He is merely an officer of the Government who is required to deal with or retain the monies in his charge in accordance with the provisions of the law and the lawful directions of his superiors in office. The money is not vested in him in any sense, and unless it be so, we can give no effect to the section

in this case. Apart from this objection, we think that for many [241] reasons it would be impossible to hold that s. 10 of the Limitation Act applies to this case. A deposit does not necessarily create a trust.

The next question is whether the Collector is a depository of the money within the meaning of art. 145; that article is as follows :—

"Against a depository or pawnee to recover moveable property deposited or pawned, 30 years. The date of deposit or pawn." The art. (147) of Act IX of 1871 which corresponds with this article was held in the case of *Radha Nath Bose* v. *Bama Churn Mookerjee* (1) to apply only to a case of a deposit which is recoverable in specie; and we see no reason to differ from that view. The same view was taken by a Bench of this Court in *Issur Chnnder Bhaduri* v. *Jibun Kumari Bibi* (2); and we think that the learned Judge who has referred this case is wrong in considering the case of *Upendro Lal Mukhopadhya* v. *The Collector of Rajshahye* (3) as an authority for the contrary proposition.

Article 60 has clearly no application, as there is no agreement in this case.

Article 62 does, we think, apply. There is authority (*Raghumoni Audhicary* v. *Nilmoney Singh Deo* (4)) for the proposition that this article was intended to cover the cases to which the English form of common law action for money had and received applied : but it is sufficient in this case to accept the more contracted view of the article taken by a Bench of this Court in the case of *Nund Lall Bose* v. *Aboo Mohamed* (5). The surplus proceeds come into the hands of the Collector for the use of the proprietors of the estate sold and are retained by him for such use. This is, we think, within the words of the article.

We answer this reference by holding that the plaintiff's claim is barred by limitation. We make no order as to costs.

C. S.

---

18 C. 242.

[242] CIVIL RULE.

Before Mr. Justice Tottenham and Mr. Justice Trevelyan.

HAFEZ MAHOMED ALI KHAN AND ANOTHER (*Objectors*), *Petitioners v.* DAMODER PRAMANICK (*Decree-holder*), *Opposite party.** [27th January, 1891.]

Civil Procedure Code (Act XIV of 1882), s. 295 "Whenever assets are realized," meaning of—Sale in execution of a decree—Deposit of twenty five per cent. of purchase money —Assets.

The words "whenever assets are realized" in s. 295 of the Code of Civil Procedure really mean "whenever assets are so realized as to be available for distribution among the decree-holders."

The twenty-five per cent. of the purchase-money deposited at a sale in execution of a decree is not "assets" within the meaning of s. 295, but a mere deposit, and therefore not immediately available for payment to the decree-holder.

Vishvanath Mahesvar v. *Virchand Panachand* (6) distinguished. *Jogendro Nath Sircar* v. *Gobind Chunder Addi* (7) distinguished and commented upon.

[R., 26 M. 179 (181) = 12 M.L.J. 276; 14 C. L. J. 50 = 15 C.W.N. 872 (874) = 10 Ind. Cas. 527 ; **Cons.**, 15 C.W.N. 783 = 8 Ind. Cas. 4.]

---

* Civil Rule No. 1812 of 1890, against the order of Baboo Nalini Nath Mitra, Munsif of Serajgunge, dated the 23rd of September 1890.

(1) 25 W. R. 415. (2) 16 C. 25. (3) 12 C. 113. (4) 2 C. 393.
(5) 5 C. 597. (6) 6 B. 16. (7) 12 C. 252.

1891 JAN. 27. — CIVIL RULE. — 18 C. 242.

THE petitioners, Hafez Mahomed Ali Khan and Aysa Khanu, had each obtained several decrees against one Moulvie Abdul Hye: and in execution of two of these decrees certain properties belonging to Abdul Hye were sold on the 16th June 1890 in the Munsif's Court of Serajgunge; twenty-five per cent. of the purchase-money was deposited in Court on the day of sale, and the balance paid on the 1st July 1890. Damodar Pramanick (the opposite party), who had also obtained a decree against Abdul Hye, on the 23rd June 1890, applied for rateable distribution of the sale-proceeds. The petitioners objected to the application on several grounds, but especially on the ground that it was not in time. On the 23rd September 1890 the objections were all overruled by the Munsif, who held that the purchase-money had not been realized at the time the opposite party had put in his application, and that therefore it was in time. Accordingly, the Munsif passed an order under s. 295 of the Code, allowing the opposite party a rateable distribution in the entire purchase-money.

[243] Thereupon the petitioners moved the High Court and obtained a rule calling upon the opposite party to show cause why the order of the 23rd September should not be set aside.

On the rule coming up for argument,

Baboo *Srinath Das* and Baboo *Jogesh Chunder Roy*, for the petitioners.

Baboo *Mohini Mohun Roy* and Baboo *Debendra Nath Banerjee*, for the opposite party.

The Court (TOTTENHAM and TREVELYAN, JJ.) delivered the following judgments :—

JUDGMENTS.

TOTTENHAM, J.—This was a rule to show cause against an order passed by the Munsif of Serajgunge allowing rateable distribution of the proceeds of a sale held in execution of decree to the opposite party under s. 295 of the Code of Civil Procedure.

The petitioners, having obtained a decree against the judgment-debtors, caused certain properties to be sold in execution thereof. Twenty-five per cent. of the purchase-money was deposited at the time of the sale. Before the balance of the purchase-money was paid in, the opposite party, who had also obtained a decree against the same judgment-debtors, applied for rateable distribution of the proceeds; and the present petitioners objected to his being allowed to participate, upon the ground that he had not applied in time. The Court below held that the application of the opposite party was in time, in as much as it held that the purchase-money had not been realized at the time he put in his application, and it allowed him rateable distribution in respect of the whole of the purchase-money.

The rule was granted because the Bench before whom the motion was made had some doubt as to whether the opposite party was entitled to a share in the twenty-five per cent. of the purchase-money deposited before the petition for rateable distribution was filed. As to the balance of the purchase-money, the Judges, who granted the rule, had not much doubt that the opposite party was entitled to share in that; but the whole matter has been argued at the hearing of this rule.

[244] The pleader for the petitioners has asked us to read the first clause of s. 295 as if the words "prior to realization" meant prior to the sale, and to hold that any petition for rateable distribution not filed

1891 JAN. 27. — CIVIL RULE. — 18 C. 242.

before the sale took place would be too late. We do not think that we should be justified in construing the words of the section as suggested by the learned pleader. It is true that in a subsequent portion of the same section, which releates to a different state of circumstances, the words are, "rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court," &c. We were asked to hold that the words in the two parts of the same section, although different, mean precisely the same thing. We do not feel at liberty to hold that this is so. As regards, therefore, the three-fourths of the purchase-money paid in after the filing of the petition of the opposite party for rateable distribution, it is quite clear from the words of the section that he was entitled to participate in those assets.

The question still remains whether the opposite party was entitled to participate in the twenty-five per cent. of the purchase money paid in before his petition was filed.

Our attention has been called to the case of *Vishvanath Mahesvar* v. *Virchand Panachand* (1) decided in the Bombay High Court, in which it was held that a decree-holder, who had filed an application under s. 295 after the sale had taken place, was not entitled to take a share in any of the sale-proceeds. In that case, however, the whole of the sale-proceeds had been realized before the application was made. The application was made before the sale was confirmed, and upon that ground the first Court in that case had allowed the second decree-holders to participate. The High Court held that he could not participate in any.

The question before us seems to depend in a great measure upon what is meant by the words in s. 295 : " Whenever assets are realized by sale or otherwise in execution of a decree."—If the deposit of twenty-five per cent. upon the date of sale is a realization of assets within the meaning of s. 295, then no doubt the opposite party in the present case would not be entitled **[245]** to a share in it, his petition having been filed after it. The Bombay case already mentioned and a case decided in this Court, the case of *Jogendro Nath Sircar* v. *Gobind Chunder Addi* (2) were cited as showing that the deposit in question should be regarded as assets. The case of *Jogendro Nath Sircar* v. *Gobind Chunder Addi* did not raise the same point as that now before us ; but incidentally the Judges expressed an opinion that the sale-proceeds might be paid away to the decree-holder before the sale was confirmed ; and in that view it would appear that the Judges were of opinion that the purchase-money, or any part of it, as soon as paid into Court, became assets within the meaning of s. 295. That, however, was not the particular point upon which that case turned ; and, as I have already said, the Bombay case was different in this respect, that all the purchase-money had been paid in, at any rate, before the second decree-holders had applied for rateable distribution. We think that the words " whenever assets are realized " in s. 295 really mean " whenever assets are so realized as to be available for distribution among the decree-holders." It appears to us clear upon the reading, not only of s. 295, but also of the other sections of the Code, that the twenty-five per cent. deposited at the time of the sale is not immediately available for payment to the decree-holders, because it is merely a deposit ; and by s. 308 it is provided that should the purchaser not pay the balance within the time allowed, that deposit, after deduction

(1) 6 B. 16. (2) 12 C. 252.

1891 JAN. 27. — CIVIL RULE. — 18 C. 242.

of the expenses of the sale, shall be forfeited to Government. Until, therefore, the balance is paid in, and the sale confirmed, the deposit is not at the disposal of the decree-holder in any sense.

In this view, we hold that the lower Court was right in saying that inasmuch as the other decree-holders had filed their petitions before the purchase-money had been paid into Court, they were entitled to rateable distribution in respect of the whole sum.

We, however, note that by the last clause of s. 295, if all the assets be paid to persons not entitled to receive the same, any person so entitled may sue and obtain a refund of the assets.

We think, therefore, there is no ground for interference by this Court under s. 622. We accordingly discharge the rule with costs.

[246] TREVELYAN, J.—The only difficulty I have felt at any time during the argument of this case, arises from the decision of the Bombay High Court, *Vishvanath Mahesvar* v. *Virchand Panachand* (1), and the decision of this Court, *Jogendro Nath Sircar* v. *Gobind Chunder Addi*(2). Both these cases are, there is no doubt, authorities on the question argued before us, although the cases are not exactly the same, and the point argued is not exactly the same. If the point were the same, I feel it would be necessary for us to refer the matter to a Full Bench; but the point being somewhat different, it is not necessary to do so. It is unfortunate that our decision is to some extent inconsistent with the decision of this Court, although not so inconsistent as to justify a reference. I think that in the Bombay case there is the distinction which Mr. Justice Tottenham has pointed out, namely, in that case the whole purchase-money was paid; so that there was no question there under s. 308. Section 308 seems to me to be the real difficulty in the way of the petitioners in this case. Although we may be inclined to hold, and although in another csse I have held that the "assets realized" within the meaning of s. 295 mean assets available for distribution, it is unnecessary in this particular case to go quite so far. In the Bombay case s. 308 did not apply. But in the Calcutta case, speaking with the greatest possible respect, it seems to me that the learned Judges, who decided that case, omitted to consider the effect of s. 308, to which their attention does not seem to have been called, and which is not referred to in any portion of their judgment. As is frequently the case in the Law Reports, the absence of a report of the argument and of the cases cited inconveniences us in consideration of the decision, but we must take the decision as we find it. If the learned Judges had fully considered the effect of s. 308, I cannot help thinking that they might have arrived at another conclusion. Be that as it may, the view I take is, that the effect of s. 308 is to show that until, at any rate, the whole purchase-money is paid in, neither the decree-holder, nor any other attaching creditor, has any interest whatever in the twenty-five per cent. It is paid in as a mere deposit, and if the rest of the money [247] is not paid in within the time allowed, this one-fourth does not go back to the person who paid it, but is forfeited to Government. That section seems to me to conclude the case.

The rule is discharged with costs.

C. D. P. *Rule discharged.*

(1) 6 B. 16. (2) 12 C. 252.

18 C. 247.

CRIMINAL MOTION.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1891 JAN. 5. CRIMINAL MOTION. 18 C. 247.

IN THE MATTER OF THE PETITION OF J. WILSON.*
[5th January, 1891].

Sonthal Pergunnahs—European British subject—Jurisdiction of High Court to transfer—Grounds for transfer—Criminal Procedure Code (X of 1882), *s.* 526*—Act XXXVII of* 1855.

The Court of a Magistrate in the Sonthal Pergunnahs is, as regards the trial of an European British subject, subordinate to the High Court, and the High Court has power under s. 526 of the Criminal Procedure Code to direct the transfer of a case in which such subject is concerned.

The transfer of a case should be ordered when there are circumstances which may reasonably lead the petitioner to believe that the Magistrate has to some extent prejudged the case against him, and will in consequence be prejudiced in the trial.

[R., 28 C. 297 (300); 33 C. 1183=3 C.L.J. 637 (648)=10 C.W.N. 793.]

THIS was an application for the removal of a case from the Court of Mr. Ainslie, Sub-divisional Officer of Rajmehal, in the Sonthal Pergunnahs, to that of some other Magistrate. The applicant, a European British subject, was charged under s. 447 of the Indian Penal Code and with abetment of offences under ss. 352 and 426 of the same Code, alleged to have been committed by his co-accused. He alleged in his petition that the Sub-divisional Officer was prejudiced in favour of the prosecutor, and had himself instigated the institution of these proceedings, and that he would in consequence be unable to obtain a fair trial in Mr. Ainslie's Court. The Magistrate denied the applicant's allegations and stated that [248] in his opinion the High Court had no jurisdiction over any criminal Court in the Sonthal Pergunnahs.

Mr. *Hill* appeared for the petitioner.

No one appeared for the Crown.

Mr. *Hill*.—The Sonthal Pergunnahs are a scheduled district under Act XIV of 1874, but, as no notification with regard to them has been published under s. 3 of that Act, Act XXXVII of 1855 is still in force there. The applicant is an European British subject, and in the latter Act there is an express saving of the criminal laws relating to European British subjects. Till 1813 the East Indian Company's Courts had no jurisdiction to try European British offenders. They were amenable only to the Supreme Court or to Justices of the Peace appointed by the Crown under 33 Geo. III, c. 52, s. 151; and whose proceedings were open to revision by the Supreme Court under a writ of *certiorari*, the Supreme Court possessing under its Charter all the common law jurisdiction of the King's Bench. In 1813 the Company's Courts were empowered by 53 Geo. III, c. 155, s. 105, to try European British subjects for certain offences. On conviction they could appeal to the Company's Courts, but by so doing they waived their right to a *certiorari*, which right was expressly reserved if they did not so appeal; see also Act

* Criminal Miscellaneous Case No. 34 of 1890, against the order passed by W. R. Bright, Esq., Officiating Deputy Commissioner of Sonthal Pergunnahs, dated the 23rd of September 1890, affirming the order passed by E. F. Ainslie, Esq., Sub-divisional Officer of Rajmehal, dated the 8th of August 1890.

1891 JAN. 5. — CRIMINAL MOTION. — 18 C. 247.

VII of 1853. The Criminal Procedure Code of 1861, s. 42, saves the above jurisdiction, but provides that it shall only be exercised by Justices of the Peace. A similar provision is to be found in Act XXII of 1870, s. 4. It is only by virtue of his powers as a Justice of the Peace that Mr. Ainslie can try Mr. Wilson and in exercising the powers of a Justice of the Peace he is subject to the control of the High Court in exercise of the jurisdiction which under s. 11 of the Charter Act, 1862, it has inherited from the Supreme Court. Further than this, Mr. Ainslie can only try the case under the provisions of Ch. XXXIII of the Criminal Procedure Code, 1882, and in the exercise of his powers under that chapter he is not merely inferior, but in the strict sense of the word subordinate, to the High Court. The right of appeal reserved to European British subjects by ss. 408 and 416 of the Code subjects Mr. Ainslie in the trial of this case to the appellate jurisdiction of the High Court.

[249] Mr. *Hill* also argued the question as to the High Court's jurisdiction over all the Criminal Courts in the Sonthal Pergunnahs under the revisional powers conferred upon it by the Criminal Procedure Code, and in the course of his argument referred to the following Acts, Regulations and Cases :—Reg. IX of 1793, especially s. 72 ; Act XXXI of 1841 ; Act XIX of 1848, s. 4 ; Act XXII of 1869 ; Act VIII of 1869, ss. 445A to 445D ; Reg. III of 1886 ; *Hursee Mahapatro* v. *Dinobundo Patro* (1) ; *Surdharee Lall* v. *Mansoor Ally Khan* (2) ; *Queen-Empress* v. *Laskari* (3) ; *Queen-Empress* v. *Pirya Gopal* (4) ; *Opendro Nath Ghose* v. *Dukhini Bewa* (5) ; *Queen* v. *Gorachand Gope* (6) ; *Dulai Dat Rai* v. *Nijabat Hossein* (7) ; *Queen-Empress* v. *Morton* (8) : *In re Hayes* (9).

The judgment of the Court (MACPHERSON and BANERJEE, JJ) was as follows :—

JUDGMENT.

This is an application to transfer a case from the Court of the Sub-divisional Officer of Rajmehal to some other Court. The Deputy Commissioner having expressed a doubt as to the jurisdiction of the High Court over criminal Courts in the Sonthal Pergunnahs, it was intimated, when the rule was granted, that the Court would, on the hearing of the rule, consider the question of its jurisdiction to act as a Court of Revision generally, and also, with reference to the fact stated in the affidavit, as to the status of the petitioner as a European British subject.

No one appeared to show cause or to support the contention that the Court had no jurisdiction in the matter. Mr. Hill has argued that the Court has jurisdiction over all the criminal Courts in the Sonthal Pergunnahs under the revisional powers conferred upon it by the Code of Criminal Procedure, and that, if this is not so, it has undoubtedly jurisdiction in every case in which the accused person is a European British subject. The legislation in connection with the Sonthal Pergunnahs is somewhat complicated, and we do not think it necessary in the present case to consider the wide [250] question of the Court's jurisdiction as a Court of Revision over all the criminal Courts in that territory. It is not necessary, because we have no doubt that the Court has full jurisdiction to entertain and deal with an application of the kind now before us in all cases in which the accused person is a European British subject.

(1) 7 C. 534. (2) 3 C. 298. (3) 7 A. 853.
(4) 9 B. 100. (5) 12 C. 473. (6) B.L.R Sup. Vol. 443 = 5 W.R. Cr. 46.
(7) 12 C. 536. (8) 9 B. 288. (9) 12 M. 39.

Act XXXVII of 1855 which is still in force removed the districts comprising the Sonthal Pergunnahs from the operation of the general regulations of the Bengal Code and of the laws passed by the Governor-General of India in Council, and vested the administration of criminal justice in officers to be appointed by the Lieutenant-Governor of Bengal, whose decisions to the extent of the powers conferred upon them by the Lieutenant-Governor according to the provisions of the Act were to be final. But that Act did not affect the laws then in force with respect to the amenability of European British subjects to any Court or officer for acts of a criminal nature. European British subjects were not, therefore, amenable for such acts to the officers appointed by the Lieutenant-Governor of Bengal under the provisions of Act XXXVII of 1855. They remained amenable to the Courts and officers empowered to try them.

1891 JAN. 5. — CRIMINAL MOTION. — 18 C. 247.

The law relating to the appointment of Justices of the Peace outside the Presidency towns and to the trial of European British subjects is now embodied in the Code of Criminal Procedure which was brought into force in the Sonthal Pergunnahs by Reg. III of 1886 amending Reg. III of 1872, which was to be read with Act XXXVII of 1855. Magistrates trying charges against European British subjects are therefore, so far at least as regards the mofussil Courts, empowered under the Code of Criminal Procedure, and they must follow the procedure prescribed by that Code. The Code further defines the High Court to mean (so far as we need give the definition for the purposes of this case), in reference to proceedings against European British subjects, the High Court of Judicature at Fort William, and it gives to a European British subject convicted on a trial held by a Magistrate a right of appeal to the High Court. There cannot therefore be a doubt that the Court of a Magistrate in the Sonthal Pergunnahs is, as regards the trial of a European British subject, subordinate to the High Court, and that the High Court can under s. [251] 526 of the Procedure Code direct the transfer of a case in which such subject is concerned.

The whole history of the legislation in connection with European British subjects, into which we need not enter, shows moreover that the jurisdiction of this Court in cases in which they are concerned has always existed and does exist.

The question remains whether we should direct the transfer of the case. We have considered the petition of Mr. Wilson, which sets out the facts and the grounds upon which a transfer is asked for, the comments of the Sub-divisional Officer thereupon, and the grounds upon which the Deputy Commissioner refused to order the transfer of the case. We make no reflection on Mr. Ainslie's fairness or impartiality, and do not doubt that he would endeavour to come to a just decision on the evidence adduced: but, having regard to all the circumstances, we are disposed to hold that it is expedient for the ends of justice that the trial should be held elsewhere. There are circumstances which might reasonably lead the petitioner to believe that the Magistrate had to some exent prejudged the case against him, and that he would in consequence be prejudiced in the trial, and if this is so, we think a transfer is expedient. It does not appear that the petitioner was in the first instance charged with taking part in the offences said to have been committed by the persons in whose company he was. The proceedings against him were taken under directions of the Magistrate acting on the police report of the case. The Magistrate may have been quite justified in directing the prosecution of the petitioner, but he was not justified in at once issuing a warrant for his arrest and in

1891 JAN. 5. — CRIMINAL MOTION. — 18 C. 247.

having him arrested and brought before him. The case was a summons and not a warrant case. Then the case arose out of a dispute relating to a julkur, the disputants being the prisoner's employer and certain other persons, and there are grounds for believing that the Magistrate had in connection with other proceedings, necessarily perhaps, formed a conclusion unfavourable to the former. On the whole we think a transfer is expedient, and we direct that the case be transferred to the Court of the District Magistrate of Maldah. The District Magistrate will either try it himself or make it over to some other officer competent to try it.

H.L.B.

---

18 C. 252.

[252] CIVIL REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Macpherson, and Mr. Justice Ameer Ali.

GOBARDHAN DASS (*Petitioner*) *v.* JASADAMONI DASSI (*Respondent*) AND ANOTHER (*Co-Respondent*).*
[4th February, 1891.]

Dissolution of marriage—Non-Christian marriage—Conversion to Christianity—Divorce Act (IV of 1869), *ss.* 2, 17—*Native Converts' Marriage Dissolution Act* (*XXI of* 1866), *ss.* 4, 5, 7, 8, 9, 10, 15, 16.

The petitioner and the respondent were married while professing the Hindu faith and afterwards became converts to Christianity. The petitioner subsequently applied for dissolution of the marriage on the ground of his wife's adultery. *Held* that, being a person professing Christianity at the time of presenting the petition, he was entitled to a dissolution of the marriage under the provisions of the Indian Divorce Act (IV of 1869).

It is clear from the provisions of the Native Converts' Marriage Dissolution Act (XXI of 1866) that a non-Christian marriage is not dissolved by the mere fact of the conversion of one or both of the parties to Christianity, and may therefore be dissolved in accordance with the provisions of Act IV of 1869.

[**Diss.**, 17 M. 235 (245); **R.**, U.B.R. (1892—1896), Vol. II, p. 338 (341); U.B.R. (1897—1901), Vol. II, 488 (490).]

THIS was a reference to the High Court, under s. 17 of the Indian Divorce Act (IV of 1869), by the District Judge of Bankura, for the purpose of confirming the decree for the dissolution of the petitioner's marriage with the respondent on the ground of the latter's adultery with the co-respondent.

The petitioner, Gobardhan Doss, and the respondent, Jasadamoni Dassi, were originally Hindus, and were married while professing the Hindu faith, but subsequently both became converts to Christianity. On the evidence the District Judge found that the petitioner was entitled to a decree for the dissolution of the marriage, and declared the same to be dissolved subject to the confirmation of the order by the High Court under s. 17 of Act IV of 1869.

No one appeared for any of the parties.

JUDGMENT.

[253] The judgment of the High Court (PETHERAM, C.J., and MACPHERSON and AMEER ALI, JJ.) was delivered by

---

* Civil Reference in divorce case No. 29 of 1889, made by B.C. Seal, Esq., Judge of Bankura, dated the 31st of March 1890.

1891 FEB. 4. — CIVIL REFERENCE. — 18 C. 252.

PETHERAM, C.J.—This matter comes before us under s. 17 of Act IV of 1869 for confirmation of the decree *nisi* made by the District Judge of Bankura for the dissolution of the marriage of the parties to those proceedings. The petitioner and respondent were originally Hindus by religion, and were married in this country whilst professing the Hindu faith. After their marriage they both became converts to Christianity. On the 18th of December 1889 the petitioner presented a petition to the District Judge of Bankura for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent, and the learned Judge, holding the adultery established, made a declaration to the following effect:—"It is hereby declared that the marriage of the petitioner, Gobardhan Dass, a native convert, with Jasadamoni Dassi, the respondent, is hereby dissolved subject to the confirmation of the order by the High Court, under s. 17 of the Act."

A doubt having been raised as to whether the petitioner was entitled to a decree for the dissolution of his marriage which was not performed according to Christian rites, we have considered the question carefully, and we have come to the conclusion that there is nothing in Act IV of 1869 or in any other Act to exclude him from the benefit of its provisions.

The second section of Act IV of 1869 runs thus:—

"This Act shall extend to the whole of British India, and (so far only as regards British subjects within the dominions hereinafter mentioned) to the dominions of Princes and States in India in alliance with Her Majesty.

"Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition; or to make decrees of dissolution of marriage except in the following cases:—(*a*) where the marriage shall have been solemnized in India; or (*b*) where adultery, rape or unnatural crime complained of shall have been committed in India; or (*c*) where the husband has, since the solemnization of the marriage, exchanged his profession of Christianity for the [254] profession of some other form of religion; or to make decrees of nullity of marriage except in cases where the marriage has been solemnized in India."

The petitioner unquestionably professed the Christian religion at the time of presenting his petition. Therefore, unless it can be said that his previous marriage became *ipso facto* dissolved by his or their conversion to Christianity, the marriage relationship previously contracted must be regarded as subsisting, in respect of which he would, as a person professing Christianity at the time of presenting his petition, be entitled to seek under the Act a dissolution on the ground of his wife's adultery. That a previously contracted marriage is not dissolved by the mere fact of the conversion of the one or the other party to Christianity is clear from the provisions of Act XXI of 1866. Section 4 of this Act says:—

"4. If a native husband change his religion for Christianity, and if in consequence of such change his native wife, for the space of six continuous months, desert or repudiate him, he may sue her for conjugal society.

"5. If a native wife change her religion for Christianity, and if in consequence of such change her native husband, for the space of six continuous months, desert or repudiate her, she may sue him for conjugal society."

1891 FEB. 4. — CIVIL REFERENCE. — 18 C. 252.

Section 7 provides how the suit is to be commenced; ss. 8, 9, and 10 provide for issue and service of citations: s. 15 directs that in the case of a female respondent, the matter should be adjourned for a year to see whether she persists in her refusal to live with the petitioner. And then s. 16 provides: "At the expiration of such adjournment the petitioner shall again appear in Court and shall prove that the said desertion or repudiation had continued up to the time last hereinbefore referred to, and if the points mentioned in the twelfth and this section of this Act shall be proved to the satisfaction of the Judge; and if the respondent on being interrogated by the Judge or Commissioners, as the case may be, again refuse to cohabit with the petitioner, the respondent shall be taken to have finally deserted or repudiated the petitioner, and the Judge shall, by a decree under his hand and sealed with the seal of his Court, declare that the marriage between the parties is dissolved."

[255] It is clear therefore that a non-Christian marriage is not dissolved by the mere fact of the conversion of one or both the parties to Christianity. That being so, and the petitioner being a Christian at the time of presenting his petition, and it being found that the respondent has committed adultery, we think Act IV of 1869 applies. We accordingly confirm the decree made by the District Judge (1).

A. A. C. *Decree confirmed.*

---

18 C. 255.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Ameer Ali.

UGRAH LALL (*Judgment-debtor*) *v.* RADHA PERSHAD SINGH (*Decree-holder*) AND OTHERS (*Auction-purchasers*).*
[4th February, 1891.]

Bengal Tenancy Act (*VIII of* 1885), s. 174—*Amount payable incorrectly calculated by an officer of the Court.*

The judgment-debtor within 30 days from the date of sale deposited in Court, under s. 174 of the Bengal Tenancy Act, the amount which had been calculated in the office of the Munsif as the amount payable under the section. Subsequently on its being discovered that the amount was short by a small sum the calculation being incorrect, the Munsif held that the provisions of the section had not been complied with, and passed an order confirming the sale.

Held, that when the amount payable by the judgment-debtor under s. 174 has been calculated and settled by an officer of the Court, and when that amount has been paid into Court, an order setting aside the sale must be made by the Court as a matter of right. The order of the Munsif confirming the sale was therefore held to be without jurisdiction and was set aside.

[F., 25 C. 216 (219); 25 C. 609 (610); 13 C. L. J. 467 (470) = 10 Ind. Cas. 51 (53); 22 Ind. Cas. 842; R., 11 C.W.N. 116 (118); 1 O.C. 193 (196).]

IN this case the judgment-debtor obtained a rule and also appealed against an order of the District Judge upholding an order of the Munsif confirming an execution sale, and claimed **[256]** to have the sale set

---

* Appeal from Order No. 179 of 1890 and Rule No. 1745 of 1890, against the order of J. G. Charles, Esq., Judge of Shahabad, dated the 31st of May 1890, affirming the order of Baboo Pramatha Nath Chatterji, Munsif of Buxar, dated the 22nd of February 1890.

(1) See the case of *Zuburdust Khan* v. *His Wife*, 2 N. W. 370,—REP.

aside under the provisions of s. 174 of the Bengal Tenancy Act (VIII of 1885) under the following circumstances :—

On the 3rd August 1887, the Maharajah of Dumraon obtained a decree for arrears of rent against the judgment-debtor, and applied for execution of the decree with costs, amounting to Rs. 795-13, on the 15th July 1889. A sale proclamation was issued on the 6th August 1889, and Rs. 694-6 was mentioned as the decretal amount for which the property of the judgment-debtor was advertised to be sold. On the 30th October 1889 the property was sold for Rs. 1,035 to the opposite party, and on the 25th November within the 30 days prescribed by s. 174 of the Tenancy Act, the judgment-debtor applied under that section to have the sale set aside, offering to pay whatever amount might be found due on an account being taken. An order was made on the following day to the effect that "the judgment-debtor may deposit the amount if he so likes," and a *chalan* for Rs. 792-11-6 was accordingly prepared and signed by the sheristadar of the Munsif, in which Rs. 51-12 was mentioned as "damages" and Rs. 740-15-6 as "original decree." The officer in charge of the Treasury was directed to receive and credit the above sum before 3 P.M. on the 28th November 1889, and the same was duly tendered and received.

On the 24th January 1890, the auction-purchasers applied to have the sale confirmed on the ground that the whole amount had not been deposited, and on the 15th February the Court ordered another account to be prepared, and fixed the 22nd February for the hearing, ordering notice to issue to the parties. On that date the judgment-debtor put in a petition stating that he had deposited Rs. 792-11-6 according to the *chalan* made over to him by the sheristadar, and offered to pay the sum of Rs. 5-3, which, on the further account being taken, appeared to be due over and above the amount which had formerly been deposited. The decree-holder did not raise any objection, but the auction-purchasers appeared and claimed to have the sale confirmed. The Munsif on the same date confirmed the sale on the ground that the full amount recoverable under the decree together with costs and compensation had not been deposited as required by the section. On appeal the **[257]** District Judge held that no appeal lay against the order of the Munsif either under the Tenancy Act or the Code of Civil Procedure. The judgment-debtor obtained a rule from the High Court under s. 622 of the Code of Civil Procedure, and also appealed against the order of the District Judge.

Moulvi *Mahomed Yusuf* appeared for the judgment-debtor.

Baboo *Saligram Singh* appeared for the auction-purchasers.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and AMEER ALI, J.) was delivered by

PETHERAM, C.J.—This matter comes before the Court on appeal from an order of the District Judge of Shahabad, and a rule to set aside the order of the Munsif, out of which that of the District Judge arose. The appeal to the District Judge was dismissed by him, on the ground that no appeal lay in the case. That question has not been argued before us, and the real question arises upon the rule.

A decree for rent was obtained by the landlord against the applicant, and the tenure was put for sale in execution of the decree, and sold

1891 FEB. 4. — APPELLATE CIVIL. — 18 C. 255.

to the present respondent on 30th October 1889. On 25th November 1889 the applicant presented the following petition to the Munsif in whose Court the action had been brought :—

"Petition for reversal of auction sale for arrears of rent under s. 174, Act VIII of 1885.

Present :

Purna Chunder Dey, Roy Bahadoor, Munsif at Buxar, District Shahabad.

No. 423 of 1889.

Maharajah Radha Pershad Singh Bahadoor (decree-holder) *v.* Ugrah Lall (judgment-debtor).

Hail Cherisher of the poor :—In execution of this decree, the whole of the gozashta land has been sold by public auction, but the sale has not been confirmed. Within 30 days your petitioner, his brother Rajpati Lall, nephew (brother's son) Ram Parsad Lall, Mohabeer Ram, son of Srigobind, Ramdainy Tailee, son of Bisram Tailee, and Sheo Churn Lall, son of Hanuman Doss, of [258] Bhojpurkadim, have sold some gozashta land, and brought the decretal money with compensation for the auction-purchaser at 5 per cent. The amount as per calculation be received, and the auction sale set aside.

UGRAH LALL, judgment-debtor, by my own pen.

The 25th November 1889."

And on the next day, November 26, the Munsif made this order :—

"The judgment-debtor may deposit the amount if he likes." On the same day a *chalan* was prepared in the office of the Munsif, and was signed by his sheristadar, for the sum of Rs. 792-11-6, and was given to the applicant as showing the amount payable by him under s. 174 of the Tenancy Act, and the officer in charge of the Treasury was directed to receive that amount, if it was paid before 3 o'clock on the 28th. The amount was in fact paid in by the applicant before that time, and was received by the officer. It was afterwards, and after the expiration of 30 days from the date of the sale, discovered that the calculation made in the office of the Munsif was incorrect, and that the amount which should have been paid by the applicant in respect of the matters mentioned in s. 174, was two or three rupees more than the sum mentioned in the *chalan*, and the Munsif, holding that the provisions of the section had not been complied with, confirmed the sale. We think that in doing so he has taken an incorrect view of the law. Section 174 provides no machinery by which the amount payable under the section is to be ascertained, but apparently, from what has taken place in this case, the amount is in practice calculated in the office after notice to the decree-holder, and when that has been done, we think the amount so calculated and settled by the officer of the Court, has been settled as the amount payable under the section, and that when that amount has been paid into Court, an order to set aside the sale must be made by the Court as a matter of right. For these reasons, we think that the order of the Munsif confirming the sale, after the amount which had been found by the Court officer to be the amount payable had been paid, was without jurisdiction, and must be set aside, and an order to set aside the sale passed in its place. Appeal against order dismissed. No costs.

A. A. C. *Rule made absolute.*

18 C. 259.

[259] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Trevelyan.

MAHAMED ARIF (*Defendant*) *v.* SARASWATI DEBYA AND ANOTHER (*Plaintiffs*).* [5th February, 1891].

Contract by a minor—Voidable contract.

A contract entered into with a minor is only voidable at the option of the minor.

Sashi Bhusan Dutt v. *Jadu Nath Dutt* (1) followed.

[F., 23 B. 146 ; L.B. R. (1893—1900) 398 (400) ; L.B.R. (1893—1900) 656 (657); **Appr.**, 23 A. 288 (290) ; 18 M. 415 (417) = 5 M.L.J. 164 ; R., 19 B. 697 (700) ; 23 B. 1 (13); 13 C.L.J. 277 (281) = 9 Ind. Cas. 377; **Doubted**, 24 C. 265 = 1 C.W.N. 453.]

IN this suit Saraswati Debya and another (the plaintiffs) sought a declaration of their title to and the recovery of possession of an 8-annas share in a certain piece of land. The land originally belonged to one Jogul Kishore Roy and upon the death of his widow on 15th Bhadro 1283 (30th August 1876), it passed to his four grandsons (sons of a daughter) Ram Mohun Deb, Beerbullub Deb (defendant No. 9), Chandra Kishore Deb (deceased), and Pyari Mohun Deb (defendant No. 10). In or about April 1877 Harogovindo Deb was appointed guardian of his minor sons Beerbullub, Chandra Kishore, and Pyari Mohun under Act XL of 1858. Without receiving the necessary authority from the Court, during their minority, Harogovindo, as the guardian of Beerbullub, Chandra Kishore, and Pyari Mohun, conveyed their 12-annas share in the land to Lokenath Deb Chowdhry (defendant No. 8) by two kobalas, dated respectively Sraban and Bhadro 1288 (July and August 1881). Defendant No. 8 remained in possession until 1st Assar 1293 (14th June 1886), when he conveyed the 12-annas share to the father of defendants Nos. 1, 2, 3, 5, 6 and 7 and the husband of defendant No. 4. On 29th Magh 1293 (10th February 1887), Beerbullub and Chandra Kishore by a registered kobala conveyed their 8-annas share to the plaintiffs. Beerbullub had attained majority in April 1883, and therefore was of full age at the date of this conveyance: but Chandra Kishore was a minor at the time, being over 18 and under 21 years of age. **[260]** Chandra Kishore died before attaining majority. His father Harogovindo was his heir, but he neither ratified nor repudiated the conveyance by Chandra Kishore. Mahamed Arif (defendant No. 1) alone defended the suit. He contended that the sale by Harogovindo as guardian of his minor sons was valid; that as neither Beerbullub nor his representatives had questioned the sale within three years after he came of age, the plaintiffs' claim, so far as this share was concerned, was barred by art. 44, sch. II of the Limitation Act. As regards the share of Chandra Kishore, his contention was that Chandra Kishore being a minor at the date of the conveyance to the plaintiffs, so far as his share was concerned it was absolutely void: but that if the conveyance was voidable only, he, the defendant, was entitled to question it since he claimed through the minor.

The Munsif held that the sale by Harogovindo was void, as it was made without the previous sanction of the Court, and that the plaintiff's

* Appeal from Appellate Decree, No. 377 of 1890, against the decree of Baboo Jibun Krishna Chatterjee, Subordinate Judge of Sylhet, dated the 6th of January, 1890, affirming the decree of Baboo Akhoy Kumar Mitra, Munsif of Sylhet, dated the 30th of March 1889.

(1) 11 C. 552.

1891 FEB. 5. — APPELLATE CIVIL. — 18 C. 259.

claim, so far as Beerbullub's share was concerned, was not barred. Regarding Chandra Kishore's share, the Munsif held, upon the authority of *Sashi Bhusan Dutt* v. *Jadu Nath Dutt* (1), that the sale by him to the plaintiffs was voidable only; and that the defendant was not entitled to avoid it, as Harogovindo's sale being invalid did not pass the interest of the minors.

Accordingly the Munsif held the sale to the plaintiffs was valid and decreed the suit. On appeal the lower appellate Court upheld the decision of the Munsif.

Mahamed Arif (defendant No. 1) appealed to the High Court.

Baboo *Tarakishore Chowdhry*, for the appellant.

Baboo *Srinath Das* and Baboo *Prasanna Gopal Roy*, for the respondents.

Baboo *Tarakishore Chowdhry.*—The sale by Chandra Kishore of his share to the plaintiffs is void, not voidable. It is admitted that at the time of the sale Chandra Kishore was a minor, and that he died before attaining majority. According to the Hindu law a sale by a minor is absolutely void. The law has not been altered by the Contract Act. S. 2, sub-s. (*h*) of that Act [261] defines a contract as "an agreement enforceable by law." S. 10 declares what agreements are contracts, *i.e.*, enforceable by law, and according to it the competence of the parties is one of the essentials of a contract. S. 11 deals with the competence of parties, and there it is stated that "every person is competent to contract who is of the age of majority according to the law to which he is subject." Hence it follows that the agreement of a minor cannot be a contract, or, in other words, that the contract of a minor is void. S. 19 also supports this view inasmuch as that section whilst it declares what agreements are voidable, makes no mention of agreements by minors. Then again special provisions are made by ss. 247 and 248 for the case of a minor becoming a partner. See also ss. 7 and 127 of the Transfer of Property Act.

The case of *Sashi Bhusan Dutt* v. *Jadu Nath Dutt* (1) is against me; but that case should not be followed, as it was decided according to the English law and upon the authority of the case of *Hari Ram* v. *Jitan Ram* (2) which was decided some time before the Contract Act was passed. Suppose, however, the sale is voidable and not void. The father as heir of Chandra Kishore could not have avoided it on the death of the latter, as he had already sold his son's share as his certificated guardian, and he was bound by such sale by s. 34 of the Transfer of Property Act. The defendants, therefore, who claim under the sale by the guardian, and are in possession, are entitled to avoid the sale by Chandra Kishore, and the plaintiffs' title cannot prevail over that of the defendants.

With regard to Beerbullub's share, as he did not on attaining majority repudiate the sale of his share to the defendants by his father and guardian, he must be presumed to have ratified it, and therefore his conveyance to the plaintiffs is void as against the defendants.

Baboo *Srinath Das* for the respondents.—The sale to the defendants being made without the sanction of the Court was void; *Harendra Narain Singh Chowdhry* v. *Moran* (3): and therefore it was not at all necessary for Beerbullub on attaining majority to [262] have avoided it. The conveyance to the plaintiff by Chandra Kishore is valid. Under the Hindu law a transfer by a minor is not void, but voidable only; *Rennie*

---

(1) 11 C. 552. (2) 3 B. L. R. A.C. 426. (3) 15 C. 40.

1891 FEB. 5. — APPELLATE CIVIL. — 18 C. 259.

v. *Gunga Narain Chowdhry* (1), *Boiddonath Dey* v. *Ram Kishore Dey* (2), *Doorga Churn Saha* v. *Ram Narain Doss* (3), *Hari Ram* v. *Jitan Ram* (4); and if it be not avoided by the minor or his heir, it must be taken to be ratified; *Doorga Churn Saha* v. *Ram Narain Doss* (3). The Contract Act has in no way altered the law; *Sashi Bhusan Dutt* v. *Jadu Nath Dutt* (5).

The judgment of the Court (TOTTENHAM and TREVELYAN, JJ.) was as follows :—

JUDGMENT.

The facts which it is necessary to state before determining the questions of law in this case are shortly as follows :—

Two brothers, Beerbullub Deb and Chandra Kishore Deb, were owners of the land in dispute. They had inherited it from their maternal grandfather through their mother. In a proceeding under Act XL of 1858 their father was appointed their guardian, and without receiving the necessary authority from the Court, sold the property to the defendants, who are now in possession of it.

After this Beerbullub and Chandra Kishore, the former having attained majority, the latter being over 18 but under 21, and therefore according to law still a minor, conveyed this property to the plaintiff. Both the conveyance to the plaintiff and that to the defendants were made *bona fide* and for good consideration. There can be no question that the defendants have got no title.

The reported cases, the last of which is *Harendra Narain Singh Chowdhry* v. *Moran* (6), make it clear that an unsanctioned act of a certificated guardian in excess of the powers contained in s. 18 of Act XL of 1858 is void.

The question remains as to the plaintiffs' title.

So far as Beerbullub's share is concerned, there can be no doubt that the plaintiff is entitled to recover. Beerbullub was of age when he conveyed.

[263] Chandra Kishore's share is on a different footing. Chandra Kishore died before he attained 21 years of age. His heir was his father. The father neither ratified nor repudiated the act of Chandra Kishore.

It has been contended before us that the conveyance by Chandra Kishore was void and not voidable. This depends upon whether the law has in this respect been altered by the Indian Contract Act. Although there seems to be text-book authority for the proposition that under the Hindu law a transfer by a minor is absolutely void (see Mr. Chatterjee's Tagore Lectures, p. 146), we prefer to follow the decisions of this Court in which it has been held that a transfer by a minor is voidable under the Hindu law. See *Boiddonath Dey* v. *Ram Kishore Dey* (2), *Doorga Churn Saha* v. *Ram Narain Doss* (3), *Rennie* v. *Gunga Narain Chowdhry* (1), and *Hari Ram* v. *Jitan Ram* (4). Apart from the Contract Act, there is no doubt we think that this transaction must be held valid, as it was not avoided by the minor or his heir. See *Doorga Churn Saha* v. *Ram Narain Doss* (3).

The question whether the Indian Contract Act has altered the law is not an easy one. There is no express provision declaring the contract of an

(1) 3 W. R. 10. (2) 13 W.R. 166=10 B.L.R. 326, note.
(3) 13 W.R. 172=10 B.L.R. 327, note. (4) 3 B.L.R. A.C. 426.
(5) 11 C. 552. (6) 15 C. 40.

1891 FEB. 5. — APPELLATE CIVIL. — 18 C. 259.

infant to be void, but it is said that s. 2, sub-ss. (*g*) and (*h*), and ss. 10 and 11 have this effect. (See also s. 7 of the Transfer of Property Act.) In the case of *Sashi Bhusan Dutt* v. *Jadu Nath Dutt* (1), it was held by a Division Bench of this Court that a contract entered into with a minor is only voidable at the option of the minor. We have very carefully considered this decision, and as we are not prepared to say that in our opinion it is erroneous, we do not think it necessary to refer the question to a Full Bench. The question is one of some difficulty, but on the whole we prefer to follow the decision to which we have referred.

The result is that this appeal must be dismissed with costs.

C. D. P. *Appeal dismissed.*

---

18 C. 264.

[264] CRIMINAL MOTION.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

IN THE MATTER OF RAM KUMARI, *Petitioner.**
[18th February, 1891.]

Bigamy—Marriage—Conversion of Hindu wife to Mahomedanism—Marriage with Mahomedan—Penal Code, s. 494.

The petitioner, originally a Hindu woman, and the illegitimate offspring of chattri parents was duly married according to Hindu rites to *D*, who was also by caste a Chattri. Subsequent to the marriage the petitioner became a convert to Mahomedanism and then married a Mahomedan. She was charged with and convicted of an offence under s. 494 of the Penal Code.

It was contended on her behalf that—(1) the marriage between her and *D* was invalid under Hindu law by reason of her illegitimacy and the consequent difference of caste between the contracting parties; (2) the marriage between her and *D* became dissolved under the Hindu law on her conversion to Mahomedanism; and (3) the second marriage was not void under the Mahomedan law by reason of its taking place in the lifetime of *D* and that the conviction was therefore erroneous. There was no evidence of any notice having been given to *D* previous to the second marriage calling on him to become a Mahomedan.

Held, that illegitimacy under Hindu law is no absolute disqualification for marriage, and that when one or both contracting parties to a marriage are illegitimate, the marriage must be regarded as valid, if they are recognized by their caste people as belonging to the same caste.

Held, also, that there is no authority in Hindu law for the proposition that an apostate is absolved from all civil obligations, and that so far as the matrimonial bond is concerned, such a view would be contrary to the spirit of that law, which regards it as indissoluble, and that accordingly the marriage between the petitioner and *D* was not, under the Hindu law, dissolved by her conversion to Mahomedanism.

Rahmed Beebee v. *Rokeya Beebee* (2) dissented from.

Held, further, that as the validity of the second marriage depended on the Mahomedan law and as that law does not allow a plurality of husbands, it would be void or valid according as the first marriage was or was not subsisting at the time it took place; that no notice having been given to *D* **[265]** as required by Mahomedan law previous to the second marriage, and no recourse having been had to the Courts for the purpose of obtaining a declaration that the former marriage was dissolved, and as British India cannot be held to be a foreign country for the purpose of rendering such notice unnecessary, the previous marriage was not dissolved under Mahomedan law and the subsequent marriage was therefore void.

Held, accordingly, that the conviction was right.

---

* Criminal Motion No. 559 of 1890, against the order passed by H. Beveridge, Esq., Sessions Judge of Alipore, dated the 2nd December 1890.

(1) 11 C. 552. (2) 1 Norton's Leading Cases on Hindu Law, p. 12.

[F., 30 M. 550=6 Cr.L.J. 338=17 M.L.J. 476=2 M.L.T. 345; 49 P.R. 1907=83 P.L.R. 1908=110 P.W.R. 1907; 15 M.L.T. 107=26 M.L.J. 260=22 Ind. Cas. 697; Appr., 9 Ind. Cas. 71 (76)=13 O.C. 375 (387): R., 34 A. 589=10 A.L.J. 82=13 Cr.L.J. 705=16 Ind. Cas. 513; 72 P.R. 1908=64 P.L.R. 1908=47 P.W.R. 1908; D., 17 M. 235 (242).]

THE petitioner in this case was convicted of an offence under s. 494 of the Penal Code, and sentenced by the Additional Sessions Judge of the 24-Pergunnahs to one month's rigorous imprisonment. One Ori Lal was charged with having abetted the offence of the petitioner, and was tried jointly with her, but acquitted.

The facts of the case appear fully in the judgment of the Sessions Judge, the material portion of which was as follows:—

"This was a case of bigamy. Dukhi Singh states that he was married to the prisoner Ram Kumari by the rites of the Hindu religion three or four years ago at Garden Reach, and that she has since then, and while his marriage with her was undissolved, become a Mahomedan and married a Mahomedan. The prisoner admits that she was a Hindu and has been converted to Mahomedanism, and that she has married a Mahomedan (Guzaffer). She denies that she ever was married to Dukhi. Both the assessors have found that the marriage with Dukhi took place, and I am of the same opinion. The marriage has been fully proved.

"It was argued that the marriage was not legal, because Dukhi and Ram Kumari were of different castes. This, however, was not shown. They are both of up-country origin, and both appear to be Chattris. Dukhi is the son of Malchand Singh, and he tells us that though his father afterwards kept a Bengali woman named Doya, and who is now dead, he (Dukhi) is the son of an up-country woman, who died before his father came to Calcutta. Dukhi at one place calls Doya his mother, because she brought him up, but he adds that she was really only his step-mother. There is nothing to contradict this evidence. It would appear then that Dukhi is not illegitimate, but is a Chattri on both sides and born in wedlock. However, if he is illegitimate he is not the less a Hindu, and is capable of making a valid Hindu marriage. Ram Kumari is no doubt illegitimate, being the daughter of Kampta Singh's deceased wife's sister. It is not clear whether Kampta Singh or **[266]** Ori Lal was her father, for it seems that Kampta Singh turned her mother out of his house while she was pregnant of Ram Kumari because he suspected her of infidelity with Ori Lal. Ram Kumari's mother is a Chattri, and I find no evidence that there could not be a valid Hindu marriage between Ram Kumari and Dukhi. The real law point in the case, and the one which the Mahomedan Deputy Magistrate has discussed in his order of commitment, is as to whether Ram Kumari's Hindu marriage did not become dissolved by her conversion to Mahomedanism. On this point I regard the case of *The Government of Bombay* v. *Gunga* (1) as conclusive. It is on all fours with the present case. The case has, I think, to be decided by Hindu law, and not Mahomedan law. But further I do not find that even according to Mahomedan law Ram Kumari's marriage with Dukhi was dissolved by her conversion. It is certain that she never gave notice to Dukhi of her conversion, and it has not been argued before me that British India is a foreign country (Darulparh.) There is also no evidence that Ram Kumari had three menstrual periods before she married

(1) 4 B. 330.

1891 FEB. 18. — CRIMINAL MOTION. — 18 C. 264.

Guzaffer. Granting that British India is a foreign country, still it never can be the law that the mere conversion to Mahomedanism avoids marriage without any notice being given to the other side or any opportunity afforded the one who stays behind of embracing the new faith also. Ram Kumari admits the Mahomedan marriage, and it has also been proved by two witnesses. At the time her marriage with Dukhi was in my opinion still in force, and so her marriage with Guzaffer was bigamous. It was argued that she was a minor and that the marriage was really made by her mother. But the Judge and the assessors were satisfied that the girl is now 16. She is certainly over 12, and so cannot get any help from s. 83 of the Penal Code. The witness Abdur Rohoman, who performed the ceremony of the Mahomedan marriage, proves that he asked both the girl and her mother for their consent.

"I therefore find Ram Kumari guilty, but I do not think that she deserves a severe punishment. There is nothing to show that the conversion to Mahomedanism was not conscientious, or that she became a Mahomedan merely in order to be free, as she **[267]** supposed, from her marriage with Dukhi. The whole family turned Mahomedan, and I dare say that Ram Kumari's account of the motive is the correct one. I sentence her to be rigorously imprisoned for one month. I do not find that there is any evidence of abetment against Ori Lal. He seems to have kept in the background and not to have taken any part in the marriage. It was the mother who, according to Abdur Rohoman, gave the girl in marriage. This is probable, as Ori Lal must have felt that he had no authority over the girl. He was perhaps not her father, and he was not married to her mother. I acquit and discharge him."

Ram Kumari then applied to the High Court under its revisional powers to send for the record and set aside the above conviction and sentence on the following grounds:—

(1) That the lower Court should have held that the marriage between the petitioner and Dukhiram was not proved.

(2) That the lower Court having held that Dukhiram was a genuine Chattri, and the petitioner an illegitimate child, should have held that there could have been no valid marriage between them under the Hindu law.

(3) That the lower Court was wrong in holding that Dukhiram was a Chattri by caste.

(4) That the lower Court should have held on the evidence that the petitioner was not 12 years old when she was married to Guzaffer Ali, and that such marriage being voidable under the Mahomedan law on the petitioner coming of age, no offence could be committed by her under s. 494.

(5) That assuming that the petitioner was married to Dukhiram, the lower Court should have held that such marriage was dissolved by the conversion to Mahomedanism of the petitioner, and that as the alleged marriage with Guzaffer was not void under Mahomedan law, the petitioner could not be found guilty of the offence charged.

Upon that application a rule was issued which now came on to be heard.

No one appeared to show cause.

Baboo *Surut Chunder Chatterjee*, for the petitioner in support of the rule.

1891 FEB. 18.

CRIMINAL MOTION.

18 C. 264.

[268] The arguments advanced in support of the rule appear sufficiently from the judgment of the High Court (MACPHERSON and BANERJEE, JJ.) which was as follows : —

JUDGMENT.

The petitioner in this case has been convicted by the Additional Sessions Judge of 24-Pergunnahs, under s. 494 of the Indian Penal Code, of the offence of marrying again during the lifetime of her husband, and has been sentenced to rigorous imprisonment for one month. The sentence not being an appealable one, the case comes before us by way of revision.

The facts found by the Court below are shortly these. The petitioner and one Dukhi were originally both Hindus belonging to the Chattri caste the former being, however, an illegitimate offspring of Chattri parents. They were duly married according to Hindu rites. Sometime after the marriage the petitioner Ram Kumari became a convert to Mahomedanism, and after her conversion married a Mahomedan named Guzaffer.

Upon these facts the learned Sessions Judge has held that the petitioner's marriage with Dukhi was a valid Hindu marriage, that it was not dissolved by her conversion to Mahomedanism, and that her subsequent marriage to Guzaffer was consequently void ; and he has accordingly convicted her under s. 494 of the Indian Penal Code.

It is now contended for the petitioner before us that the conviction is wrong : *first*, because the marriage between the petitioner and Dukhi could not have been a valid marriage under the Hindu law by reason of the illegitimacy of the petitioner, and the consequent difference of caste between the parties ; *secondly*, because the former marriage became dissolved under the Hindu law by the conversion of Ram Kumari to Mahomedanism ; and *thirdly*, because the second marriage was not void by the Mahomedan law, which is the law governing the parties to it, by reason of its taking place in the lifetime of the petitioner's former husband.

We do not think there is any force in the first contention, regard being had to the facts of this case. In our opinion illegitimacy is no absolute disqualification for marriage, and where one or both parties to a marriage are illegitimate, the correct view seems to us to be to regard the marriage as valid if they are in point of fact recognised by their castemen (as the parties in this case are in effect [269] found to have been) as belonging to the same caste. In this view of the case it is unnecessary for us to say more upon this point.

In support of the second contention, namely, that the marriage of the petitioner with her first husband became dissolved under the Hindu law by her conversion to Mahomedanism, we were referred to the case of *Rahmed Beebee* v. *Rokeya Beebee* (1). That case, no doubt, supports the petitioner's view, but we are unable to accept it as correct. It was argued that the Hindu law would regard the apostate wife as beyond its pale and as a person that is civilly dead. That may be so as regards her civil rights, but we find no authority in Hindu law for the position that a degraded person or an apostate is absolved from all civil obligations incurred before degradation or apostacy. So far as the matrimonial bond is concerned, such a view would, we think, be contrary to the spirit of the Hindu law which regards that bond as absolutely indissoluble (see Manu V, 156-158, IX, 46). This view is in accordance with the case

(1) 1 Norton's Leading Cases on Hindu law, p. 12.

1891 FEB. 18. — CRIMINAL MOTION. — 18 C. 264.

of *The Government of Bombay* v. *Ganga* (1), and also with those of *Administrator General of Madras* v. *Anandachari* (2) and *In re Millard* (3).

It remains now to consider the third contention for the petitioner, which raises important questions not altogether free from difficulty. The conviction of the petitioner under s. 494 of the Indian Penal Code can stand only if her second marriage is void by reason of its taking place during the life of her former husband. Now the validity or otherwise of this second marriage, the parties to which are both Mahomedans, must be tested with reference to the Mahomedan law; and as that law does not allow a plurality of husbands, the second marriage would be void or valid according as the first one was or was not subsisting at the time. It was contended for the petitioner that her marriage with her Hindu husband became dissolved under the Mahomedan law by her conversion to the Mahomedan religion, and in support of this contention we have been referred to the Hedaya, Bk. II, Ch. V (Grady's edition of Hamilton's translation, pp. 64-65), and Baillie's Digest of Mahomedan Law (2nd edition, pp. 180-181). According to these authorities, when the wife becomes a convert to the Mussalman faith, and the husband is an unbeliever, the Magistrate **[270]** is to call upon him to embrace Islam, and if he does so, the woman continues his wife, but if he refuse, the Magistrate must separate them; and if the wife embrace the Mahomedan faith in a foreign country, and the husband is an unbeliever, separation takes place on the expiration of three terms of the wife's courses. These rules may be said to favour conversion to Islam; but the former meets the obvious requirements of justice by allowing an equal freedom of conscience to both parties and giving due notice to the non-converted husband, and is somewhat similar to the provision laid down in Act XXI of 1866 in the case of native converts to Christianity, while the latter rule is justified in the Hedaya upon the express ground of necessity, as requiring the other party to embrace the faith is impracticable in a foreign country.

The second marriage in this case has taken place without any notice to the former husband.

If, therefore, it could be held that British India was a foreign country within the meaning and intention of the foregoing rules, it would have been necessary to take further evidence to ascertain whether the second marriage took place before or after the expiration of three terms of the wife's courses, as the evidence on the record is not sufficient to clear up this point. But we cannot hold that British India is a foreign country within the meaning and intention of the above rules, so that a Hindu marriage would here become dissolved by the conversion of the wife to Islam, on the expiration of a certain interval without any notice to the husband.

There does not exist in the case of persons residing in British India that necessity upon which alone is based the latter of the two rules referred to above, by which the prior marriage of a convert to Islam is said to become dissolved without any order of a Court or notice to the other side. In British India, to use the words of Lord Justice James in *Skinner* v. *Orde* (4), "All or almost all the great religious communities of the world exist side by side under the impartial rule of the British Government. While Brahmin, Buddhist, Christian, Mahomedan, Parsee and Sikh are one nation enjoying equal political rights and having perfect equality before the

(1) 4 B. 330. (2) 9 M. 467. (3) 10 M. 218. (4) 14 M. I. A. 309.

tribunals, they co-exist as separate and very distinct communities having distinct laws affecting every relation of life." The petitioner did not give any notice to her former husband, nor [271] did she seek the intervention of the Courts of Justice as she might have done by instituting a suit after notice to the husband for a declaratory decree that under the Mahomedan law, which was her personal law since her conversion, her former marriage was dissolved and that she was competent to marry again. That being so, we do not think that the rule of Mahomedan law which declares a convert to Mahomedanism in a foreign country absolved from any prior matrimonial tie upon the expiration of a certain time, without notice to his or her spouse, can have any application here. A sacred and solemn relation like marriage cannot, we think, be regarded as terminated simply by the change of faith of either spouse without notice to the other, or the intervention of a Court of Justice.

The questions that arise in this case are, as we have alread yobserved, not free from doubt and difficulty, but after giving our best attention to them, the conclusion we arrive at is that the first marriage of the petitioner was not dissolved by reason of her change of faith according to the Hindu law or the Mahomedan law, and that her second marriage was in consequence void. In this view of the case we must reject the application and affirm the conviction and sentence complained against.

H. T. H. *Rule discharged.*

---

18 C. 271.

CIVIL RULE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep and Mr. Justice Ameer Ali.

GOGHUN MOLLAH AND OTHERS (*Petitioners*) v. RAMESHUR NARAIN MAHTA AND OTHERS (*Opposite-party*).

RAMESHUR NARAIN MAHTA AND OTHERS (*Petitioners*) v. GOGHUN MOLLAH AND OTHERS (*Opposite-party*).*

[9th February, 1891.]

Bengal Tenancy Act (VIII of 1885), *s.* 84, *Construction of—Acquisition of land by landlord—Reasonable and sufficient purpose—Certificate of Collector—Functions of the Civil Court.*

The proprietors of a taluk who had constructed an indigo factory and employed a European Manager applied to the Civil Court, under s. 84 [272] of the Tenancy Act to acquire by compulsory sale a small piece of land made up of several raiyati holdings within the estate. The application was opposed by the proprietors of another indigo factory who had taken under leases from the raiyats the greater part of the lands of the village, including the holdings within which the plot in question was comprised. The Collector of the district had certified, under s. 84, that the purpose for which the land was required was reasonable and sufficient. The Munsif tried the matter as a disputed question of fact, and held that the purpose alleged was not reasonable or sufficient, and declined to authorise the purchase. The District Judge on appeal reversed the Munsif's finding and authorised the compulsory acquisition of the land.

Held, that there is no appeal against an order passed by a Civil Court under s. 84 of the Bengal Tenancy Act, and that the order of the District Judge was without jurisdiction and must be set aside.

---

* Civil Rules Nos. 1369 and 1692 of 1890, against the order of A. C. Brett, Esq., Judge of Tirhoot, dated the 24th of July 1890, reversing the order of Baboo Bhaba Churn Mukerjee, Munsif of Somastipur, dated the 30th of May 1890.

1891
FEB. 9.

CIVIL
RULE.

18 C. 271.

Held by PRINSEP and AMEER ALI, JJ. (PETHERAM, C.J., dissenting):—That the Collector's certificate under s. 84 is not conclusive as to the reasonableness and sufficiency of the purpose for which the land is sought to be acquired.

That the jurisdiction of the Civil Court is not confined to giving effect to the Collector's certificate, but the Court is to hold a judicial enquiry to determine the reasonableness and sufficiency of the purpose and all matters coming within the section, and is competent to consider the grounds upon which the certificate was granted.

That the appointment of a European manager and the necessity for erecting buildings for his comfort and convenience are insufficient grounds for authorising the compulsory acquisition of land under s. 84. The purpose for which the land is sought to be acquired must have a direct relation to the good of the holding, and objects which might have a remote or speculative bearing upon the good of the holding are foreign to the scope of the Act.

Held by PETHERAM, C. J.—The section gives to the Collector jurisdiction to decide whether the alleged purpose is reasonable and sufficient, leaving to the Civil Court to settle the amount to be paid for the land and the decision of the question whether the land is *bona fide* required for the alleged purpose. The words "satisfied on the certificate" mean that the Civil Court is to be satisfied on the certificate alone and has no jurisdiction to take other evidence on that question, but is to accept the decision of the Collector as final.

[F , 19 C. 485 (486); 9 C. W. N. 472.]

THE first of these rules was obtained by the proprietors of the Dalsingserai indigo factory, who had acquired an interest in the larger portion of the lands belonging to the village of Maniarpur under *kurtauli* leases from the tenants of the village, and the second rule was obtained on behalf of the maliks of [273] that mouza. The circumstances out of which these proceedings arose were shortly as follows:—

The maliks of mouzah Maniarpur having recently appointed one Mr. Coryton as manager of their estate, the latter on their behalf applied to the Collector of the district for a certificate under s. 84 of the Bengal Tenancy Act (VIII of 1885) to enable him to acquire 2 bighas 15 cottahs 17 dhurs of land situated in the village under the provisions of that section, the purpose alleged being that the lands were required for making suitable buildings with compounds and out-offices for the residence of the European manager whom the landlords had appointed for the better and more efficient management of the estate, and also for holding cutchery. The petition further stated that a small piece of land had already been obtained for a bungalow, and that more land was required for the purposes above mentioned and for no other purposes; that the appointment of a European manager would be of benefit to the taluk, which was a large one, and many of the abuses of a native amla would disappear under his supervision; and that the land sought to be acquired was a short distance from the grass house in which Mr. Coryton was then residing. No notice at that time appears to have been given to the proprietors of the Dalsingserai indigo factory, and on the 5th December 1889, the Collector signed a vernacular order, endorsed on the back of the petition, to the effect that the persons upon whom notice had been served having offered no objection, he saw no reason to withhold the certificate under s. 84, the purpose appearing to be reasonable and one contemplated by the law.

Upon this certificate Mr. Coryton, on behalf of the Maniarpur maliks, applied to the Munsif of Somastipur to authorise the acquisition of the lands in question upon the terms specified in s. 84 of the Tenancy Act. Notices having been served upon eight raiyats whose lands formed part of the holding, and also upon the proprietors of the Dalsingserai factory,

the latter, through their manager (Mr. Dalgleish), and three of the raiyats, opposed the application, upon the ground (*inter alia*) that the purposes for which the lands were sought to be acquired did not fall within the provisions of the above section. On the 30th [274] May 1890, the Munsif rejected the application, holding that the Civil Court must satisfy itself whether the purpose was a reasonable and sufficient one; that the erection of the buildings in question, though conducing to the comfort and convenience of the manager, had no direct relation to the good of the holding, and that this view was strengthened by the observations of the Select Committee in their Report upon the Bill.

From this decision an appeal was preferred to the District Judge on the 19th June, and the appeal came on for hearing on the 22nd July, when the proprietors of the Dalsingserai factory being represented in Court by their pleader, although they were not made parties to the appeal, the learned Judge directed them to be made respondents, and subsequently set aside the order of the Munsif and passed orders in terms of s. 84 of the Tenancy Act.

On the 19th August 1890, the proprieters of the Dalsingserai indigo factory obtained a rule from the High Court calling upon the other party to show cause why the order of the District Judge should not be set aside as having been made without jurisdiction, there being no appeal from the order of a Civil Court under s. 84 of the Tenancy Act; and on the 2nd December following, the rule coming on for hearing, the other party, the Maniarpur maliks, who filed no petition or affidavits, obtained a rule, at the suggestion of the Court, calling upon the opposite side to show cause why the Munsif's order of the 30th May 1890 should not be set aside; and it was ordered that both the rules should come on for hearing together.

Upon hearing arguments upon the rules, the Court (PETHERAM, C.J., and AMEER ALI, J.) differing in opinion, the case was again argued before three Judges.

Mr. *Woodroffe*, Mr. *Henderson*, and Baboo *Dwarkanath Chuckerbutty* appeared for the proprietors of the Dalsingserai indigo concern in support of the first rule and to show cause against the second rule.

Mr. *Evans*, Moulvie *Mahomed Yusuf*, and Baboo *Saligram Singh* appeared for the Maniarpur maliks to show cause against the first rule and in support of the second rule.

[275] Mr. *Henderson* contended that the certificate of the Collector was in the nature of an initiatory proceeding, and was required as a safeguard against vexatious or frivolous applications. The sanction of the executive head of the district was, however, not conclusive upon matters of fact, as the proceeding might be *ex parte*, and no procedure was laid down as to the course of enquiry before the Collector; nor was it likely that the Legislature, while protecting the interests of raiyats throughout the Act, would in this instance alone have vested the Collector with absolute powers without providing the additional guarantee of a full enquiry before the Civil Court. That a judicial enquiry upon the evidence was intended to be held is clear from the Final report of the Select Committee, and the Civil Court had to be satisfied that the purpose had a direct relation to the good of the holding. Here the appointment of a manager had only a remote bearing upon the estate, and the erection of stables or a cutchery could at the most be said to afford additional conveniences. As to the first rule, it was clear that no appeal lay under the Act from the decision

1891 FEB. 9. — CIVIL RULE. — 18 C. 271.

of the Civil Court under s. 84. As to the second rule, the Collector's certificate was not final. The Munsif undoubtedly had jurisdiction, and it has not been shown that he acted illegally or with material irregularity. There were materials before him, and whether right or wrong his decision on the facts is final and cannot now be disturbed under s. 622 of the Civil Procedure Code. *Muhammad Yusuf Khan* v. *Abdul Rahman Khan* (1).

Mr. *Evans, contra.*—All that the Civil Court has to do is to satisfy itself as to the *bona fides* of the application, and to settle the terms upon which the land should be acquired. The section bears this construction more reasonably than any other. If it was intended that there should be a judicial enquiry before the Civil Court, the intention would have been unmistakeably expressed. There is nothing in the section to show that the Civil Court is to be satisfied upon anything else than the certificate, or that the Court is at liberty to take other evidence. The Collector would not unadvisedly grant a certificate, and his sanction would be of greater weight than a Munsif's decision. Assuming, however, that the certificate was not conclusive, then the purposes for which this land [276] was required were clearly within the section as having a direct relation to the good of the holding. The second rule should therefore be discharged.

The judgments of the Court (PETHERAM C.J., PRINSEP and AMEER ALI, JJ.) were as follows :—

JUDGMENTS.

PETHERAM, C. J.—These rules arise out of an application made by the proprietor of a mouza, under s. 84 of the Tenancy Act, to acquire by compulsory sale a small piece of land made up of parts of several raiyati holdings within his estate. The application was opposed, and the matter has been brought before this Court by the proprietors of an indigo factory, who have taken under leases the greater part of the lands of the village, including the holdings within which this small plot of land is comprised, from the raiyats.

The applicant is the zemindar of the mouza, and has himself constructed an indigo factory in the mouza, and has employed a European manager for it and his estate; and the present contest is not between the zemindar and the raiyats in the ordinary sense of the words, but is one between the European managers of rival indigo factories. The Collector of the District granted to the applicant a certificate under s. 84, that the purpose for which the land was required was reasonable and sufficient, and thereupon application was made to the Munsif under that section, to acquire the land compulsorily. The Munsif tried the matter as a disputed question of fact, came to the conclusion that the purpose alleged was not reasonable and sufficient, and declined to authorise the purchase under the section. The applicant appealed to the District Judge, who reversed the finding of the Munsif, and made an order authorising the compulsory acquisition of the land.

The first of those rules was obtained by the owners of the indigo factory, under s. 622 of the Code, to set aside the order of the District Judge, on the ground that no appeal lay from the order of the Munsif under the Tenancy Act. The second was obtained by the owner of the mouza, to set aside the order of the Munsif refusing to allow the compulsory acquisition of the land, on the ground, amongst others, that the Collector was, under the section, the proper authority to decide whether or not

(1) 16 C. 749.

1891 FEB. 9. — CIVIL RULE. — 18 C. 271.

the alleged purpose was reasonable and sufficient, and that [277] his certificate was on the hearing before the Civil Court conclusive evidence that it was so. I am of opinion that both rules should be made absolute. It has not been seriously argued before us that any appeal lay from the order of the Munsif to the District Judge; no section of the Act has been pointed out to us giving such appeal, and as there is no right of appeal, the order of the District Judge was without jurisdiction, and must be set aside on revision. The decision of the second rule depends on the construction to be placed on the section itself. It is said in support of the Munsif's judgment that the meaning of it is that before proceedings can be instituted in the Civil Court at all, the certificate of the Collector must be obtained, but that when the matter comes before the Civil Court, the whole question is at large, and that at most the certificate is evidence that the purpose is reasonable and sufficient, and that the Civil Court may accept that view or refuse to do so as it pleases; the second paragraph of the section is relied on, and it is argued that, as the words "having relation to the good of the holding or of the estate in which it is comprised, including the use of the ground as building ground or for any other religious, educational or charitable purpose," appear in the second paragraph, and do not appear in the third, it is apparent that the question upon which the Munsif must be satisfied, before granting the application, is different from that which the Collector must determine, before granting the certificate. And it was further argued that the report of the Select Committee, which will be found quoted in K. N. Roy's edition of the Tenancy Act, p. 330, shows that the Committee, at all events, intended that the certificate of the Collector was only to guard the interests of the raiyats, and not to control the discretion of the Civil Court.

As to the second argument, I can only say that if that was the intention of the Select Committee, it does not appear to me to have been accepted by the Legislature, and that the section must have been changed after the report, as I am unable to reconcile the section as it now stands with the quotation from the report, or to read it in any other way than as giving to the Collector, and to the Collector only, jurisdiction to decide whether the alleged purpose is reasonable and sufficient, but leaving to the Civil Court [278] the amount to be paid for the land, and the decision of the question whether the land is *bona fide* required for the alleged purpose.

As to the first argument, I cannot agree that it is well founded. It is to my mind perfectly clear that the certificate of the collector mentioned in the third paragraph is intended to deal with the same "purpose" as that mentioned in the second paragraph, and to deal with its reasonableness and sufficiency with reference to the matters which the second paragraph directs the person, whoever he may be, by whom the question has to be determined, to take into his consideration. The section at first sight may appear somewhat ambiguous and difficult to construe, but if the order of the paragraphs is changed so that they may stand in the section in the order in which the events contemplated by the section would happen, I think the meaning becomes clear. The section will then read—"On being satisfied on the certificate of the Collector that the purpose is reasonable and sufficient, and on being satisfied that the landlord is desirous of acquiring the holding or part thereof for some reasonable and sufficient purpose, having regard to the good of the holding or of the estate in which it is comprised, including the use of the ground as building ground or for any religious, educational or charitable purpose, a Civil Court may, on the

1891 FEB. 9. — CIVIL RULE. — 18 C. 271.

application of the landlord of a holding, authorise the acquisition thereof by the landlord, &c."

In construing this section, as in all cases, effect must be given to every word in it, and amongst others, to the words "on being satisfied on the certificate of the Collector that the purpose is reasonable and sufficient". It is said these words mean "and on being satisfied (*inter alia*) that the Collector has given a certificate;" but these are by no means the words of the section: there is nothing in the section to indicate that anything but the certificate is to be required to prove the reasonableness and sufficiency of the purpose, but, on the contrary, the words are satisfied on the certificate." I think that the meaning of this is, that the Civil Court is to be satisfied on the certificate alone, and is not at liberty to take other evidence on that question, but is to accept the decision of it by the Collector as final. To hold otherwise would be, in my opinion, to refuse to give any effect to the words "satisfied on the certificate," and to read the question from the [279] report of the Select Committee as if it were a part of the section which, in my opinion, we are not at liberty to do. For these reasons I think that the Munsif acted without jurisdiction in considering this question at all. I would make the rule absolute to set aside his decision, and remit the matter to the Munsif to decide the question whether or not the land was *bona fide* required for the alleged purpose, and to settle the terms on which it should be sold.

The result is that the first rule will be made absolute and the second discharged with costs.

PRINSEP, J.—The proprietors of a taluk through their recently appointed manager Mr. Coryton on 5th December 1889 obtained from the Collector of Durbhunga a certificate within the terms of s. 84 of the Bengal Tenancy Act, that the purposes for which they required 2 bighas 15 cottahs 17 dhurs land in the occupancy of their tenants were in his opinion reasonable and sufficient. They then applied to the Civil Court, the Munsif of Somastipur, to obtain the necessary order for possession of those lands. The purposes set forth in their application are, that "being desirous of improving their taluk and of having it better managed than hitherto, they have appointed Mr. Coryton to act for them in the capacity of manager;" that in order that the estate should reap the full benefit of the manager's services, it is necessary that he should live in Maniarpur, the central village of the taluk; that they are desirous for that purpose of erecting a suitable dwelling-house with a compound and all necessary out-houses for himself and his servants, and that the small piece of land obtained for this purpose not being sufficient, they make this application to enlarge the premises so as to provide for "the necessary out-houses and allow for egress and ingress to the manager's bungalow and for the erection of a cutchery." The application further states that a European manager of a taluk of such an area "will be of benefit to the estate," and that "many of the abuses of a native amla will under his supervision disappear."

The Munsif on 30th May following refused the application, holding that the purposes for which the land was required were not within the terms of s. 84, Bengal Tenancy Act. On this an appeal was preferred to the District Judge on 19th June, and [280] this appeal came on for hearing on 22nd July. The proprietors of the neighbouring factory of Dalsingserai who had been made parties to the proceedings in the Munsif's Court but not to the appeal, happened to be present in the District

Judge's Court in the person of their manager and duly constituted attorney. The District Judge, professing to act under s. 559 of the Code of Civil Procedure directed these parties to be made respondents, and holding that as they were present this order was sufficient notice to them, fixed the following day for the hearing of the appeal. Against this a protest was made and a postponement asked for to enable these respondents to instruct their pleaders, and also to apply to the High Court to transfer the appeal to some other Court in consequence of the bias of the District Judge. This appears from a petition before us, dated 23rd July last. On his order refusing any postponement, it may be observed that the District Judge has recorded that the only ground stated is the desire to obtain an order for the trial of the appeal by another Court. The appeal was then heard; the District Judge set aside the order of the Munsif and passed orders in the terms of s. 84.

1891 FEB. 9. — CIVIL RULE. — 18 C. 271.

On 19th August a rule was granted by a Division Bench of this Court to show cause why the order of the District Judge should not be set aside for reasons stated in a petition and affidavit, amongst which it was set out that there was no appeal, and that therefore the order of the District Judge was without jurisdiction.

This rule came on for hearing on 2nd December last before another Division Court, who adjourned its trial and issued a rule on the manager of the Dalsingserai factory, the party who had already obtained a rule, to show cause why the Munsif's order of 30th May 1890 should not be set aside. No reason is stated for this order, either in the order itself or in the rule issued, and it may be observed that it was not passed on any written application or affidavit of either party.

The two rules have now come on for hearing.

In regard to the first rule there can be no doubt that there is no appeal against an order passed by a Civil Court under s. 84, Bengal Tenancy Act. Consequently the order of the District Judge setting aside that of the Munsif is without jurisdiction and must be set aside, the rule being made absolute. The Bengal [281] Tenancy Act does not specially provide for an appeal, and an order under s. 84 of that Act is not within the definition of a decree as given in the Code of Civil Procedure so as to become appealable under our ordinary judicial system. I would add that the District Judge did not exercise a proper discretion in summarily trying this appeal and in refusing the application of the newly-made respondents for a postponement.

The question has been raised on the other rule whether we should, under s. 622 of the Code, set aside the Munsif's order rejecting the application under s. 84, Bengal Tenancy Act, on the ground that he has improperly failed to exercise the jurisdiction vested in him. As I understand the grounds taken, it is contended that he was not competent to consider whether the purposes for which the lands were required were reasonable and sufficient within the terms of s. 84, inasmuch as this is a matter on which the Collector's certificate is conclusive, but that it is for him only to consider whether the applicants are *bona fide* desirous to apply the land to the purposes specified, and that he is then bound merely to settle the terms on which the lands are to be acquired.

Before proceeding to authorise the acquisition of lands forming the whole or part of a tenant's holding by the landlord and to determine the amount of compensation which the tenant should receive, and the conditions and terms of the order for compensation, a Civil Court is to be

1891 FEB. 9. — CIVIL RULE. — 18 C. 271.

"satisfied," to use the terms of s. 84, (1) that the landlord is desirous of acquiring the particular lands for some reasonable and sufficient purpose having relation to the good of the holding which it forms or to which it belongs or of the estate in which it is comprised; (2) that on the certificate of the Collector the purpose for which it is required is reasonable and sufficient. On the one hand it is contended that the Collector's certificate is conclusive that the purpose is reasonable and sufficient; on the other that it alone enables a landlord to move a Civil Court and gives that Court jurisdiction to take cognizance of the matter; that its object is to relieve the Civil Courts of application, *prima facie* untenable, but that with such a certificate it is open to a Civil Court to determine all matters coming under s. 84.

[282] I should certainly not be inclined in any way to fetter the jurisdiction of the Civil Courts in the determination of any matter affecting any private rights without some express provision of law to that effect. The Bengal Tenancy Act contains numerous instances in which those rights have been created amongst tenants, and it has provided that all questions affecting such rights shall be determined only in the Civil Courts even where, under Ch. X, the Local Government, with the previous sanction of the Governor-General in Council, has directed a survey to be made and a settlement of rights to be recorded in respect of any particular lands, and any dispute arises regarding the correctness of the proceedings affecting any individual right. Although the Revenue officer is competent to determine that matter, it is ultimately left to the decision of the superior Civil Courts, for an appeal lies to a Special Judge and thence to the High Court. This is the only instance in which a Revenue officer can act in the matter affecting a question of right. *Prima facie*, therefore, it could not have been intended to vest a Collector with such absolute powers under s. 84. I may add that although a Collector's orders are generally subject to appeal, the law prescribes no appeal in this matter. Moreover, there is no procedure laid down as to the nature of any proceedings before his certificate is given. The latter consideration is not without weight, for the Land Acquisition Act (X of 1870), s. 48, in proceedings of a somewhat similar character, has expressly provided for an enquiry, and has indicated its judicial character; but there is nothing in s. 84 of the Bengal Tenancy Act in this respect. There is no reason apparently why the Collector's certificate should not be granted *ex parte*. I find myself therefore unable to concede such absolute powers to the executive order of a Collector in a matter in which the terms of s. 84 taken alone are so doubtful and obscure, and where the opposite view is consistent with the principles on which our system of administration is founded. Whether the decision of the Civil Court is open to appeal or not is of less consequence, for there it is quite certain that all the issues will be tried out under the sanction of recognized legal forms and subject to the supervision of a superior Court, and if the Legislature has not thought proper to provide an appeal against such an order, it [283] is not open to us to question the expediency or to venture to form conclusions of the probable consequences of the finality of a Munsif's order.

Section 84, however, requires that the Civil Court should be "satisfied on the certificate of the Collector that the purpose is reasonable and sufficient." I do not understand this to mean that the Civil Court is not competent to consider the grounds on which this certificate was granted. If it were intended to make the Collector's certificate conclusive, the law would, I apprehend have been differently expressed. The terms of

1891
FEB. 9.
CIVIL RULE.
18 C. 271.

s. 84 of the Bengal Tenancy Act are very different from those of the Land Acquisition Act, 1870, and yet according to this view the action of the Civil Court would be similar, except that under s. 84 it is conceded that the Civil Court must satisfy itself of the *bona fides* of the application. But under the Land Acquisition Act possession of the land follows the sanction of the Government by a notification under that Act. It is difficult to understand on what grounds, if it were intended that the Collector's certificate should be conclusive, it should not be left also to him to decide as to the *bona fide* character of the application for that certificate, and that he should not also be empowered to give possession of the land, leaving the amount and character of the compensation to be dealt with by the Civil Court. If the Collector's certificate is on the face of it granted on improper grounds, if the purpose alleged is one that does not properly come within that section, is the Civil Court precluded from going behind it? Is it bound to accept it as conclusive? Surely this cannot have been intended by the Legislature, and yet this must be so, if the Civil Court is not competent to consider whether the purpose for which the landlord applied be a legitimate purpose. The present case is a good instance of this. The land is required to extend the premises of a house to be built for a newly-appointed European manager so as to ensure his convenience and comfort. This is the main ground of the application, and much stress is laid on the benefits to the taluk from European management, and the necessity for such from the large area of the taluk. That it is intended also to erect a zamindari cutchery is only incidentally mentioned. These are clearly insufficient grounds. Why, it may **[284]** be asked, is any management necessary at all, and why should not the proprietors themselves manage their own property? Are we to assume that any management must necessarily be for the benefit of the estate, and above all that this will be best ensured by the appointment of any European? All this must necessarily be speculative, and it cannot surely have been contemplated by the Legislature that tenant rights which have been so strictly protected by the new law should be encroached upon for a purpose with such an uncertain result. If this matter is subjected to further investigation, it becomes even clearer. It has been disclosed in the course of these proceedings, though not stated either in the application to the Collector for a certificate or in the petition to the Munsif, that the real object of the petitioners is to introduce the cultivation and manufacture of indigo into this property, and no doubt thus primarily to put more money into the pockets of these proprietors. We have been told by the counsel who opposes this rule—and this has not been contradicted by the counsel for the other side—that the first application to the Collector was for a certificate to obtain some 20 bighas of land for the erection of an indigo factory and vats, and that this was refused. I observe also that it has been found by the Munsif that the site of the former zamindari cutchery was then cleared, and that it has been employed to erect such vats, &c. The real object of the application before us is thus shown. It is certainly not for a purpose contemplated by the Act, and therefore I should not be disposed to maintain any order which proceeds upon the certificate of a Collector giving effect to such a purpose. This would be the consequence of any order setting aside the Munsif's order refusing the application.

Further, as has been already stated, it has now been admitted that the real object of this application is not to introduce a better system of management, as originally stated, but to introduce the cultivation and

1891 FEB. 9. — CIVIL RULE. — 18 C. 271.

manufacture of indigo through a gentleman of the profession known as an indigo-planter, and on these grounds alone this application should be rejected.

AMEER ALI, J.—The circumstances giving rise to these rules have been so fully set forth in the judgment of Mr. Justice Prinsep, which I have had the advantage of reading, and with which I entirely concur, that I am spared the necessity of setting [285] out in detail the reasons which have led me to the same conclusion. The first rule was obtained by the owners of the Dalsingserai indigo factory, who have acquired under *kurtauli* leases from the tenants of the village of Maniarpur an interest in the whole or major portion of the lands appertaining to that mouza. The second rule was obtained on behalf of the maliks of the mouza. It appears that the owners of mouza Maniarpur have recently appointed a Mr. Coryton as the manager of their estate. This gentleman, acting on their behalf, applied to the Collector for a certificate, under s. 84 of the Bengal Tenancy Act, to enable him to acquire 2 bighas 15 cottahs of land in the village of Maniarpur. There is no question that the lands which were proposed to be acquired were in the occupation of raiyats and formed part of their holdings. The purpose for which the lands were required was stated in the petition to be the erection of a cutchery and out-offices for the manager's bungalow, with a passage leading to his residence. In paragraph 6 of the petition "the good to the estate" to which the purpose under the section must have relation was stated thus:—"That your petitioners maintain that a European manager to a taluk of the size of the Kalianpur Bombaya one will be of benefit to the estate, and many of the abuses of a native amla will under his supervision disappear." On the 5th December 1889 an order in vernacular was endorsed on the back of this petition signed by the Collector to the effect that as the persons on whom notices were served raised no objection, he saw no reason to withhold the certificate under s. 84, and that the purpose seemed to him to be reasonable and one which was contemplated by the law. No notice appears to have been given to the owners of the Dalsingserai factory, but we were informed by the learned counsel appearing on their behalf—and the statement was not controverted—that when they subsequently heard of the proceeding they came in and objected to the grant of the certificate, but were referred to the Civil Court. However that may be, Mr. Coryton, acting on behalf of the Maniarpur maliks, then applied to the Munsif. On this occasion notices were issued to the tenants as well as to the owners of the factory. The latter and three out of the eight tenants came in and raised objections to the compulsory acquisition of the lands in question. Up to this [286] time there seems to have been no question as to the jurisdiction of the Munsif to enquire into the sufficiency and reasonableness of the purpose for which the lands were proposed to be acquired. The Munsif dismissed the application, holding that the purpose for which the landlords were desirous of acquiring the lands in question did not come within the scope of s. 84, and also that the application did not appear to him to be *bona fide*. How the matter comes before us has already been mentioned. As regards the order of the Judge, it has not been seriously argued that there is any provision giving an appeal to him from the order of the first Court. In entertaining the appeal the Judge clearly acted without jurisdiction.

Mr. Evans, who appears in suppport of the rule obtained by the owners of the mouza Maniarpur, contends that although we may hold

that the Judge acted without jurisdiction in entertaining the appeal, we ought not to restore the order of the Munsif, as this officer acted without jurisdiction in going behind the Collector's certificate.

He contends in the first place that the certificate of the Collector was conclusive as to the reasonableness and sufficiency of the purpose for which the lands were sought to be acquired. He argues that the only function which the Civil Court has to perform is to assess the compensation on the production of the Collector's certificate and upon being satisfied that the lands were really wanted for the purpose certified. And he proposes to read the section thus :—" A Civil Court may, on the application of the landlord of a holding, and on being satisfied on the certificate of the Collector that the purpose is reasonable and sufficient in relation to the good of the holding or of the estate in which it is comprised, and on being satisfied that he is desirous of acquiring the holding or part thereof for that purpose, authorise the acquisition thereof by the landlord upon such conditions as the Court may think fit, and require the tenant to sell his interest in the whole or such part of the holding to the landlord upon such terms as may be approved by the Court, including full compensation to the tenant."

I find it, however, impossible to accept this view. Had the Legislature intended that the jurisdiction of the Civil Court should **[287]** be confined simply to giving effect to the Collector's certificate, it is difficult to imagine the necessity of so much circumlocution. The intention could have been expressed in simpler language and the collocation of the sentences, it seems to me, would have been different. Apart from the fact that the construction suggested renders meaningless a large portion of the second clause, which is repugnant to all canons of interpretation, there are other serious objections against the view advanced by the learned counsel. There is no procedure in accordance with which the Collector should proceed in determining whether the purpose is sufficient and reasonable. It is said that the Local Government might frame rules under s. 142, but admittedly no rules have been framed yet under s. 84. Is it likely that the Legislature would have vested the Collector with such absolute powers without providing any machinery for the enquiry or subjecting his proceedings to the guarantee of judicial formalities ?

Upon the face of it, the Collector's certificate is an executive proceeding. As the section stands, there is nothing to prevent the grant of a certificate without any notice to the raiyats. Is it reasonable to suppose that the Legislature intended to impress such a conclusive character as is contended for upon an executive act which would have the effect of taking away other people's property and which may be held *ex parte* ?

The argument, however, becomes quite untenable when we examine the words of the section. It runs thus :—" A Civil Court may, on the application of the landlord of a holding, and on being satisfied that he is desirous of acquiring the holding or part thereof for some reasonable and sufficient purpose, having relation to the good of the holding or of the estate in which it is comprised, including the use of the ground as building ground, or for any religious, educational or charitable purpose, and on being satisfied on the certificate of the Collector that the purpose is reasonable and sufficient, authorise the acquisition thereof by the landlord upon such conditions as the Court may think fit, and require the tenant to sell his interest in the whole or such part of the holding to the landlord upon such terms as may be approved by the Court, including full compensation to the tenant."

1891
FEB. 9.
—
CIVIL
RULE.
—
18 C. 271.

[288] Let us analyse the section. There must first be an application; upon that application the Court has to go through a certain judicial process. It must be satisfied (1) that the landlord is desirous of acquiring the holding or part thereof; (2) that the purpose for which he is so desirous is reasonable and sufficient; (3) that the purpose aforesaid has relation to the good of the holding or of the estate; and (4) that the Collector is also of the same opinion that the purpose is reasonable and sufficient. When it has found these facts it may proceed to authorise the acquisition of the lands upon such conditions as it may think fit. Even then it is discretionary with the Court to make the order for compulsory acquisition or not. The words "on being satisfied on the certificate of the Collector, &c.," cannot possibly be supposed to cut down all that had gone before. The words "on being satisfied" are repeated in the third clause from the collocation of the preceding words and the necessity for making it clear that the Court must also have before it the opinion of the Collector that the purpose is reasonable and sufficient; and the certificate is to be the evidence of that opinion. The Collector's certificate is thus *sine qua non* to obtaining an order from the Civil Court. The landlord may apply before obtaining a certificate, but no order can be made under s. 84 unless the Court is satisfied that the Collector is of opinion also that the purpose is reasonable and sufficient. The section thus construed does not do violence to the language and keeps in view the policy of the Tenancy Act. To make the Collector's certificate conclusive would, as has been already pointed out by Mr. Justice Prinsep, be not only contrary to the policy of the Act, but disastrous to the tenants. Remembering what the effect of these compulsory acquisitions would be, that they would withdraw raiyati lands from that category and make them the khas lands of the zamindar, and remembering how carefully the Legislature has endeavoured to prevent the destruction of raiyats' holdings under whatever disguise attempted, we can well understand the anxiety of the Legislature to provide a double safeguard against such compulsory alienations of raiyati lands. It has provided a judicial enquiry as to the sufficiency and reasonableness of the purpose, guarded by the opinion of the executive head of the district to the same effect. That this opinion is not hypothetical is borne out by [289] the words of the Final Report of the Select Committee, "We have inserted a new section (84) giving power to landlords to acquire by compulsory sale, through the Civil Court, and at a price to be fixed by the Court, any land in their estate required for building purposes or for religious, charitable or educational objects. The necessity of some such power, especially with a view to provide building sites either for new tenants or in cases of diluvion, has been strongly urged upon us. *We have guarded the section against abuse by requiring the certificate of a Collector as to the sufficiency of the reason before action can be taken under it.*"

It is contended in the second place by the learned counsel for the Maniarpur maliks that, assuming the certificate of the Collector is not conclusive, the Munsif has wrongly refused to exercise jurisdiction, on the ground that the purpose must have relation to the good of the land comprised in the estate. He further contends that in the present case the purpose for which the lands were sought to be acquired was within the purview of the section, for the appointment of a European manager must be beneficial to the estate and he must be provided with stables, &c. Now the section says the purpose must have relation to the good of the holding or of the estate in which it is comprised, meaning thereby the conglomeration of holdings

of which the estate is comprised. I understand from these words that the good to the holding or estate must be the direct result of the purpose. Now it is very possible that a European manager may prove more efficient than native amlas, and may thus indirectly do good to the estate. Anything therefore which conduces to his comfort and convenience may thus be supposed to have some indirect relation to the management of the estate. But I fail to see how the purpose of building stables, kitchen and cutchery has any relation to the good of the holding or the estate. What the section really contemplates is apparent from the words used. The purpose must have a direct relation to the good of the particular holding or the holdings in general of which the estate is composed. Lands may be wanted for constructing drainage or irrigation works or for sinking wells or cutting pynes or housing tenants, and such objects are within the Act. Objects which might have a remote or speculative bearing upon the estate seem to me to be foreign to the scope of the Act. For [290] these reasons I concur with Mr. Justice Prinsep in holding that the order of the Munsif is correct and ought to be maintained. I would accordingly make the first rule absolute and discharge the second.

Rule No. 1369 made absolute.

A. A. C. *Rule No. 1692 discharged.*

---

18 C. 290.

CIVIL RULE.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ameer Ali.

IN THE MATTER OF SHEORAJ NANDAN SINGH (*Claimant*), *Petitioner* v. GOPAL SURAN NARAIN SINGH, A MINOR, REPRESENTED BY HIS NEXT FRIEND, MR. A. OGILVIE, MANAGER UNDER THE COURT OF WARDS, ESTATE TIKARI (*Decree-holder*), AND ANOTHER (*Judgment-debtor*), *Opposite-party.**
[26th January, 1891.]

Attachment—Claim—Property attached in possession of some person in trust for the judgment-debtor—Code of Civil Procedure (Act XIV of 1882), ss. 278, 279, 280, 281.

Certain property was attached in the hands of the petitioner (who had preferred a claim under s. 278 of the Code of Civil Procedure), on the ground that he had become a trustee for the judgment-debtor by virtue of an alleged agreement on his part to discharge the decree-holder's debt contained in a hibanama by which the judgment-debtor had transferred the property to him. The petitioner having obtained a rule under s. 622 of the Code:

Held, that the property having been transferred to the petitioner and being now admittedly his property, the lower Court had acted without jurisdiction in directing execution to issue against the property.

Per AMEER ALI, J.—When a claim is preferred under s. 278, what the Court has to see is whether the property, though standing in the name of the claimant or of the some other person, is in the possession of the judgment-debtor or not. The mere fact that the judgment-debtor has some beneficial interest in the income would not render the property liable under s. 281. If the claimant satisfies the Court that he has some interest in, or is possessed of, the property attached, and it does not appear that the possession of the claimant was in reality that of the judgment-debtor, the claim must be allowed.

[**F.**, 29 C. 543 (545); **Expl.**, 10 Ind. Cas. 994=U.B.R. (1910), 4th Qr., 75; **R.**, 1 L.B.R. 180 (182); U.B.R. (1897—1901), Vol. II, p. 262.]

---

* Civil Rule No. 1772 of 1890, against the order of Baboo Jadu Nath Dass, Subordinate Judge of Muzafferpur, dated the 13th of December 1890.

1891 JAN. 26. — CIVIL RULE. — 18 C. 290.

IN this case the petitioner, who had preferred a claim, under s. 278 of the Code of Civil Procedure, to certain property **[291]** attached in execution of a decree, obtained a rule under s. 622 of the Code calling upon the decree-holder to show cause why the order of the Subordinate Judge disallowing the petitioner's claim on the ground that he was "in possession of the property in trust for the judgment-debtor" should not be set aside on the ground that the order was made without jurisdiction.

The facts were shortly as follows:—The judgment-debtor sued the present decree-holder to recover possession of certain properties and the suit was dismissed, but on appeal to the High Court the decree of the lower Court was reversed, and the judgment-debtor obtained possession of the property in dispute and recovered her costs by execution of the decree. The defendant, however, appealed to the Privy Council, and in 1885 the decree of the High Court was reversed and the suit dismissed with costs. On the 15th January 1886 the defendant (decree-holder) applied for execution of the decree which he had obtained, praying that he might recover possession of the property in suit with mesne profits, and that the plaintiff (judgment-debtor) might be ordered to refund the costs realised by her in execution of the decree of the High Court. On the 4th December 1886 the Subordinate Judge held that the defendant was entitled to recover the property and his costs, but referred him to a separate suit for the mesne profits. On appeal, however, the High Court allowed the defendant's claims to mesne profits, and a decree was passed on the 10th August 1889 in respect of the same. The decree-holder now sought to execute this decree against properties of the judgment-debtor which had been conveyed to the petitioner on the 29th May 1887 by a hibanama subject to the following conditions—that the petitioner should pay to the judgment-debtor an annuity during her lifetime, and should also pay to the decree-holder "from his person or property, or in any other way he thinks fit to the Court of Wards Tikari Raj, the decree-holder aforesaid, the debts of costs and refund of costs." It was admitted that the petitioner had paid the annuity to the judgment-debtor, and the costs under the decree to the decree-holder.

On the 31st March 1890 the decree-holder applied for execution of his decree of the 10th August 1889 for the mesne profits against the properties the subject-matter of the hibanama, and on the **[292]** 11th October 1890 the petitioner preferred a claim under s. 278 of the Code of Civil Procedure to the properties sought to be attached. The Subordinate Judge under s. 281 of the Code disallowed the claim, holding, upon the construction of the hibanama and upon the circumstances of the case, that the petitioner was in possession of the properties "in trust for the judgment debtor" for the payment of the mesne profits.

The petitioner's claim was rejected on the 11th December 1890, and on the 13th December he applied for and obtained the present rule. Notice was also issued to the judgment-debtor, who appeared and was heard through her counsel. The question mainly argued upon the hearing of the rule was as to the construction to be placed upon the words "property. . . . in the possession of some other person in trust for" the judgment-debtor in s. 281 of the Code of Civil Procedure, and it was contended on behalf of the decree-holder that the order of the Subordinate Judge was not made without jurisdiction.

Mr. *Woodroffe*, Dr. *Rash Behari Ghose*, and Baboo *Abinash Chunder Banerjee* appeared for the petitioner (the claimant).

1891 JAN. 26. CIVIL RULE. 18 C. 290.

Baboo *Hem Chunder Banerjee* appeared for the decree-holder.

Mr. *Evans* and Baboo *Dwarka Nath Chuckerbutty* appeared for the judgment-debtor.

The following judgments were delivered by the Court (PETHERAM, C.J., and AMEER ALI, J.) :—

JUDGMENTS.

PETHERAM, C.J.—We think that this rule must be made absolute. The rule arises out of an application for the attachment of certain properties which are claimed by the applicant to answer the judgment at the suit of the Manager of the Tikari Raj, against a lady of the name of Janki Kooer, and this property has been attached in the hands of the present applicant by the present decree-holder on the ground that it was originally the property of the judgment-debtor. It was transferred by her to the present applicant, the consideration for the transfer being an annuity payable by the transferee to her, and also an agreement on his part to discharge certain debts due by her including (it was contended) the debt in question in respect of which this claim is made.

[293] The Subordinate Judge has directed that this property should be sold to answer that claim, on the ground that by that document which transfers the property the present applicant does agree to pay this debt, and in consequence of that he became a trustee of the property for the judgment-debtor, and consequently the property was liable to attachment in his hands.

Assuming that the view of the meaning of the document with reference to the liability of the applicant to pay this sum of money be correct, as to which I at all events must not be understood as expressing any opinion whatever, I am of opinion that that would not be sufficient to entitle the decree-holder to attach this property in the hands of the transferee. The debt, as I said just now, was the debt of Janki Kooer, and the property which is attached is admittedly now the property of the applicant. It is not disputed that it was transferred to him by the judgment-debtor *bona fide* for a consideration, and consequently that property has been transferred to him, and is now his property. If the object of the decree-holder is to get rid of the effect of that transaction by showing that it is not binding upon him under s. 53 of the Transfer of Property Act, or by contending that notwithstanding that transaction the applicant is liable to pay his debt because he has agreed with the judgment-debtor to pay that for her, he must be made liable to pay it in some other proceeding much more elaborate than this one. Before his property can be attached and sold, there must be a declaration that he has become responsible for this debt as well as the judgment-debtor and bound to pay it; and until that has been done, his property cannot be attached.

For these reasons, it seems to us that the Subordinate Judge was acting beyond his jurisdiction in directing that this property which belongs to a person other than the judgment-debtor should be attached and sold to answer her debt in an execution proceeding arising in a suit to which the present applicant is no party, and the result is that this rule must be made absolute to set aside the order of the lower Court, and we think that the decree-holder must pay the costs of the present applicant.

AMEER ALI, J.—This rule arises out of the following circumstances. The judgment-debtor Janki Kooer brought a suit against the decree-holder to recover possession of a certain property. [294] Her claim was dismissed by the first Court. On appeal, however, to this Court, a decree

1891 JAN. 26. — CIVIL RULE. — 18 C. 290.

was made in her favour, in execution of which she obtained possession of the property in question, and subsequently thereto recovered the costs decreed to her by the High Court. The defendant thereupon appealed to the Privy Council which, reversing the judgment of the High Court, dismissed the suit of Janki Kooer. This was in 1885. On the 15th of January 1886 the defendant applied to recover possession of the property with mesne profits, and for an order that Janki Kooer should refund the costs realized by her.

The Subordinate Judge on the 4th of December 1886 granted the execution of the decree in respect to the recovery of the property and the refund of the costs, but referred the defendant (the present decree-holder) to a separate suit for mesne profits. The matter then came up to the High Court which allowed his claim as to mesne profits which was finally ascertained on the 10th of August 1889, and a decree passed in respect thereof on that date. In the meantime, that is, on the 29th of May 1881, Janki Kooer conveyed by a hibanama all her properties to the petitioner before us subject to certain conditions, two of them being that the petitioner should pay her an annuity during her lifetime and pay "from his person or property, or in any other way he thinks fit to the Court of Wards Tikari Raj, to the decree-holder aforesaid, the debts of costs and refund of costs."

There is no question that the petitioner has been in possession of the properties conveyed to him under the deed, and that pursuant to the covenants already referred to he has been paying the annuity to the judgment-debtor. It is also not disputed that the costs realizable by the decree-holder have been paid to him by the petitioner. On the 31st March 1890 the decree-holder applied to execute his decree for mesne profits by the attachment of the properties conveyed under the hibanama. On the 11th of October 1890 the petitioner put in a claim under s. 278 of the Civil Procedure Code which has been disallowed. The lower Court's order is in the following terms:—"Upon a proper construction of the deeds of the 29th May 1887 (marked I and A), and under the circumstances of the case, I am of opinion that the claimant is in possession of the property in trust for the **[295]** judgment-debtor for the payment of this debt, and that the claim cannot therefore be allowed."

On the 15th of December last the petitioner applied for and obtained a rule from this Court upon the opposite side to show cause why the order of the Subordinate Judge should not be set aside. Notice, however, seems to have been issued not only to the decree-holder, but also to the judgment-debtor, who have appeared separately to show cause against the rule. The judgment-debtor, so far as appears upon the materials before us, had raised no question in the lower Court as to the claim of the petitioner, and she had no *locus standi* in this Court. But for the sake of convenience we have heard her counsel as well as the learned pleader on behalf of the decree-holder. The main objection to the rule is that we ought not to interfere with the order of the Subordinate Judge disallowing the claim, as it was not made without jurisdiction.

Concurring, however, with the view expressed in *Hamid Bakhut Mozumdar* v. *Buktear Chand Mahto* (1), I am clearly of opinion that the lower Court has acted illegally and with material irregularity in the exercise of its jurisdiction in directing execution to issue against the properties held by the petitioner under the deed of gift. When a claim is preferred

(1) 14 C. 617.

under s. 278, what the Court has to see is whether the property, though standing in the name of the claimant or some other person, is in reality in the possession of the judgment-debtor or not. The mere fact that the judgment-debtor has some beneficial interest in the income of the property would not, in my opinion, render the property liable under s. 281. The words of ss. 279 and 280 to my mind leave no room for doubt. Section 279 runs thus:—"The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached." And s. 280 declares:—"If upon the said investigation the Court is satisfied that, for the reason stated in the claim or objection, such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of **[296]** the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall pass an order for releasing the property, wholly or to such extent as it thinks fit, from attachment."

It seems clear, therefore, that when a claim is put forward under s. 278, and a claimant or objector satisfies the Court that he has some interest in, or is possessed of, the property attached, and it does not appear that the possession of the objector was in reality the judgment-debtor's, the claim must be allowed. In this particular case the question for determination is not whether the petitioner is liable to pay the mesne profits or not, under the covenants contained in the deed of gift. The real question is whether the property is really in the possession or enjoyment of the judgment-debtor, though nominally conveyed to the petitioner. There is no doubt as to the fact that the petitioner is in possession in his own right, subject to the payment of the annuity and the costs.

In disallowing his claim the Subordinate Judge has allowed execution for the debt of one person against the property of another. I therefore concur with the learned Chief Justice in making the rule absolute.

A. A. C. *Rule made absolute.*

---

18 C. 296.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

ISMAIL SOLOMON BHAMJI (*Plaintiff*) *v.* MAHOMED KHAN AND ANOTHER (*Defendants*).* [10th February, 1891.]

*Attachment—Claim to attached property in Calcutta Court of Small Causes—Suit in High Court by unsuccessful claimant—*Res judicata—*Code of Civil Procedure* (*X of* 1882), ss. 278, 283—*Presidency Small Cause Courts' Act* (*XV of* 1882), ss. 9, 23 *and* 37—*Act X of* 1888, s. 2.

An order made upon a claim to attached property filed in the Small Cause Court of Calcutta under s. 278 of the Civil Procedure Code, 1882, is an order in the suit within the meaning of the Presidency Small Cause Courts' Act, 1882, s. 37, and is final, subject only to the right to apply for a new trial. Where such a claim has been disallowed, a suit brought under **[297]** s. 283 of the Civil Procedure Code by the person against whom that order has been passed to establish the right which he claims to the property in dispute is not maintainable in any Court.

---

* Original Civil Suit No. 365 of 1890.

1891 FEB. 10.

ORIGINAL CIVIL.

18 C 296.

The exclusion by the Small Cause Court under the powers conferred on it by s. 23 of the Presidency Small Cause Courts' Act, 1882, of s. 283 of the Civil Procedure Code has not been affected by Act X of 1888.

[F., 26 C. 778 (784); D., 4 C.W.N. 470 (473).]

THIS was a suit to recover damages for wrongful attachment of property.

The circumstances of the case were as follows :—

One Mahomed Khan, a defendant in this suit, seized two horses, as being the property of Hoshein Dooply, the other defendant, in execution of a decree which he had obtained against him in the Calcutta Small Cause Court. The present plaintiff alleged that the horses in question were his property and applied to the Small Cause Court for their release from attachment. The Court refused the application. The plaintiff then paid the amount of Mahomed Khan's decree and costs into Court, and applied to have the former order set aside. This application also was refused with costs. He then brought a suit in the High Court to obtain a declaration that the horses were his property at the date of attachment, and to recover the sum of Rs. 2,686, being the amount paid by him into Court, together with the costs of his applications to the Small Cause Court.

Mr. *T. A. Apcar* and Mr. *Chowdhry*, for the plaintiff.

Mr. *Hill* and Mr. *Sale*, for the defendant Mahomed Khan.

The defendant Hoshein Dooply was unrepresented.

At the settlement of issues it was contended that the suit was not maintainable.

Mr. *Hill*.—This suit is brought under s. 283 of the Civil Procedure Code, a section which does not apply to suits in the Calcutta Court of Small Causes. The procedure in that Court is regulated entirely by Act XV of 1882 as amended by Act X of 1888. Under s. 37 of the former Act, every decree or order of the Small Cause Court in a suit shall be final, save as by the Act provided. Section 23 extends to the Small Cause Court the portions of the Civil Procedure Code mentioned in the second schedule of the Act, subject, however, to the powers reserved to the Court by that section. By a notification under the section published [298] in the *Calcutta Gazette* of the 14th June 1882, the Court has declared s. 283 of the Code to be inapplicable to it. This notification has not been affected, so far as s. 283 is concerned, by any subsequent notification. Act X of 1888, s. 2, substituted for this schedule a new schedule, which also extends to the Small Cause Court but s. 3 of the Act expressly declares that any notifications regarding the old schedule shall be construed as referring to the new schedule. Moreover, s. 23 of the Act of 1882 provides that the portions of the Code specified in the second schedule shall be applied only so far as the Court may deem them applicable, and s. 9 empowers the Court to make rules for all matters not specially provided for by the Act. Under r. 46 a claim under s. 278 of the Code is not tried summarily, but has to be preferred in a regular suit, and s. 26 of the Act enables the Court in such suit to award compensation by way of damages for a wrongful attachment or claim. The question of wrongful seizure is therefore *res judicata* under s. 13 of the Civil Procedure Code.

Mr. *Apcar*, for the plaintiff.—The subject-matter of this suit is not *res judicata*. This is a suit for damages, and, as we lay our damages at Rs. 2,600, this is the proper Court in which to bring it. The notification in the Gazette as to s. 283 has been cancelled by implication by the Act of 1888. Even if it has not been cancelled, it does not affect this suit.

Section 283 does not require the suit to be brought in the Court which has adjudicated upon the claim. The notification, if still in force, has merely taken away the right of bringing such a suit in the Small Cause Court. If the amount of the damages is such as to bring the matter within the jurisdiction of the High Court, a suit will lie in this Court. Suits of this kind are not appeals from the orders of the lower Courts, but are substantive suits to all intents and purposes—*Kishori Mohan Dass* v. *Hursook Dass* (1). We have followed the right course in adding our costs to the amount of our claim, and making them part of the subject-matter of our suit for trespass—*Raghu Nath Dass* v. *Badri Prasad* (2). This is the only Court in which suits of this nature for damages can be **[299]** maintained. The plaintiff is not barred by this section from bringing a suit, as he has not claimed compensation in the Small Cause Court. He has not availed himself of the remedy afforded by s. 26, and it is therefore still open to him to sue under s. 283. *Durga Prasad* v. *Kachla Kuar* (3); *Annaji Raw* v. *Rama Kurup* (4) were referred to.

Mr. *Hill*, in reply.—The plaintiff contends that he has a right to bring a suit for damages for trespass, but the Court has already decided that there has been no trespass.

JUDGMENT.

The following judgment was delivered by

WILSON, J.—The plaintiff sues on allegations in his plaint which are in substance to this effect:—The now defendant, in execution of a decree of the Calcutta Court of Small Causes against a third person, caused to be attached a pair of horses which, the plaintiff says, are his property. The plaintiff filed a claim in the Small Cause Court, and his claim was disallowed with costs. He applied for a new trial, and his application was refused. He now sues to establish his title to the horses, and for damages.

The case came on for settlement of issues, and the question for decision is whether, on the above statement of facts, this suit will lie. Had the previous proceedings taken place in a Court other than the Small Cause Court, there is no doubt that such a suit could be maintained, for it is expressly given by s. 283 of the Civil Procedure Code; and if it can be maintained, there is no doubt that this is the proper Court. But the case stands on a different footing by reason of the proceedings having been in the Small Cause Court.

The sections of the Presidency Small Cause Court Act, XV of 1882, which it is necessary to consider, are the following:—

Section 9: "Except as otherwise provided by this or any other law for the time being in force, the Small Cause Court may, with the previous sanction of the High Court, make rules to provide in such manner as it thinks fit for all matters not specially provided for by this Act, and for the exercise, by one or more of its Judges, **[300]** of any powers conferred on the Small Cause Court by this Act or by any other law for the time being in force."

Section 23: "The portions of the Code of Civil Procedure specified in the second schedule hereto annexed shall extend, and shall, so far as the same may, in the judgment of the Court, be applicable, be applied to the Small Cause Court, and the procedure prescribed thereby shall be the procedure followed in the Court in all suits cognizable by it except where

(1) 12 C. 696. (2) 6 A. 21. (3) 9 A. 140. (4) 10 M. 152.

1891 Feb. 10. — Original Civil. — 18 C. 296.

such procedure is inconsistent with the procedure prescribed by any specific provisions of this Act. Provided that the Court may, subject to the control of the Local Government, from time to time by notification in the Official Gazette, declare that any of the said portions of the said Code shall not extend and be applied to the Small Cause Court, or that any of such portions shall so extend and be applied with such modifications as the Court, subject to the control aforesaid, may think fit."

Section 26, paras. 2, 3, and 4: "When any claim preferred or objection made, under s. 278 of the Code of Civil Procedure, is disallowed, the Small Cause Court may in its discretion order the person preferring or making such claim or objection to pay to the decree-holder, or to the judgment-debtor, or to both, by way of satisfaction as aforesaid, such sum or sums as it thinks fit.

"And when any claim or objection is allowed the Court may award such compensation by way of damages to the claimant or objector as it thinks fit; and the order of the Court awarding or refusing such compensation shall bar any suit in respect of injury caused by the attachment.

"Any order under this section may, in default of payment of the amount payable thereunder, be enforced by the person in whose favour it is made against the person against whom it is made as if it were a decree of the Court."

Section 37: "Save as is herein specially provided, every decree and order of the Small Cause Court in a suit shall be final and conclusive; but the Court may, on application of either party, made within eight days from the date of the decree or order in any suit (not being a decree passed under s. 522 of the Code of Civil Procedure), order a new trial to be held, or alter, set aside, or reverse **[301]** the decree or order, upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings."

Among the sections of the Procedure Code specified in the second schedule to the Act were the sections relating to claims by third parties to property attached in execution, including s. 283, which gives a right of suit to get rid of the effect of the decision upon a claim in the following terms: "The party against whom an order under s. 280, 281, or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive." But in exercise of the power given by the proviso to s. 23, the Small Cause Court, with the sanction of the Local Government, while retaining the other claim sections, excluded s. 283, and the effect of the amending Act X of 1888 is, I think, to maintain the exclusion. Under s. 9, the Small Cause Court, with the sanction of this Court, has made rules for dealing with claims, the effect of which is that the claimant files a plaint, and the matter is then treated as a suit.

In my opinion an order made upon a claim filed under s. 278 of the Civil Procedure Code is an order in the suit, within the meaning of s. 37 of the Presidency Small Cause Courts Act. The words in s. 278 to the effect that the Court is to investigate the claim with the like power, as regards the examination of the claimant or objector, and in other respects as if he were a party to the suit, are strong to show this. It follows that by the terms of s. 57 of the Presidency Small Cause Courts Act the order is final, subject only to the right to apply for a new trial. And there can be no doubt that the omission of s. 283 from the sections of the Procedure Code applied to the Small Cause Court was intended to give effect to this view.

The balance of convenience is, I think, altogether in favour of the same view. Under the rules of the Small Cause Court claims are not tried summarily; they are dealt with just as suits are, with the same remedy in case of mistake by application for a new trial, and the Court has full power to award damages to either party. A person who thinks himself aggrieved by the seizure of goods, in execution of a Small Cause Court decree, [302] has his choice of remedies. He may bring an ordinary suit in the proper Court, or he may make a claim in the Small Cause Court. In either case his rights are fully tried out, and it would, I think, be inconvenient and contrary to sound principle to allow him to try first one remedy and then the other. The suit is dismissed with costs.

1891 FEB. 10. — ORIGINAL CIVIL. — 18 C. 296.

Attorney for the plaintiff: Baboo *Kedar Nath Mitter*.

Attorney for the defendant: Mr. C. *Pittar*.

H. L. B.

---

18 C. 302 (P.C.) = 5 Sar. P.C.J. 632.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Macnaghten, Sir B. Peacock, and Sir R. Couch.
[*On appeal from the Chief Court of the Punjab in* 86 *P.R.* 1886.]

BUDHA MAL (*Plaintiff*) *v.* BHAGWAN DAS AND ANOTHER (*Defendants*). [18th and 23rd July, 1890.]

Hindu law—Partition—Evidence of Partition—Distribution of family estate, followed by separate possession, equivalent to informal partition—Appeal to Chief Court, Punjab—Civil Procedure Code, 1882, *s.* 584—*Questions of fact.*

The Courts below found that a distribution of ancestral estate among the members of a family had taken place in former years, and had been followed by continuous possession, without their having any intention to re-adjust or to hold on behalf of the family. The right of an individual member to claim another partition was therefore negatived.

The parties, who had long discontinued joint residence, were members of a family consisting at the time of the distribution of four sons left by a Sikh Dewan deceased. The son of one brother now claimed from the son of another, joining a third who still survived, partition of the property which had descended from the grandfather with the increment since his time.

That an actual partition had been effected, although probably no formal document of partition had been executed, appeared to their Lordships to be a just inference from the evidence.

An appeal from an appellate Court to the Chief Court is not limited as such appeals are under the Civil Procedure Code, 1882, s. 584; but evidence may be dealt with, and questions of fact are open for decision (1).

[303] APPEAL from a decree (20th March 1886) of the Chief Court, affirming, with an exception as to part, a decree (26th February 1883) of the Additional Commissioner of the Lahore Division, who had reversed a decree (1st May 1882) of the Judicial Assistant Commissioner of the Lahore district.

The principal question raised was whether the separate possession by the brothers Tara Chand, Mangal Sein, Rattan Chand, and Harnam Das (the first two having been sons of Karam Chand, who died in 1835, by one

(1) Act XVII of 1877, s. 38, providing for such appeals, was replaced by s. 40 of the Punjab Courts' Act XVII of 1884.

1890 JULY 23.

PRIVY COUNCIL.

18 C. 302 (P.C.) = 5 Sar. P.C.J. 632.

of his wives, and the latter two his sons by another wife) had been rightly considered by the Courts below to constitute their separate estate, or this distribution among the brothers had been ineffectual to supply the place of a partition. The appellant, a son of Mangal Sein, suing on the 8th June 1880, claimed to be still entitled to a partition of the family estate, as against Bhagwan Das and Barkat Ram (the latter deceased during the proceedings), the two sons of Rattan Chand, and Harnam Das. The property to which the claim related consisted of houses in Lahore and its suburbs, with gardens, also houses in Amritsar, and some proprietary shares in the revenue-paying village of Bela Basti Ram, in the district and tehsil of Lahore.

The Judicial Assistant Commissioner found that no partition had been shown to have already taken place, and that there had been no possession by the brothers adverse to one another's title; but that the properties which had been at one time joint must he held to be so still. He considered that the claim was not barred by limitation, and he awarded to the plaintiff his share of nearly all the property sued for.

The Additional Commissioner agreed with the Judge of the first Court that the suit was not barred by limitation, but considered that the parties, by their acts and conduct, had shown that they had intended and had tacitly consented, to possess separate portions of the family property in severalty, although there had been no formal act of partition among them. So that there was at the date of the suit no joint property of which a partition could be granted. He was of opinion that there had been long separate possession, and independent enjoyment, without trace of any joint account, or sharing of profits, or any proof of intention to have any future re-adjustment, or that **[304]** each individual was holding, not for himself, but on behalf of the family.

The Chief Court substantially agreed with the lower appellate Court as to the intention of the parties, and as to the legal effect of their dealings, except as to one piece of property, *viz.*, the village land in Bela Basti Ram; the result being that except as to this latter part of the claim. the suit was dismissed.

In considering the state of the family at Karam Chand's death, and what became of the ancestral houses. the Additional Commissioner found that the three sons held separate offices, with separate pay and jagirs, under the Sikh Government, the fourth being an infant under his own brother's, Rattan Chand's, care. Tara Chand was the Sirdar commanding the Charyari Cavalry; Mangal Sein was a ressaladar of the same troops. Rattan Chand was "hazur-navis'" or Court-writer. The brothers were all separate in residence and food at time of Karam Chand's death. Without being able to fix the precise time when the distribution of the houses happened, the Commissioner found that it was, most probably, in Sambat 1896, or 1839 A.D., when Tara Chand was about to depart to Benares; quitting Lahore without leave, and contrary to the order of the Sikh Government, prohibiting its servant crossing the Sutlej. A settlement took place at this time of most of Tara Chand's property, he having taken with him a large sum in cash and jewels, and having given his houses in the Punjab to his brother Mangal Sein, of which last the plaintiff was in possession. Karam Chand's property thenceforward remained in possession of his sons separately. The Additional Commissioner added :—

"However unequal the sharing may be argued to be, I hold that it has taken effect and been adhered to for over 40 years at least, and that it

cannot now be interfered with ; it constitutes in fact, a virtual or *de facto* partition, and this partition is further rendered unalterable, inasmuch as the intention of the parties was manifested by their subsequent conduct, by their sole and independent enjoyment of these properties. It is nothing to the point that Rattan Chand was clever and pushing, and got the lion's share. Unless the others resisted that in due time, and insisted on partition before any question of finality could arise, **[305]** their displeasure, so far from being in their favour, is much against them ; they were aware of their claims, and yet took no step to redress what they felt to be their grievances. It is too late to do so now when they have suffered the separate enjoyment to last without interruption for forty years."

1890
JULY 23.

PRIVY COUNCIL.

18 C. 302 (P.C.) = 5 Sar. P.C.J. 632.

He added that the plaintiff's case did not fail on the ground of limitation, but on the ground of long separate possession, and independent enjoyment, without a trace of any joint account, or sharing of profits, or any proof of intention that there should be any future re-adjustment, or that the properties held by each were only held for the family, not for the individual.

He lastly considered whether there was any affirmative evidence relating to the separate properties, and showing their purchase out of joint family funds. This he could not find, nor would he allow that the settlement record of the land in village Bela Basti Ram, which was entered in the names of all the family both in the first settlement of 1849 and in the second of 1867-68, was sufficient to show the plaintiff to be entitled to his share by inheritance in this part of the patrimonial estate.

On an appeal by the plaintiff the Chief Court considered the questions as to the intentions of Karam Chand's sons in distributing the property, and whether Rattan Chand's position had been shown to be that of manager. The judgment referred to the following authorities :—

"The presumptions as to the property of a Hindu family descended from a common ancestor remaining joint property until separation is shown are presumptions of facts such as are provided for by s. 114 of the Evidence Act. The case of *Appovier* v. *Rama Subba Aiyan* (1), and the cases of *Neelkisto Deb Baromono* v. *Beerchunder Thakoor* (2) and *Yanumula Venkayama* v. *Yanumula Boochia Venkondora* (3) illustrate the ordinary rule, but the presumption may be weakened or even rebutted by proof of facts which give rise to an inference that the property is held in separate ownership, even though there is no evidence of a formal partition. **[306]** See *Bodh Singh Doodhoria* v. *Gunesh Chunder Sen* (4), a decision of the Judicial Committee, and *Moro Vishvanath* v. *Ganesh Vithal* (5). That there may be a partial partition of the family property, while other members remain united, is settled, contrary to the view expressed in *Radha Churn Dass* v. *Kripa Sindhu Dass* (6) by the Privy Council judgments cited in *Upendra Narain Myti* v. *Gopee Nath Bera* (7). See also *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (8) and Jolly's Tagore Law Lectures for 1883, p. 135. The judgment in *Lakshman Dada Naik* v. *Ram Chundra Dada Naik* (9), while it notices the absence of a formal partition in the father's lifetime, really turned upon other grounds."

The result was that the Chief Court affirmed the judgment of the Additional Commissioner except as to the shares in Bela Basti Ram, as to which his decision was reversed, and a one-third share was decreed to the plaintiff.

(1) 11 M.I.A. 75 (2) 12 M I.A. 523. (3) 13 M I.A. 333.
(4) 12 B. L. R. 317 (326, 327). (5) 10 B.H.C R. 444 (452, 453, 468, 469).
(6) 5 C. 474. (7) 9 C. 817. (8) 5 M. 362. (9) 5 B. 48.

1890 JULY 23. — PRIVY COUNCIL. — 18 C. 302 (P.C.) = 5 Sar. P.C.J. 632.

Mr. *J. D. Mayne* for the appellant, argued that the facts were consistent with there not having been a partition; and that the presumption of jointness should prevail. The question was as to the intention of the members of the family in separating, and the distribution which had taken place had not been the equivalent of a partition.

Mr. *R. V. Doyne* and Mr. *John Eldon Bankes*, for the respondents, were not called on.

JUDGMENT.

The judgment of their Lordships was delivered by

SIR R. COUCH.—The parties to the suit which is the subject of the present appeal are the descendants of one Karam Chand who died in the year 1835, and who was in the service of Ranjit Singh, and apparently held a position of some importance in his service. Karam Chand had two wives. The first was the mother of Tara Chand and Mangal Sein, and the second was the mother of Rattan Chand and Harnom Das. Mangal Sein died leaving a son Budha Mal, who is the plaintiff, and Rattan Chand died in 1872, leaving a first son Bhagwan Das, also a son who is stated to have disappeared in consequence of getting into some difficulty and of whom nothing now is known, and a **[307]** third son Barkat Ram, who is the second defendant in the suit, but who died on the 29th of June 1884. Tara Chand, the eldest son of Karam Chand, left Lahore, the residence of the family, and went to Benares, either in 1838 or 1839, taking with him a quantity of moveable property, according to the evidence of the plaintiff, of the value of Rs. 60,000 or Rs. 70,000. He died at Benares without children in 1858, his widow succeeding to the property which he had. It appears that during the life of Karam Chand the sons had themselves acquired and held separate property, and it is said that Rattan Chand had property to a greater extent than the other brothers.

The suit was brought by Budha Mal, the son of Mangal Sein, on the 8th of June 1880, and in it he alleged that the property, or a considerable portion of it, was still joint family property, and he asked to have a partition.

The question raised in the suit is stated by the Judicial Assistant Commissioner, before whom the case first came, to be that Bhagwan Das, who was the principal defendant, said, "that though he has no knowledge that the property of Karam Chand after his death was formerly partitioned, yet all the brothers have always been separate in food, residence and estate;" and that "each party enjoys the income of his own property, and has no concern with the property in the possession of the other;" and further, "that Rattan Chand never held nor purported to hold the property in suit as manager for the benefit of Mangal Sein and Tara Chand." The defence was made in that form; no doubt in consequence of the plaintiff having alleged in his plaint that at first Tara Chand was the manager on behalf of the whole family, and after he went to Benares, Rattan Chand, who was a literate man, became the manager on behalf of the whole family. Substantially the plaintiff alleged that the property of which he sought a partition was, at the time when the suit was brought, joint family property. The principal defendant, Bhagwan Das, who is the only respondent who has appeared in the present appeal, alleged that although there had not been a formal partition of the property, yet that somewhere about the time when Tara Chand went to Benares, or shortly afterwards, there was in fact a **[308]** separation of the family in

1890 JULY 23. PRIVY COUNCIL. 18 C. 302 (P.C.) = 5 Sar. P.C.J. 632.

the estate as well as in food, and from that time there had been a separate possession of the property by the different members of the family in consequence of it.

The case was tried in the first instance by the Judicial Assistant Commissioner of Lahore; and in his judgment, he says: "Now the fact that plaintiff holds a large number of houses as separate estate, and that defendants do the same, would seem to point to some *de facto* if not formal partition of the joint family of the sons of Karam Chand; and this view receives emphasis from this other fact, that plaintiff's father Mangal Sein and Tara Chand have held together all along, and are the sons of Karam Chand by one wife; while defendants 1 and 2's father and defendant 3 have held together, and are Karam Chand's sons by another wife." He says further: "For the manager of a joint estate in which he is a co-sharer to acquire separate property would be usual, but where we have it admitted that the respective alleged co-sharers are all in possession of distinct properties, it would seem to import that their joint condition had ceased to exist." And a few lines further on: "Where the two sons by one wife hold a long list of separate property, and the two sons of another wife do the same, it seems a fair inference that at some time anterior to that state of things there was a separation of interest." Now he does appear in a subsequent part of his judgment to have thought it necessary that there should be, not what he had found in the above passages, a separation *de facto*, but a specific partition. But it is evident that the conclusion which he came to from the evidence was that there had been a partition—some transaction between the parties, which in fact amounted to a partition of the property, and that from that time they had become separate in estate, and had enjoyed the property separately. He however made a decree partly in favour of the plaintiff and partly in favour of the defendant, in consequence of the view which he took as to the necessity of some specific partition.

From that decree there was an appeal to the Additional Commissioner, and his language upon the question of the partition is this: "The case does not throw any light as to the precise time at which the *de facto* distribution was made or happened. It was most probably about the time of Tara Chand's departure to **[309]** Benares in Sambat 1896. I find accounts of rents for some of the houses as paid to Tara Chand after Karam Chand's death, which led to the supposition that some of them remained with Tara Chand for a time. All I can say with reasonable certainty is, that this distribution was existing in Sambat 1897 (when the rents appear first in Rattan Chand's accounts), and has ever since that remained in operation." In a subsequent part of his judgment, after considering the evidence, he says: "To sum up, the conclusions I have come to are, that this family was predisposed to separation, or naturally circumstanced so as to lead to it, if this phrase be preferred. The family consisted of two sons of one wife, who held together, and two sons of another wife; they held separate offices with separate salaries, and had certainly acquired separate houses. I find then that it is in every way probable, and it is certainly proved that as far back as Karam Chand's death, or even before it, they were separate in food and residence, Harman Das, an infant, being in charge of Rattan Chand." Then he says: "I find that Karam Chand's property was tacitly apportioned without objection at a time which is uncertain." And further on: "I find that from that day to this all these houses that came to the different members, as detailed in this judgment, have since been separately and independently held, and that there has been no trace of any managership, anything remotely resembling a common fund, a com-

1890 JULY 23. — PRIVY COUNCIL. — 18 C. 302 (P.C.) = 5 Sar. P.C.J. 632.

mon or joint account, or a sharing, or participation of profits." He afterwards says: "However unequal the sharing may be argued to be, I hold that it has taken effect and been adhered to for over 40 years at least, and that it cannot now be interfered with; it constitutes in fact a virtual or *de facto* partition, and this partition is further rendered unalterable, inasmuch as the intention of the parties was manifested by their subsequent conduct, by their sole and independent enjoyment of these properties." There is thus a most distinct finding on the part of the Additional Commissioner that there was a separation in fact, although no formal document could be produced, and probably there never was any formal document executed between the parties. If there had been, it might have been very difficult to prove it. This judgment was given after a careful examination of the evidence in the case, and certainly appears to their Lordships to be a fair inference from it.

[310] There was then an appeal from the judgment of the Additional Commissioner to the Chief Court of the Punjab, and it is to be observed that although this was an appeal from an appellate Court it was not limited, as such appeals under the Code of Civil Procedure are, to questions of law, and the Chief Court had authority to deal with the evidence and decide questions of fact. After noticing the evidence, and the facts that were relied upon as showing that the property continued to be held as undivided family property, the first learned Judge of the Chief Court says: "Under these circumstances I am of opinion that in 1854 at latest, and probably several years earlier, Rattan Chand had begun to hold adversely to the plaintiff's father, even if there had been no such acquiescence on the part of the latter as to operate as a *de facto* partition. Whether there had been such acquiescence the lapse of time and Mangal Sein's manifest dissatisfaction with the existing state of things 10 years before his death, make it difficult satisfactorily to determine."

It has been argued by Mr. Mayne, who appeared for the appellant, that this shows that this learned Judge was not satisfied that there had been an actual or a *de facto* separation. That he was so satisfied appears from the previous passages in his judgment, in which he says, after speaking of the presumption of a family being joint, "but the presumption may be weakened, or even rebutted, by proof of facts which give rise to an inference that the property is held in separate ownership, even though there is no evidence of a formal partition." This part of his judgment shows that he was of opinion that there had been a separation, or partition, in fact; but that even if that had not been the case, there was the question of the operation of the adverse possession. The judgment of the other learned Judge is more distinct upon the question. He says: "The finding of the Additional Commissioner that there was (at least so far back as (1854) an absolute *de facto* separation between Rattan Chand and Mangal Sein, and, that Rattan Chand was not the manager of the joint family property, seems perfectly right, and, as far as I can understand, Mr. Parker"—that is, the Judicial Assistant Commissioner—"came to the same conclusion in the 6th and 7th pages of the printed judgment."

[311] Thus, upon the question which was the real issue between the parties, whether there had been a partition of the family property, there are the findings of three Courts, all of which appear to have looked very carefully into the evidence. The judgments are very full, and nothing has been urged before their Lordships by the learned counsel for the appellant which in any way shows that the conclusion which they came

to was not a fair inference from the evidence in the case. It does appear that more than 40 years ago—although there might not have been any formal document drawn up between these persons—there was a partition of the family property.

The Additional Commissioner dismissed the plaintiff's suit entirely, but on the appeal to the Chief Court it appeared that there was a small portion of the property of which there had been no partition; and on that ground the Chief Court modified the decree of the Additional Commissioner by excepting that portion from the decree dismissing the suit. That decision has not been appealed from by the respondent.

The result, therefore, is that their Lordships will humbly advise Her Majesty to affirm the decree of the Chief Court, and to dismiss this appeal, and the appellant will pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents: Bhugwan Das: Messrs. *Speechly, Mumford, Landon and Rogers.*

C. B.

---

18 C. 311 (P.C.) = 18 I.A. 1 = 15 Ind. Jur. 34 = 5 Sar. P.C.J. 642.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, Sir B. Peacock, Sir R. Couch and Mr. Shand (Lord Shand).
[*On appeal from the High Court at Calcutta.*]

HURRO NATH RAI CHOWDHRI (*Plaintiff*) v. RANDHIR SINGH AND OTHERS (*Defendants*). [19th and 20th November, 1890.]

Hindu Law—Widow—Power of Hindu widow to alienate—Qualified title to alienate in contracting debt by manager of estate charging it in the hands of heir—Responsibility of lender—Rate of interest as regards necessity, distinguishable.

A suit was brought by a creditor who had advanced money for the payment of Government revenue upon an estate under the management of a [312] Hindu widow. The plaintiff's agent had received rents to a certain amount from part of the estate. *Held*, that the plaintiff ought to have taken care that this sum was applied in part reduction of the debt to him; and that it must be deducted from the amount chargeable to the estate in the hands of the reversionary heir. *Hunooman Persad Panday* v. *Munraj Koonweree* (1) followed.

The widow was borrowing in a case where it was for the plaintiff to see whether there was actually a ground of necessity for the loan. Though the loan was necessary, for her to borrow at the high rate of interest charged, considering the security which she gave, was not necessary. The rate of interest had therefore been rightly reduced to twelve per cent.

[F., 5 C.L.J. 542 (548); 22 Ind. Cas 304; R., 34 A. 126 = 8 A.L.J. 1294 = 13 Ind. Cas. 5; 37 C. 179 (193) = 11 C.L.J. 317 = 14 C.W.N. 535 = 3 Ind. Cas. 353; 18 M. 113 (118); 34 M. 188 (196) = 8 Ind. Cas. 1072 = 21 M.L.J. 320 = 9 M.L.T. 235 = (1910) M.W.N. 799; 1 C.L.J. 199 (210); 6 C.L.J. 462 (469); 6 C.L.J. 490 (521).]

APPEAL from a decree (24th March 1886) varying a decree (28th August 1882) of the Subordinate Judge of Rajshahi.

(1) 6 M. I. A. 393.

1890 Nov. 20. — PRIVY COUNCIL. — 18 C. 311 (P.C.) = 18 I.A. 1 = 15 Ind. Jur. 34 = 5 Sar. P.C.J. 642.

The suit out of which this appeal arose was brought by the appellant to recover Rs. 28,837, for money advanced by him to Shamasunderi Bai, the first defendant. She was the widow of Gobind Persad, and purporting to act under his authority, had adopted to him Radhika Persad, the second defendant. The claim was secured by mortgages upon the family estate, executed by Shamasunderi for herself, and as guardian of the adopted son who was a minor. The question now raised was whether the transactions between the plaintiff and the first defendant were binding on the estate in the hands of the reversionary heirs.

Shamasunderi commenced to borrow in 1877 and continued till 1880, the loans amounting to Rs. 17,650, secured by eight mortgages upon the property left by Gobind Persad.

The first defendant admitted the execution of the bonds, but asserted that they were not intended to bind the estate or herself, having been merely part of an arrangement whereby the plaintiff had undertaken to incur all the expense of a suit that had been going on in the family to set aside a compromise, it having been agreed that the plaintiff should receive a six-annas share of all the property recovered. She had another defence upon the bonds, which was that the consideration had not been received on her account, but for the use and benefit of the minor defendant as heir. Another defence, upon failure to establish either of the above, was that a sum of Rs. 10,000 had been received by the plaintiff's agent, Shamacharan Rai, which was part of the rents of **[313]** the estate, and should have been allowed in account with the widow as manager. The Court did allow the deduction of Rs. 7,700, part of this sum, there having been an admission of Rs. 2,239 by the widow, and the suit was decreed against her for Rs. 21,076, with interest and costs. But as against the minor defendant, the Court dismissed the suit, holding that the plaintiff had not made out that the loans, as against him, were binding.

The plaintiff appealed to the High Court, and, while his appeal was pending, a decision was given in another suit, to which Shamasunderi Bai was a party, that the adoption by her of Radhika Persad was invalid. Also she died pending the appeal, and by order of the Court Randhir Singh, claiming as the next reversionary heir to the estate, and Romanath Sein, as purchaser of part of it from him, were substituted as respondents in the appeal.

The High Court (McDONELL and GHOSE, JJ.), in part disagreeing with the Subordinate Judge, held that about half the claim was binding on the estate, and in part agreeing with him, held that this amount must be reduced by the sum received by the plaintiff's agent. Deducting this Rs. 10,000, for the balance the High Court decreed in the plaintiff's favour, reducing the interest claimed down to suit brought, from 18 per cent. to 12 per cent.

The plaintiff having appealed,

Mr. *C. W. Arathoon*, for the appellant, argued that the whole amount claimed should have been decreed against the estate. He relied on the finding that the widow had borrowed for necessary purposes, the consideration money stated in the bonds having been advanced. It had been for the respondents to show that the advances had not been made for the benefit of the estate, and citing *Hunooman Persad Panday* v. *Munraj Koonweree* (1), he argued that the appellant had done all that had been required of him in advancing to a person whose powers to charge the estate were

(1) 6 M.I.A. 393.

limited. He had inquired, and had acted *bona fide* with due caution, so that he was not bound to see to the application of the Rs. 10,000.

Mr. *J. D. Mayne*, for the respondents, was not called upon.

1890 Nov. 20.

PRIVY COUNCIL.

18 C. 311 (P.C.) = 18 I.A. 1 = 15 Ind. Jur. 34 = 5 Sar. P.C.J. 642.

JUDGMENT.

Their Lordships' judgment was delivered by

[314] SIR B. PEACOCK.—Their Lordships are of opinion that the judgment of the High Court is correct, and that it ought to be affirmed.

The learned Judges of the High Court in delivering their judgment say:—"The question arises, what are the particular sums of money in respect to which the plaintiff is entitled to any charge upon the estate? It is alleged, and the recitals in the bonds are to the effect, that the moneys were borrowed for three purposes—first, litigation expenses; second, maintenance of the widow and deb-sheba; and third, Government revenue." With regard to the litigation expenses, the learned Judges disallow the amount claimed, upon the ground that the plaintiff has not proved what those litigation expenses were; that he has not properly rendered any accounts of them, and that under those circumstances he is not entitled to a decree in respect of them. As regards the maintenance of the widow and deb-sheba they say:—"We cannot say that the plaintiff was entitled to a decree as against the estate for the sums of money said to have been advanced for maintenance and deb-sheba except as regards the sum of Rs. 2,239, which is admitted by the lady in her deposition to have been received by her, and which is proved by Srinath Dobey to have been paid for maintenance and deb-sheba expenses. To this extent we think the plaintiff is entitled to charge the estate." As regards the payment of Government revenue the learned Judges allow Rs. 12,418-10-6, which is proved in the judgment of the Court to have been paid by the plaintiff as Government revenue. They thus hold the plaintiff to be entitled to Rs. 14,657-12-6, as money which had been paid by him for maintenance and deb-sheba and for Government revenue, the litigation expenses having been disallowed, and their Lordships are of opinion that the High Court rightly so held.

A question then arises whether a sum of Rs. 10,000, which has been found by the Courts below to have been received by the plaintiff's principal man of business on account of the *ijara* rent, ought to be deducted from the sum of Rs. 14,657-13-6.

Their Lordships think that the plaintiff ought to have seen that this sum was applied in reduction of the debt for which the estate was liable, and that the judgment of the High Court was right in deducting the whole of that sum, leaving Rs. 4,657-13-6 as the [315] proper sum to be allowed to him. It is contended for the plaintiff that he was not bound to see to the application of the money. The rule laid down in *Hunooman Persad Panday* v. *Munraj Koonweree* (1) is this:—"Their Lordships think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think under such circumstances he is bound to see to the application of the money." But then their Lordships proceed further and give the reason why he is not bound to see to the application of the money. They say:—"The purposes for which a loan is wanted are often future, as respects the

(1) 6 M I. A. 393 (424).

1890 Nov. 20. — PRIVY COUNCIL.

18 C. 311 (P.C.) = 18 I.A. 1 = 15 Ind. Jur. 34 = 5 Sar. P.C.J. 632.

actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application." In this case the plaintiff did have the control and actual application of the money, and having that control and application he was bound to see that the money was properly applied.

There was also a further question relating to interest. The learned Judges of the High Court say:—" The bonds stipulate payment of interest at the rate of 18 per cent. per annum. We do not think that the plaintiff is entitled to this high rate of interest as a charge upon the estate. But we are of opinion that the ends of justice would be quite met by allowing him interest at the rate of 12 per cent. per annum, which is to be calculated upon the several sums of money as they were advanced from time to time up to the date of the decree," and they allow the plaintiff a total sum of Rs. 6,194, the sum which they give for interest being the difference between this sum and the above-mentioned sum of Rs. 4,657-13-6. It has been said that there ia a miscalculation of the interest at the rate of 12 per cent. If there is, the plaintiff ought to have applied to the High Court to set the figures right, and no doubt they would have been set right. No such application having been made, the decree ought not to be reversed upon this ground.

Then comes the question, was 12 per cent. a sufficient rate of interest? The widow was borrowing in a case of necessity. It was for the plaintiff to see whether there was really and fairly a **[316]** ground of necessity. Was there a necessity to borrow at the rate of 18 per cent.? That is a question to which he ought to have applied his mind; and if it were unreasonable to suppose that the widow could not borrow the money at a less amount than 18 per cent. he ought not to have charged her that rate.

Their Lordships think therefore that the High Court were right in not allowing interest as against the estate at a higher rate than 12 per cent.

For these reasons their Lordships think that the decree of the High Court ought to be affirmed; and they will humbly advise Her Majesty to that effect. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent: Messrs. *Wrentmore & Swinhoe.*

---

18 C. 316.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

SRIRAM SAMANTA (*Plaintiff*) *v.* KALIDAS DEY AND OTHERS (*Defendants*)* [2nd March, 1891.]

Second Appeal—Small Cause Court cases—Suit for mesne profits—Provincial Small Cause Court (Act IX of 1887), *sch. II, art.* 31.

Where the plaintiff, after obtaining a decree in a suit for possession of certain land of which he had been dispossessed by the defendants, brought a suit in the Munsif's Court for mesne profits for the period during which he had been kept

---

* Appeal from Appellate Decree No. 666 of 1890, against the decree of R.F. Rampini, Esq., Judge of Burdwan, dated the 5th of March 1890, reversing the decree of Baboo Raj Narain Chuckerbutty, Munsif of Kutwa, dated the 15th of August 1889.

out of possession and the suit, though partly decreed by the Munsif, was dismissed by the District Judge, *held*, that such a suit was not cognizable by a Small Cause Court, and therefore a second appeal in the suit would lie to the High Court. 1891 MARCH 2.

[Overruled, 23 C. 884 (885); F., 25 B. 85 (89); R., 15 M. 298 (300); 39 P.L.R. 1901 =94 P.R. 1900; Cited, 119 P.R. 1894.] APPELLATE CIVIL.

THE facts of this case were as follows:—

The defendant No. 3 was the owner of certain lands. The defendant No. 2 had obtained a decree against the defendant **[317]** No. 3. The defendant No. 3 in order to pay off the decree sold the lands to the plaintiff, who deposited in Court the amount due to defendant No. 2 under his decree. The defendant No. 2 did not take the money out of Court, but caused the lands to be put up for sale, and they were purchased by him and his brother, defendant No. 1, and they obtained the sale certificate and entered into possession. 18 C. 316.

The plaintiff thereupon sued to recover possession of the lands and obtained a decree.

He now sued to recover mesne profits for the years 1292 and 1294. The amount he claimed was Rs. 389-7. The Munsif gave the plaintiff a decree, but not for the whole amount sued for.

On appeal the District Judge reversed the Munsif's decision and dismissed the suit with costs.

From this decision the plaintiff appealed.

Baboo *Saroda Churn Mitter*, for the appellant.

Baboo *Promoth Nath Sen*, for the respondents.

The arguments and cases cited are fully stated in the judgment of the Court (NORRIS and BEVERLEY, JJ.) which, after stating the facts as above, continued :—

JUDGMENT.

In second appeal the only point urged is that the Judge was wrong in holding that a certain petition, upon which the Munsif had relied, was inadmissible in evidence by reason of its not having been formally proved.

The learned pleader for the respondents raised a preliminary objection that as the suit was of the nature cognizable by a Court of Small Causes, and the subject-matter did not exceed Rs. 500, no second appeal lay.

For the appellant it was contended that the suit was one "for the profits of immoveable property belonging to the plaintiff which had been wrongfully received by the defendants," which by virtue of art. 31 of sch. II of Act IX of 1887 is exempted from the cognizance of a Court of Small Causes.

The learned pleader for the respondents relied upon the following cases, *viz.*, *Ram Peari Debia* v. *Dinonath Mookerjee* (1), *Bheenuck Lall Mahton* v. *Rung Lall Mahton* (2), and *Makhan Lall Datta* **[318]** v. *Goribullah Sardar* (3). For the respondents the case of *Krishna Prosad Nag* v. *Maizuddin Biswas* (4) was relied on.

The cases in the *Weekly Reporter* were cases under the repealed Act of 1865, s. 6 of which enacted that the following suits should be cognizable by Courts of Small Causes, *viz.*, "claims for money due on bond or other contract, or for rents, or for personal property or for the value of

(1) 10 W. R. 375. (2) 11 W. R. 369. (3) 17 C. 541. (4) 17 C. 707.

1891 MARCH 2. — APPELLATE CIVIL. — 18 C. 316.

such property, or for damages when the debt, damage or demand does not exceed in amount or value the sum of five hundred rupees, whether on balance of account or otherwise." In *Ram Peari Debia* v. *Denonath Mookerjee* (1) Macpherson and Bayley, JJ., held that a suit for mesne profits only, no question of title or right arising in it, was within the meaning of this section, and that if the amount claimed did not exceed Rs. 500, by virtue of s. 27 of Act XXIII of 1861 no special appeal lay. The facts of the case are not given. In *Sungram Singh* v. *Jaggun Singh* (2) it was held that a suit for assessed mesne profits, within the pecuniary limits of s. 6 of the repealed Act, was a suit for damages and therefore cognizable by a Court of Small Causes.

In *Krishna Prasad Nag* v. *Maizuddin Biswas* (3) the learned Judges say that the case of *Sungram Singh* v. *Juggun Singh* (2) "has never been followed." In one sense this is no doubt correct, for it was decided after the case of *Ram Peari Debia* v. *Denonath Mookerje* (1); but with all due respect, the dictum is somewhat misleading, for the case of *Ram Peari Debia* v. *Denonath Mookerjee* distinctly decided that a suit for mesne profits within the pecuniary limits of s. 6 of the repealed Act was a suit for damages, and therefore cognizable by a Court of Small Causes. The case of *Bheenuck Lall Mahton* v. *Rang Lall Mahton* (4) is not in point. That was a suit for damages for carrying away standing crops. It was contended that s. 6 of the repealed Act was limited to damages in respect of moveable property alone, and that standing crops were immoveable property. The Court held that the section made no distinction between suits for damages to moveable property and suits for damages to immoveable property.

[319] The case of *Makhan Lall Datta* v. *Goribullah Sardar* (5) came before this Court upon a reference from the Judge of the Small Cause Court of Sealdah, and no one appeared on the reference. In that case the plaintiff sued for Rs. 20 as damages for use and occupation of his land by the defendant for three months, alleging that the defendant had occupied the land for that period without his consent, and had used some of the earth for making wall sidings. The learned Judges (Tottenham and Ameer Ali, JJ.) held that the suit was cognizable by a Court of Small Causes.

The case of *Krishna Prosad Nag* v. *Maizuddin Biswas* (3) came before the same learned Judges. It was a suit for damages for cutting and carrying away grass growing on plaintiff's land. The defendant contended that such a suit was one "for the profits of immoveable property ....wrongly received by the defendant." This contention was overruled. It was held that "art. 31, sch. II of Act IX of 1887 does not except from the jurisdiction of a Court of Small Causes suits for damages for trespass and for the forcible appropriation of crops or the produce of land." This was sufficient for the decision of the case; but the learned Judges go on to discuss the question whether a suit for mesne profits is now, whatever may have been the case under the Act of 1865, cognizable by a Small Cause Court, and they express a strong opinion that it is not so cognizable.

From that opinion, as at present advised, we are not prepared to differ, and we must therefore hold that the preliminary objection fails. As intimated in the course of the argument, we think that, having regard to

(1) 10 W. R. 375. (2) 2 N. W. P. 18. (3) 17 C. 707.
(4) 11 W. R. 369. (5) 17 C, 541.

the circumstances under which it was filed and used in the first Court, the plaintiff should have an opportunity of proving the petition relied on. We therfore direct the District Judge to take such evidence as the plaintiff may produce to prove the petition, and to return his finding upon such evidence to this Court at his earliest convenience.

1891 MARCH 2. — APPELLATE CIVIL. — 18 C. 316.

The appellant must pay the costs of this appeal.

The costs of the suit in the lower Courts and of the taking of the further evidence will be dealt with after the Judge's finding has been returned to this Court.

J. V. W.

---

18 C. 320.

[320] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ameer Ali.

ROGHU NATH PERSHAD AND ANOTHER (*Defendants*) v. HARLAL SADHU (*Plaintiff*) AND OTHERS (*Defendants*).*
[4th March, 1891.]

Transfer of Property Act (IV of 1882), *s.* 82—*Mortgage—Contribution—Apportionment of the mortgage-debt—Mortgage decree.*

A brought a suit upon a mortgage bond. Five of the defendants, who had subsequently purchased all the mortgaged properties, contended that under s. 82 of the Transfer of Property Act the mortgage debt should be apportioned between the various mortgaged properties, and that each defendant should be allowed to pay off his rateable share of the mortgage debt.

Held, that the intention of s. 82 was not that the lien of the mortgagee should be split, but simply to determine the liabilities of the purchasers *inter se*; and that therefore all the mortgaged properties were liable in satisfaction of the plaintiff's claim.

[F., 7 C.L.J. 274 (278); R., 21 M. 369 (371); 29 M. 217 (222); 10 C.L.J. 150 (174) = 1 Ind. Cas. 264; 11 C.L J. 639 (647) = 15 C.W.N. 800 = 6 Ind. Cas. 842.]

THIS was a suit upon a mortgage bond. The only defendants who contested the suit were persons who had subsequently purchased all the mortgaged properties. They contended that under s. 82 of the Transfer of Property Act the amount of the plaintiff's claim should be apportioned between the various mortgaged properties according to their respective values, and that the plaintiff should be made to accept from each defendant his rateable share only of the mortgage debt. The Subordinate Judge was of opinion that all the mortgaged properties were liable in satisfaction of the mortgage debt, and that the question of contribution must be left to a separate suit between the defendants *inter se*. Accordingly the Subordinate Judge gave the plaintiff a mortgage decree for the whole amount of his claim.

Sheo Golam Lall, defendent No. 12, one of those who defended the suit, appealed to the District Judge, The District Judge agreed with the Subordinate Judge in his view of the law and dismissed the appeal.

---

* Appeal from Appellate Decree No. 2218 of 1889, against the decree of J. Crawford, Esq., Judge of Gya, dated the 7th of August 1889, affirming the decree of Baboo Abinash Chunder Mitter, Subordinate Judge of Gya, dated the 21th of December 1888.

1891 MARCH 4. — APPELLATE CIVIL. — 18 C. 320.

Sheo Golam Lall died on the 9th Kartick 1293 (25th October 1886), and his heirs Roghu Nath Pershad and Sheo Churn Lall appealed to the High Court.

[321] Mr. *C. Gregory* and Baboo *Akshya Kumar Banerjee*, for the appellants.

Moulvie *Mahomed Yusoof*, Baboo *Karuna Sunder Mookerjee*, and Baboo *Satish Chunder Ghose*, for the respondents.

Mr. *Gregory* contended on behalf of the appellants that, as the mortgaged properties had passed into other hands and the original mortgagor was no longer the proprietor, under s. 82 of the Transfer of Property Act, the lower Courts should have apportioned the mortgage-debt between the several persons who then owned the properties, and should have allowed the appellants to pay off their share of the mortgage debt.

The respondents were not called upon.

The judgment of the Court (TOTTENHAM and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

This was a suit to recover money due upon a mortgage by the sale of the mortgaged properties, which were the five properties originally mortgaged; and it appears that some have since passed out of the hands of the original mortgagor.

The present owners were made parties to the suit. The present appeal has been preferred by one of those parties, the original defendant No. 12; and the point which we have to decide is whether by virtue of s. 82 of the Transfer of Property Act, this defendant is entitled to require the plaintiff, mortgagee, to apportion his claim amongst the various properties mortgaged, and to accept from the appellant his rateable share only.

The learned pleader for the appellant has not been able to put before us any authority for his construction of s. 82 of the Transfer of Property Act, nor are we aware of any such authority.

We think the position is not tenable, but that the lower Courts are quite right in the view they have taken of s. 82, when the District Judge says, "that the intention of the law is not that the lien of the mortgagee should be split, but simply to determine the liabilities of the purchasers *inter se*." Section 82 upon the face of it refers to contribution as between the various persons who may be liable with respect to the same debt. It seems to us that the lower Courts were quite right in allowing the plaintiff a decree for the whole sum claimed, making all the mortgaged properties liable for the satisfaction of that decree, and [322] leaving it to any one of the defendants who might have to pay up more than his rateable share to recover with reference to s. 82 of the Transfer of Property Act from his co-debtors.

This appeal is dismissed with costs.

Appeal dismissed.

C. D. P.

18 C. 322.

1891 MARCH 4.

APPELLATE CIVIL. 18 C. 322.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

JOGODINDRO NATH (*Defendant*) v. SARUT SUNDURI DEBI, ON HER DEATH, HER HEIR, HEMANTO KUMARI DEBI AND ANOTHER (*Plaintiffs*).* [4th March, 1891.]

Appeal – Withdrawal of suit—Appeal from order permitting withdrawal—Decree—Civil Procedure Code (Act XIV of 1882), *ss.* 2, 373 *and* 588.

An order made by an appellate Court under s. 373 of the Civil Procedure Code, giving permission to withdraw a suit with liberty to bring a fresh one is not a decree within the meaning of s. 2, and is not appealable.

Ganga Ram v. *Data Ram*(1) *dissented from Kalian Singh* v. *Lakhraj Singh* (2) approved of.

[F., 16 A. 19 (20) = 1893 A.W.N. 189; 17 A. 97 (99); 27 C. 362 (363); R., 21 M. 421 (422).]

THE plaintiffs brought a suit against the defendant for the recovery of possession of a certain piece of land. The Munsif dismissed the suit on the ground that it was barred by limitation. The plaintiffs appealed, and the Subordinate Judge passed an order under s. 373 of the Civil Procedure Code, giving them permission to withdraw the appeal and the original suit with liberty to bring a fresh suit.

From this order the defendants appealed.

At the hearing of the appeal, a preliminary objection was taken on behalf of the respondents that no appeal lay.

The Advocate-General (Sir *Charles Paul*), Baboo *Hem Chunder Banerjee* and Baboo *Srish Chunder Chowdhry*, for the appellant.

Baboo *Srinath Das* and Baboo *Grija Sunker Mozumdar*, for the respondents.

[323] The judgment of the Court (TREVELYAN and BANERJEE, JJ.) was as follows:—

JUDGMENT.

The learned pleader for the respondents has taken a preliminary objection that no special appeal lies in this case. The order of the Court below, which is the subject of the appeal before us, is an order giving leave to withdraw the appeal and to withdraw the suit with liberty to bring a fresh suit. The appellant before that Court had a decree made against him by the first Court, and the appeal Court, under the powers which it has under the Code similar to those exercised by an original Court, gave this leave. The learned Advocate-General, who appears for the appellant, contends that an appeal does lie. The order is not included amongst the orders which are appealable under s. 588: but he contends that the order made is a decree within the meaning of the word "decree" as given in s. 2 of the Code of Civil Procedure. A decree is there defined as "the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards

---

* Appeal from Appellate Decree No. 1039 of 1890, against the decree of Baboo Kali Churn Ghosal, Subordinate Judge of Mymensingh, dated the 16th May 1890, reversing the decree of Baboo Mohendra Lall Ghosh, Munsif of Pingna, dated the 4th of January 1889.

(1) 8 A. 82. (2) 6 A. 211.

1891 MARCH 4. — APPELLATE CIVIL. — 18 C. 322.

the Court expressing it, decides the suit or appeal." There can be no question that where an order of this kind is made by the first Court it does not come within the definition of a decree in the terms of s. 2 : but it is contended that in cases in which a decree of the first Court has been got rid of by a decree of the appellate Court, the order which gets rid of that decree must be itself a decree; and in support of this contention he relies on a decision of Mr. Justice Straight and another learned Judge of the Allahabad High Court in the case of *Ganga Ram* v. *Data Ram* (1). There is no doubt that that decision is an express authority in favour of the proposition; but there is also an earlier decision of another Division Bench of the same Court, the case of *Kalian Singh* v. *Lekhraj Singh* (2), which is an authority for the contrary proposition. Speaking with all respect of the Court which gave judgment in the case of *Ganga Ram* v. *Data Ram* (1), it seems to us that we must prefer the other decision with regard to this matter. We do not think that this order is in any sense a decree. The setting aside or annulling of a decree by the appellate Court, as it has been done in this case, does not set aside [324] the decree as the term is used in its ordinary sense; it does not substitute anything for the decree which is set aside, but simply wipes it out and leaves the parties to the determination of their rights in a subsequent suit, and what is done with regard to the first Court's decree is merely ancillary to the rest of the order, which is not a decree. The rest of the order does not express any adjudication on the thing claimed, and the setting aside of the first Court's decree, or annulling it, whatever the term used may be, is also no adjudication upon any right claimed. It says, it is true, that the person who obtained that decree will not be at liberty to make use of it, but the right which is declared by that decree will still be open for the determination of the Court in the subsequent suit, and is not adjudicated upon in this particular suit. It has also been pointed out to us that the appellate Court in setting aside the decree does not do so in any sense of adjudicating whether the decree was a right or a wrong decree. That being so, we think that no appeal lies against an order of this description, and this appeal must therefore be dismissed with costs.

C. D. P. *Appeal dismissed.*

---

18 C. 324.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

BEPIN BEHARI CHOWDHRY (*one of the Defendants*) *v.* ANNODA PROSAD MULLICK AND ANOTHER (*Plaintiffs*).*

[9th February, 1891.]

Arbitration—Civil Procedure Code (Act XIV of 1882), *s.* 510—*Power of Court to appoint new arbitrators.*

The Court has power under s. 510 of the Code of Civil Procedure, to appoint a new arbitrator in the place of another only when the latter had consented to act as arbitrator.

Pugardin Ravutan v. *Moidinsa Ravutan* (3) approved of.

---

* Appeal from Order No. 184 of 1890, against the order of H. T. Mathews, Esq., Judge of Burdwan, dated the 27th of May 1890, reversing the order of Baboo Raj Narain Chakravarty, Munsif of Cutwa, dated the 30th March 1889.

(1) 8 A. 82. (2) 6 A. 211. (3) 6 M. 414.

[**Diss.**, A.W.N. (1908) 159 (160); **F.**, 38 P.L.R. 1901=110 P.R. 1900; **R.**, 17 M. 498 (501); 9 Ind. Cas. 173=21 M.L.J. 263 (275)=9 M.L.T. 251=(1911) 1 M. W.N. 151; **Disappr.**, 33 A. 745 (750) (**P.C.**)=8 A.L.J. 1164=13 Bom. L.R. 826 =14 C.L.J. 313=15 C.W.N. 1005=12 Ind. Cas. 15=21 M.L.J. 1151=10 M. L.T. 173=(1911) 2 M.W.N. 132 (137)=14 O.C. 289.]

THIS appeal arose out of an application under s. 521 of the Civil Procedure Code to set aside an award.

[325] The plaintiffs brought a suit against the defendants. Five persons, who were nominated by the parties to the suit were appointed arbitrators by the Munsif to settle the matters in dispute between them. They were appointed arbitrators without any communication having been made to any one of them by either of the parties, and consequently without their assent to act having been first obtained. One of the five persons, originally nominated as arbitrators by both the parties, took no notice of his nomination and refrained from all action whatever in the matter. Thereupon the Munsif, purporting to act under s. 510 of the Code, with the consent of the defendants, but against the strenuous opposition of the plaintiffs, appointed a new arbitrator. The award was made: and the plaintiffs applied under s. 521 of the Code to set aside the award on the ground, *inter alia*, that the award was illegal, inasmuch as the new arbitrator had been appointed against the wishes of the plaintiffs, and the Court had no power under s. 510 to appoint a new arbitrator in the place of a person who not only had been appointed arbitrator without his consent to act as such having been previously obtained, but who had taken no notice of his nomination, nor any part whatever in the arbitration proceedings. The Munsif overruled the objection and made a decree in terms of the award, dismissing the suit. The plaintiffs appealed to the Judge, who, in allowing the appeal, delivered the following judgment:—

"In this case the chief point for determination is whether any appeal lies. It is contended by the defendant that the latter part of s. 522, Civil Procedure Code, is conclusive on the question. The plaintiffs, however, urge that before that section can be rightly held to apply it must be shown that there has been a valid and legal award, and that in the present instance this is not the case. It appears that one of the five persons originally nominated as arbitrators by both the parties abstained from taking any notice of the nomination, and refrained in fact from all action whatever in the matter. The Court, therefore. with the consent of the defendant, but against the strenuous opposition of the plaintiffs, appointed another individual as arbitrator, purporting to act under the provisions of s. 510 of the Civil Procedure Code. On reading that section along with s. 522, **[326]** my first impression was that the Court was perfectly justified in taking this course, that the award was good, and that no appeal lay. The plaintiffs' pleader, however, has drawn my attention to a ruling of the Madras High Court in the case of *Pugardin Ravutan* v. *Moidinsa Ravutan* (1) which certainly seems to bear out his contention. By this ruling it appears to have been decided that s. 510 of the Civil Procedure Code presupposes that the arbitrators have first consented to act, and have declined after the reference to arbitration. In this instance, as in that, what actually occurred was that the consent of the person who failed to act had not been previously obtained. Section 510, therefore, did not apply: and the appointment by the

(1) 6 M. 414.

1891 FEB. 9. — APPELLATE CIVIL. — 18 C. 324.

Court of another individual as arbitrator in his place, against the wish of the plaintiffs, was accordingly *ultra vires*. The result is that the award was invalid. Section 522, therefore, is inapplicable. The Munsif's decree is consequently appealable. There being no materials on the record on which this Court can come to a finding on the merits of the case, the appeal must be decreed and the suit remanded under s. 562 of the Civil Procedure Code. Costs to abide the result."

From this decision Bepin Behari Chowdhry, the principal defendant, appealed to the High Court.

Dr. *Rash Behari Ghose* and Baboo *Jogesh Chunder Dey*, for the appellant.

Baboo *Jogendra Chunder Ghose*, for the respondents.

It was contended on behalf of the appellant that the Munsif was justified under the circumstances of the case, and had full power under s. 510 of the Code to appoint a new arbitrator; and that therefore the award was valid. It was also contended that, under s. 522 of the Code, no appeal lay from a judgment upon award, but this contention was overruled on the authority of the case of *Joy Prokash Lall* v. *Sheo Golam Singh* (1).

The judgment of the Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

We think that this appeal fails and must be dismissed.

As the point, so far at any rate as this Court is concerned, is a new one, I will state the facts and give the reason for the conclusion at which we have arrived.

[327] It appears that the plaintiffs brought a suit against the defendant. Five persons were nominated as arbitrators to settle the matter in dispute between the parties. There is no evidence to show that any one of these five persons had been previously communicated with by either of the parties, and therefore nothing to show that any of them had given his consent to accept the position of an arbitrator. The so-called five arbitrators were appointed by the Munsif at the suggestion of the respective parties in Court. It appears that one of these five persons abstained, as the Judge finds, from taking any notice of the nomination, and refrained from any action whatever in the matter. The Munsif thereupon nominated, as he called it, a fifth arbitrator.

We think that that proceeding on the part of the Munsif was illegal, and that s. 510 of the Code of Civil Procedure, under which he purports to act, applies only in cases where a person has signified his assent to take upon himself the duty of an arbitrator, and after so signifying his assent dies, or refuses, or becomes incapable to act, or leaves British India under the circumstances therein referred to. That view was taken by the Madras High Court in the case of *Pugardin Ravutan* v. *Moidinsa Ravutan* (2) referred to by the District Judge, and in that view we concur.

We think therefore that the appeal fails, and must be dismissed with costs.

C. D. P. *Appeal dismissed.*

---

(1) 11 C. 37. (2) 6 M. 414.

18 C. 327.

1891 MARCH 3.

APPELLATE CIVIL.

18 C. 327.

APPELLATE CIVIL.

Before Mr. Justice Norris, Mr. Justice Beverley, and Mr. Justice Banerjee.

CHARU CHUNDER PAL, GUARDIAN FOR SATISH CHUNDER PAL, MINOR (*Defendant*) v. NOBO SUNDERI DASI AND ANOTHER (*Plaintiffs*).* [3rd March, 1891.]

Hindu law—Inheritance—Stridhan—Bengal School of Law—Widowed daughter with dumb son—Daughter's son.

Under the Bengal School of the Hindu law a widowed daughter having a son who is dumb at the time the succession opens out (but is not shown to be incurably dumb) is entitled to succeed to her mother's *stridhan* in preference to a daughter's son.

[328] THE facts of the case and the authorities cited are sufficiently stated in the judgment of NORRIS, J.

Baboo *Umakali Mukerjee* and Baboo *Tarit Mohun Das*, for the appellant.

Baboo *Mohini Mohun Roy* and Baboo *Golap Chunder Sircar*, for the respondents.

The following judgments were delivered by the Court (NORRIS, BEVERLEY and BANERJEE, JJ.).

JUDGMENTS.

NORRIS, J.—The facts of this case are as follows :—

Mehal Bildiha was the *stridhan* of one Haripriya, given to her by her father at the time of her marriage. Haripriya died on 16th July 1881, leaving three daughters, *viz.*, Koermoni, Nobo Sunderi, the plaintiff No. 1, and Tunimoni, the plaintiff No. 2. At the time of Haripriya's death, Koermoni's husband was alive, and they had an adopted son, Satish Chunder, the defendant No. 1; Nobo Sunderi was a widow with a son, Shoshi Bhusan; Tunimoni was a childless widow. Shoshi Bhusan is now dumb and partially deaf, and has been so since 1879; he was not born dumb, but could speak for some years at least in his boyhood. After Haripriya's death, Koermoni got into possession of the mehal and had her name registered; she remained in possession down to the time of her death in February 1885, since when the defendant No. 1 has been in possession.

The plaintiffs sued for possession of the mehal and for mesne profits; they alleged that they were the preferential heirs to their mother's *stridhan*; that Koermoni had no title thereto; that if she had any title it was extinguished by her death, and that defendant No. 1 had no title. The plaint asked that if the Court should be of opinion that the plaintiff No. 2 had no title by reason of her being a childless widow when the succession opened out on Haripriya's death in 1881, a decree might be passed in favour of the plaintiff No. 1 exclusively.

---

* Appeal from Appellate Decree, No. 400 of 1890, against the decree of Baboo Dwarka Nath Bhuttacharjee, Subordinate Judge of Midnapore, dated the 13th January 1890, affirming the decree of Baboo Krishna Dhun Mukerjee, Munsif of Midnapore, dated the 22nd of April 1889.

1891 MARCH 3. APPELLATE CIVIL. 18 C. 327.

The Munsif decreed the suit in favour of the plaintiff No. 1, and the Subordinate Judge affirmed the Munsif's decision.

The plaintiff No. 2 does not appeal, and it is clear that the decision as regards her inability to inherit is correct.

[329] The defendant No. 1, complaining that the Subordinate Judge's decision is erroneous in point of law, has come to this Court in second appeal.

The appeal was first argued before my brother Beverley and myself on the 16th ultimo, and as it raised an important point of Hindu law, we arranged that it should be re-argued to-day, when we have had the assistance of our learned colleague Mr. Justice Banerjee.

The case has been very ably argued on both sides; for the appellant by Baboo Umakali Mukerjee, and for the respondent by Baboo Mohini Mohun Roy.

At the first hearing Baboo Umakali contended that Koermoni was the sole heir to her mother's *stridhan.* This contention was based upon the construction which the learned pleader sought to put upon the words "married daughter" in verse 9, s. II, chap. IV of the Dayabhaga. The verse runs as follows:—"But for the cause above stated, the son and maiden daughter have a like right of succession. On failure of either of them the goods belonging to the other. On failure of both of them, the succession devolves with equal rights on the *married daughter* who has a son and on her who may have male issue. For by means of their sons they may present oblations at solemn obsequies." It was contended that "married daughter" meant a daughter whose husband was alive, to the exclusion of a widowed daughter. The contention has not been pressed to-day, and I think it is sufficient to say that it is not tenable.

The learned pleader's second contention at the first hearing, which he has again strenuously urged to-day, was of a two-fold character.

In the first place, it was urged that Nobo Sunderi's right to succeed to her mother's *stridhan* depended upon her having a son capable of conferring spiritual benefits on her behalf on Haripriya in existence at the time the succession opened out. In the second place, it was contended that Shoshi Bhusan, being dumb at the time the succession opened out, was incapable of conferring spiritual benefits on his mother's behalf on Haripriya. It will be convenient to consider the second branch of the argument first.

[330] In support of it the learned pleader relied on the following authorities:—The Code of Manu, Chap. IX, verse 201; the Dayabhaga, Chap. V, verses 6, 7, 9, 10, 11, 17 and 18; the Dayakrama Sangraha, Chap. III; the Dayatatwa, Chap. 14, verse 8; and Dr. Jolly's Tagore Law Lectures, pp. 274 and 275.

I only propose to refer to certain passages in the Dayabhaga relied on by Baboo Umakali, for the law there laid down is stated in almost precisely the same terms by the other authorities.

Verse 7 of Chap. V of the Dayabhaga says:—"So" (the same author, *i. e.*, Manu) "impotent persons and outcasts are excluded from a share of the heritage; and so are persons born blind and deaf; as well as madmen, idiots, the *dumb* and those who have lost a sense (or a limb)." Verse 9 says:—"*The term 'born' is connected in construction with the words 'blind' and 'deaf.'* One who is incapable of articulating sounds is dumb."

The exclusion from the inheritance is based upon the incapability of performing religious ceremonies; and upon the authority of these verses, supported as they are by the other authorities, Baboo Umakali contended that dumbness to render the person afflicted therewith incapable of performing religious ceremonies, and therefore of inheriting, need not be as in the case of blindness and deafness, congenital; that if a man was dumb when the succession opened out, he was *ipso facto* excluded from the inheritance as being a person incapable of performing religious ceremonies, and thereby conferring spiritual benefits on the deceased owner of the property. In the view I take of the first branch of the learned pleader's contention, I think it is unnecessary to express any opinion upon this point. If we had to decide it, we should also have to decide the much more difficult point, whether, admitting that a son who is dumb when the succession opened out, though not congenitally so, is excluded from the inheritance, the mother of such a son is thereby excluded from the inheritance to her mother's *stridhan*—a point which, as remarked by my brother Banerjee in his Tagore Law Lectures, p. 358, is at present undecided.

I now proceed to consider the learned pleader's contention that Nobo Sunderi's right to succeed to her mother's *stridhan* **[331]** depended upon her having a son in existence at the time the succession opened out capable of conferring spiritual benefits on her behalf on her mother.

It was argued that the words "for by means of their sons they may present oblations at solemn obsequies" at the end of verse 9 of s. II, chap. IV of the Dayabhaga, conclusively showed that the existence of such sons at the time the succession opened out was the reason for allowing the mothers of such sons to inherit. I am of opinion that this contention cannot prevail. Not only do not these words by themselves show that the capability to "present oblations at solemn obsequies" must be a capability in existence at the time the succession opens out, but a careful consideration of the whole verse points conclusively to a contrary conclusion.

The preferential heirs to a woman's *stridhan* are according to the verse declared to be the son and "the maiden daughter." The fact that the maiden daughter succeeds as joint tenant with her brother is alone sufficient to dispose of this argument. But let us look a little further:—"The married daughter who has a son" and "she who may have male issue," are on failure of "the son and the maiden daughter" entitled to succeed as joint tenants. "*She* who may have male issue" means "*a married daughter* who may have male issue," for the rights of the "maiden daughter" have been already declared. Now "a married daughter who may have male issue" is a married daughter not past child-bearing, whose husband is alive. I am not in a position to say whether the words "for by means of their sons they may present oblations at solemn obsequies" are connected in construction with "maiden daughter" as well as with "the married daughter who has a son," and "her who may have male issue," but I think it is clear that the existence of a son and the potentiality of conceiving a son are, supposing that either is necessary, equally recognized. The son of the married daughter may be only an hour old when the succession opens out; such married daughter would be clearly entitled to succeed upon the above supposition, because he may at some future time be able to "present oblations at solemn obsequies." So also the married daughter who *may* have male issue succeeds, upon the above supposition, because such **[332]** male issue if born of her may at some future time be able to "present oblations at solemn obsequies."

1891 MARCH 3. — APPELLATE CIVIL. — 18 C. 327.

In this case it is not found that Shoshi Bhusan is incurably dumb; for all that appears to the contrary, he may recover and at some future time *may* be able on his mother's behalf to confer spiritual benefits on Haripriya by the performance of religious ceremonies. Therefore he seems to me to stand in the same position as the son of the married daughter only an hour old, and as the potential son of the married daughter who may have male issue. For these reasons I am of opinion that this appeal fails, and must be dismissed with costs.

BEVERLEY, J.—I concur.

BANERJEE, J.—I entirely concur in the judgment which has been just delivered by my learned brother.

The question argued before us is whether under the Bengal law a widowed daughter having a son who is dumb at the time the succession opens out is entitled to succeed to her mother's *stridhan* in preference to a daughter's son; and the learned vakeel for the appellant contends that *that* question ought to be answered in the negative, because the reason why a daughter having or being likely to have male issue is entitled to a certain place in the order of succession is her ability to confer spiritual benefit on her mother by means of oblations presented by her son; and that reason cannot hold good in a case like this where the son is dumb.

A good deal of argument was addressed to us on behalf of the appellant to show that dumbness in order to disqualify a person from inheriting need not be congenital; and if it were necessary to decide that question in this case, I should have felt inclined to answer it in favour of the appellant's contention. But I do not think it necessary to go into that question here, because the real question that we have to decide is not whether this dumb son, Shoshi Bhusan, is himself entitled to inherit, but whether his dumbness disqualifies his mother from inheriting. Upon that question most of the authorities referred to in argument do not throw any light. All that is necessary to entitle the plaintiff, Nobo Sunderi, to succeed in this case is that she should have a son by means of whom she may present oblation at solemn obsequies. That is the only qualification required of her by the Dayabhaga (see chap.**[333]** IV, s. II, paragraph 9). That provision of the Hindu law, as I understand it, does not require any present capacity in the daughter's son to confer spiritual benefit by means of oblations at solemn obsequies. It only requires the existence of the possibility to confer such benefit; and the question is whether such possibility exists in the present case.

Now there is nothing to show that the dumbness of Nobo Sunderi's son is absolutely incurable, and that he may not in future be able to present oblations at solemn obsequies. That being so, I think the condition required by the Hindu law of the Bengal School to entitle Nobo Sunderi to succeed to the *stridhan* of her mother in preference to a daughter's son has been fully satisfied. Indeed, it would be importing into this provision of the law something that is not implied by it, if we were to hold that because the son of Nobo Sunderi, if now the succession opened out to him, would not be entitled to succeed, that would be a reason for excluding his mother from inheriting as a daughter having male issue. This being my view of the Hindu law governing this case, it is unnecessary to consider the question whether the rules of exclusion from inheritance in the case of property left by males are applicable to succession to *stridhan*.

J. V. W. *Appeal dismissed.*

18 C. 333.

1891
MARCH 4.

APPELLATE CIVIL.

18 C. 333.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

SHEO SAHOY PANDAY (*Plaintiff*) v. RAM RACHIA ROY (*Defendant*).* [4th March, 1891.]

Bengal Tenancy Act (VIII of 1889), s. 29, cl. (b)—Enhancement of rent by contract—Agreement not within the section.

An agreement embodied in a kabuliyat to pay a certain amount of rent agreed upon by the parties in settlement of differences between them as to what had been the amount and character of the rent, and to avoid further litigation, is not an agreement to enhance within the meaning of s. 29, cl. (b) of the Bengal Tenancy Act.

[F., 28 C. 90 (100, 101); 12 Ind. Cas. 589; R., 11 C.L.J. 106=5 Ind. Cas. 309 (310); D., 33 C. 607=4 C.L J. 320 (323) =11 C.W N. 62; 36 C. 604=9 C. L. J. 343=2 Ind. Cas. 828.]

[334] THIS was a suit for the recovery of Rs. 246-4 principal, *nagdi* rent for the year 1295 F.S. in respect of the defendant's *nagdi kasht* land situated within the plaintiff's proprietary mouzah on the basis of a registered *kabuliyat*, dated the 10th May 1885, executed and delivered by the defendant, the plaintiff alleging that the defendant cultivated during the agricultural season of 1295 F.S. 66 bighas 2 cottahs of land at an annual jama of Rs. 206 including road and public works cesses, and appropriated the entire produce thereof, the land being held on the *nagdi* system. The defendant generally denied the claim, and alleged that the land was held by him as his ancestral *guzashta kasht* at a rental of Rs. 153-1-6, and that the plaintiff having been defeated in previous litigation upon the same subject-matter, had instituted the present suit with the object of destroying the defendant's *guzashta* right and enhancing rent payable by him.

The Lower Court found that this kabuliyat was genuine, and had been duly executed and registered under the following circumstances:—There had been a long course of litigation against the defendants and other raiyats with reference to the rents of their holdings. On the 29th June 1886 the present plaintiff filed a suit against the present defendant, seeking to recover rent for the holding now in suit calculated as *bhowli* rent or rent in kind. The defendant pleaded that the tenure was *nagdi*, and that the rental was Rs. 153-1-6, and the case was decided on first appeal by the then District Judge of Shahabad in the defendant's favour and an appeal against this decision was dismissed by the High Court, the plaintiff's suit being dismissed with costs. Portions of the judgment of the District Judge above referred to are set out in the judgments delivered in this appeal.

Shortly after the decision of the High Court in his favour, the defendant along with other raiyats who were exhausted by the previous litigation, agreed to set off the arrears of rent which were due by them to the plaintiff

* Appeal from Original Decree, No. 18 of 1891 transferred from appeal from Appellate Decree No. 2244, by an order of this Court on the 9th of January 1891, against the decree of J. G. Charles, Esq., Judge of Shahabad, dated the 29th of June 1889, affirming the decree of Baboo Nistarun Banerjee, Munsif of Sasseram, dated the 12th of January 1889.

1891 March 4. — Appellate Civil. — 18 C. 333.

against the costs which they were entitled to recover from him, the plaintiff undertaking not to sue for the arrears or for a further enhancement. A settlement was thus effected between the plaintiff and the defendant, and pottah and kabuliyat were exchanged, the defendant agreeing to pay rent at the rate of Rs. 206 per annum, or **[335]** more than 2 annas in the rupee in excess of the former *jama* of Rs. 153-1-6.

At the first hearing of the case in the Munsif's Court, a point was raised in argument as to whether the kabuliyat, though established in evidence, came within the operation of cl. (2), s. 29 of the Bengal Tenancy Act (VIII of 1889); that is, whether the kabuliyat amounted to a contract by which the money rent was enhanced within the meaning of the section. Upon this point the lower Courts held that the defendant was an occupancy raiyat, that the contract was void to the extent not allowed by law, and that the plaintiff could not recover more than the previous *jama* of Rs. 153-1-6, together with an enhancement at the rate of 2 annas in the rupee, or 12½ per cent. upon the former *jama* as allowed by s. 29 of the Tenancy Act, being Rs. 172-3-9.

By consent of the parties the case was treated as an appeal from an original decree and heard as such upon the evidence, the appellant undertaking to prepare the paper book and give a copy to the respondent within a month.

Mr. *Woodroffe*, Moulvie *Mahomed Yusuf* and Baboo *Raghunandan Pershad* appeared for the appellant.

Baboo *Aubinash Chunder Banerjee* appeared for the respondent.

Mr. *Woodroffe.*—The question is as to the construction of s. 29, cl. (*b*) of the Bengal Tenancy Act, whether where there is a dispute between landlord and tenant and an agreement is come to of the nature of the present one, that is to be regarded as a contract for enhancement or a new independent contract. My contention is the present case does not fall within s. 29, which contemplates a fixed money rent agreed on between landlord and tenant. The findings of the first Court shew there was a series of contests as to the nature and conditions of the tenancy, and there being a prospect of further litigation, a reconciliation took place and pottahs and kabuliyats were interchanged. This is not a contract for enhancement, but a contract for the settlement of differences to avoid further litigation. A similar case may be mentioned by way of illustration where a tenant agrees to pay a larger amount of rent in consideration of an agreement not to measure the land on the part of the landlord. The rent is not **[336]** enhanced in such a case because there was nothing in the nature of a fixed rent between the parties.

Baboo *Aubinash Chunder Banerjee*, for the respondent.—The kabuliyat does not purport to be a settlement of the rent upon a new basis, and its effect was in fact to enhance the rent by more than 12½ per cent., so the agreement contained in it is only binding upon the tenant to the extent allowed by s. 29.

The following judgments were delivered by the Court (PETHERAM, C.J., and GHOSE, J.) :—

JUDGMENTS.

PETHERAM, C.J.—This was a suit instituted in the Court of the Munsif of Sasseram by a zemindar to recover the sum of Rs. 246-4 from a raiyat on account of the rent of his holding, which the plaintiff stated the

defendant held under a registered kabuliyat, dated May 10th, 1885, at an annual rental of Rs. 206. The defence set up in the statement was that the alleged kabuliyat was a forgery, and that the land held by the defendant was held by him as ancestral *guzashta khasht* at a rental of Rs. 153-1-6. Both the lower Courts have found that the kabuliyat is genuine, and was executed by the defendant, and that question is not disputed now; but it was argued before the Munsif and the District Judge that the entire rent cannot be enforced, because the kabuliyat contravenes the provisions of s. 29 of the Bengal Tenancy Act, inasmuch as, if it is proved that the rent payable by the defendant for the land was Rs. 153-1-6 prior to the 10th of May 1885, the effect of the kabuliyat of that date was to enhance the rent by more than 12½ per cent., and that the agreement contained in it is only binding on the tenant to the extent allowed by law. Both the lower Courts have accepted this view, and have given judgment for the plaintiff for an amount calculated at an annual rental of Rs. 153-1-6+12½ per cent., or a total rental of Rs. 172-3-9. The plaintiff has appealed to this Court and contends that when the case is understood, the agreement embodied in the kabuliyat is not an agreement to enhance within the meaning of s. 29, but is one to pay a rental agreed upon by the parties in settlement of the dispute between them as to what had been in fact the rental of the land held by the defendant within the plaintiff's zemindari. By consent of the parties the case has been treated as a regular appeal, and the whole of the [337] evidence which was taken before the Munsif is before us. It appears that prior to the year 1886 there had existed disputes between the parties with reference to the rent of this holding, and on the 29th of June 1886 the present plaintiff filed a plaint against the present defendant to recover rent for the holding calculated as *bhowli* rent, or as the value of a share of the produce. The defendant defended the suit on the ground that the tenure was not a *bhowli*, but a *nagdi* tenure, that the rental was Rs. 153-1-6, and he paid money into Court on the basis of that rental.

That case was decided in first appeal by Mr. Tweedie, the then District Judge of Shahabad, who has written a judgment in a somewhat eccentric and ambiguous form, and the fact that the form of the judgment has caused to a great extent the present litigation and expense should, I think, be a warning to Judges to make their judgments as clear as possible, and not to include in them matters which are not before them for decision.

After stating that he does not believe the evidence for the plaintiff, but that he does that of the defendant, he says:—"For reasons given order for decree, it is found and decreed—

"I.—That *Z* (the tenant) is not liable to pay rent in kind or by money equivalent of kind for the jote held by him (issue No. 2).

"II.—That *Z* is liable to pay cash rent only, namely *Y* (the amount found due) for the whole jote as held by him (issue No. 5).

"III.—That the appeal be, and the same hereby is decreed, and that plaintiff's suit be, and the same is hereby dismissed; that plaintiff shall pay the defendant's costs in both Courts and interest thereon at 6 per cent. per annum, to run from this date to realization.

1891 MARCH 4. — APPELLATE CIVIL. — 18 C. 333.

"IV.—That, notwithstanding the dismissal of the suit as laid and by leave of the defendant, the plaintiff shall be at liberty, if he thinks fit, to realize the cash rent (*Y*) for the period covered by this suit by withdrawing so much thereof as is in deposit, and by ordinary execution with respect to the over-plus. Interest on that portion which is not deposited is allowed, as from this date to realization, at 6 per cent. per annum."

[338] This judgment was appealed to this Court in second appeal, and the appeal was dismissed.

Afterwards the parties came to settlement, under which the plaintiff gave the defendant a receipt in full for all rent then due, and the defendant gave the plaintiff a receipt in full for all costs. No money passed, and I gather that the money which had been deposited in Court, and which is mentioned in Mr. Tweedie's judgment, was taken out by the defendant, to whom it would belong under the settlement, and as part of the settlement the defendant executed the kabuliyat set up by the plaintiff in the present action, and the defendants have remained in undisputed possession ever since. Both the lower Courts in the present case have based their judgments on the assumption that the defendant's rental was by Mr. Tweedie's decree decreed to be Rs. 153-1-6, and have considered that no settlement would be binding on the defendant by which he agreed to pay a higher rent than that sum *plus* 12½ per cent.

I am unable to agree in this view. The only portion of the document written by Mr. Tweedie which had any binding force between the parties was that portion which dismissed the suit with costs. The amount of *nagdi* rent was never in issue and was never discussed by the plaintiff, nor was the Judge ever called upon to adjudicate upon it, and it is evident that one of the considerations which induced defendant to agree to the settlement was that the plaintiff was threatening further litigation to obtain a larger *nagdi* rent than that admitted by the defendant. There is no evidence on the record, except that afforded by Mr. Tweedie's judgment, that the rental ever was Rs. 153-1-6, and having regard to the fact that the written statement does not disclose any such defence as that now set up, I do not think there is any reason for taking fresh evidence or for remanding the case, and consequently I do not think it is proved here that the rental decreed by the kabuliyat exceeded the old rental by more than 12½ per cent., and it is I think apparent that the arrangement of May 10th, 1885, was come to, not as an enhancement of an existing rent, but as a settlement of a dispute as to the amount and character of the rent, and is not within the provisions of s. 29 at all. I think the **[339]** appeal should be decreed, and the judgment and decree amended, by increasing the amount to that claimed by the plaintiff in his plaint, that is, for a sum calculated at a rental of Rs 206 per annum.

GHOSE, J.—If this appeal has to be decided upon the issues which were raised by the written statement of the defendant, there can be no doubt that the decree of the Court below cannot stand. That Court, however, having allowed a new question to be raised at the final hearing of the suit, and upon which question the judgment is against the plaintiff, the doubt that at one time arose in my mind was whether we could rightly decide this appeal without sending down an issue for trial to the Court below. The question that was raised at the final hearing was whether the *kabuliyat* executed by the defendant fell within the purview of cl. 2, s. 29 of the Bengal Tenancy Act, and whether the plaintiff was entitled to recover any increased rent over and above 2 annas in the

rupee upon what was the old *jama* of the defendant. Now, this question, although from one point of view a question of law, was really a mixed question of fact and law; for before it could be decided, it had to be found what was the old rent of the defendant's holding, and what was the true consideration for the *kabuliyat* in question. These were matters which could only be adjudicated upon the facts proved in the case.

1891 MARCH 4.

APPELLATE CIVIL.

18 C. 333.

No doubt, in the case that was tried by Mr. Tweedie there was an issue raised as to what the amount of the *nagdi jama*, which the defendant set up, was, and that learned Judge did decide the issue in favour of the defendant; and a declaration was entered in the decree that he made in the suit to the effect that the amount of the *jama* was as the defendant alleged. But at the same time it must be borne in mind that another portion of Mr. Tweedie's decree was that the suit be dismissed. If this decree of Mr. Tweedie stood alone, I should have been inclined to hold that it must be taken that the old *jama* was Rs. 153 odd; and that the rent fixed by the *kabuliyat* was in contravention of s. 29. But then let us see what does the *kabuliyat* itself say. After referring to the proceedings in the Court of first instance in the previous suit, the document [340] says as follows :—" That I, the declarant, preferred against the decree of the said Judge an appeal to the Court of the Judge of District Shahabad, and a decree was passed by the Court of the District Judge in favour of me, the declarant, under *nagdi* system, that the said proprietor preferred an appeal to the High Court, Calcutta, against the decree of the Judge, and the High Court also upheld the decree of the Judge in favour of me, the declarant, in respect of the said land as *nagdi*; that now I, the declarant, of my own will and accord, and in consideration of the real state of things take (from) the said proprietor the aforesaid 66 bighas 2 cottahs of lands as per four boundaries given below, together with *dih* and *Kharry* and all rights and interests hereto attached in *patooa khet* (land held in usufructuary lease) at an annual *jama* of Rs. 194-4 and Rs. 5-14 as road cess and public works cess and Rs. 5-14 as putwari's *neg*, in all Company's Rs. 206, for a term of nine years from 1295 to 1303 Fusli." And lower down, the document says—" that the said *kashtkar* should keep the aforesaid lands under his possession and occupation, enjoy the proceeds of the said lands year by year, pay the said defined sum to the *malik* year by year, without objection on the scores of drought, inundation and destruction by hailstones, on receipts and acquittances, and pay the said defined sum to the proprietor more or less according as the land may on measurement be found more or less. Should the defined sum payable by me, the *kashtkar*, fall into arrears, the said proprietor shall have the power to realize the same from me, the declarant, by institution of suit, or in any other way possible, with costs and interests." It will be observed that the *kubuliyat* nowhere mentions the old *jama* to be Rs. 153 odd, as is now contended for by the defendant. It simply says that a decree was passed for the land as *nagdi*; and it then says that in consideration of the "*real* state of things" the tenant agrees to take a lease for nine years at the *jama* of Rs. 194-4. This shows that, notwithstanding the decision of Mr. Tweedie, there was a contest between the parties as to what the true *jama* was; and that, regard being had to the "true state of things" (as the document itself says), the tenant settled all the differences that then existed with the landlord, and entered into the agreement embodied in the *kabuliyat*. I do not think it is really open to him now to go behind [341] the said agreement; and it would not be right in the circumstances

1891 MARCH 4. — APPELLATE CIVIL. — 18 C. 333.

to remand the case to the lower Court for the purpose of determining upon evidence the question what was the old *jama*, and whether the rent that was agreed to be paid under the *kabuliyat* was an enhancement in violation of the terms of s. 29 of the Bengal Tenancy Act.

In this view of the matter, I agree with the Chief Justice in allowing this appeal, and that with costs.

A. A. C. *Appeal allowed.*

---

18 C. 341 (P.C.) = 18 I.A. 9 = 15 Ind. Jur. 93 = 5 Sar. P.C.J. 676.

PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Sir R. Couch and Mr. Shand (Lord Shand).
[*On appeal from the High Court at Calcutta.*]

LALA MUDDUN GOPAL LAL (*Plaintiff*) *v.* KHIKHINDA KOER (*Defendant*). [9th and 13th December, 1890.]

Hindu law—Inheritance—Mitakshara—Disqualification of a brother to share—Intention as evidenced by conduct—Waiver of rights—Estoppel—Limitation.

Between the two surviving brothers of a Mitakshara family, the action of the elder to the younger, who had been born deaf and dumb, was such as to recognise for some years that the latter had a joint interest in the family property. The proper inference to be drawn from this was that the elder treated his brother as a member of the family, and entitled to equal rights until it had become clear that his disqualification would never be removed by his being cured. Their Lordships would not infer that there was an intention shown by the acts of the elder to waive the rights accruing to him in consequence of this disqualification, nor would they hold that his acts operated to create a new title in the younger.

This branch of the family became extinct, the brothers having died, and also the elder brother's daughter, she having been the only descendant. This daughter had an only son, who died before her, after taking, however, the whole family estate under a gift made to him with his mother's assent by his maternal grandfather in 1876. In 1882 the plaintiff, a collateral relation, sued the widow of the donee to obtain the estate of the younger of the brothers. The widow made title under the gift to her deceased husband, followed by his possession, and hers afterwards, since the date [342] of the gift. Upon the facts found, the suit was held to be barred by limitation.

[**Appl**, 2 A.L.J. 225 (231); **R.**, 20 M. 207; 9 Ind. Cas. 1 (2).]

APPEAL from a decree (12th January 1887) of the High Court, affirming a decree (16th May 1883) of the Subordinate Judge, Muzufferpore.

This suit was brought against a widow some years after the death of her husband, the son of the last survivor of his branch of his family. The plaintiff was a collateral relation, who alleged that this family consisted of three brothers, named Kuldip Narain, Madhoram, and Sadhoram, sons of Kishen Jiwan Lal, of whom the last Sadhoram, was the survivor; and that he, the plaintiff, as a "sapind gotia" (the late Kishen Jiwan Lal having been his third cousin) was entitled to Sadhoram's estate. He did not sue for Kuldip's share. The dates of the brothers' deaths are stated in their Lordships' judgment.

The name of Sadhoram, who was born deaf and dumb and remained incurable, was nevertheless in his early life entered in documents relating to the family estate, as one of the joint coparceners, though on account of his mental incapacity he was represented by a guardian.

1890 DEC. 13. PRIVY COUNCIL. 18 C. 341 (P.C.) = 18 I.A. 9 = 15 Ind. Jur. 93 = 5 Sar. P.C.J. 676.

On the 13th September 1838, Kuldip for himself and as guardian of his minor brother, Sadhoram, entered into an agreement with Mussummat Rajbunsi Koer, widow of Madhoram, whereby he agreed to allow her to have one-third of the family estate for her life, after which it was to pass to himself and Sadhoram and their heirs. Mussummat Rajbunsi sued to enforce this agreement, but her suit was ultimately dismissed on the ground that, as the widow of an undivided brother, she had no right to share in the estate, and that as Kuldip was not the guardian of Sadhoram, he could not enter into an agreement which would deprive him of part of his inheritance.

On the 29th February 1856, Mussummat Urhi Koer, describing herself as mother and guardian, entered into an agreement, whereby after stating that his name had been originally entered in documents, in the hope that his disease was not such as to disqualify him from inheritance, but that it had since been pronounced incurable, she fixed a certain annual sum for maintenance, and renounced the right to all the rest of the family estate in favour of Kuldip.

[343] On the 18th June 1867 Kuldip executed a tamliknama in favour of his grandson, Biseswar, whereby, after reciting the suit by Rajbunsi Koer in 1844, and the ikrarnamah of 29th February 1856, and that he had no hope of male issue, he proceeded: "therefore I do of my own free will and accord, and with the consent of my daughter Ramlochun Koer (who is a widow, and has no other son beside the said Babu), make the said Babu my heir, successor, and representative, and put him in possession, and occupation of all my moveable and immoveable properties." Then followed provisions for the maintenance of the grantor and of the female members of the family. "He shall take proper care of the maintenance and proper expenses of Babu Sadhoram, who is deaf and dumb and devoid of sense, so that he may be in no want and difficulty."

Dakhil kharij, or mutation of names in the Collectorate record, was effected in the name of Biseswar, who received rents and managed the property.

The plaint (6th May 1882) alleged that Sadhoram survived Kuldip, and that Biseswar had been in possession without title (the tamliknama of 1867 being inoperative) of all the interest that had belonged to the former. The defendant in her written statement alleged the disqualification of Sadhoram, and alleged besides that he died before his brother Kuldip, also that the tamliknama in her husband's favour was valid. She also relied on limitation, and on this ground the suit was dismissed.

The plaintiff appealed to the High Court, and on the 1st April 1885 that Court remanded the suit for decision upon the following issues:—

1. Did the tamliknama come into operation during the lifetime of Kuldip; and if so, when?
2. Did Ram Lochun Koer waive her right of inheritance, if any, in favour of Biseswar?
3. Did any and what title pass by the tamliknama?

Upon this remand the original Court decided that the tamliknama came into operation during the lifetime of Kuldip and before the death of Sadhoram; that Ramlochun did give at least an implied assent to the tamliknama, and therefore waived her right to the inheritance. As to the last question, the Subordinate Judge's view was that, though Sadhoram was not competent [344] to take by inheritance, he might take by gift, and that the conduct of Kuldip in recognizing his

1890 DEC. 13. — PRIVY COUNCIL — 18 C. 341 (P.C.)= 18 I.A. 9= 15 Ind. Jur. 93=5 Sar. P.C.J 676.

brother as joint owner after his incapacity became apparent, amounted to the creation of a new title in favour of Sadhoram, who was admitted by his brother into a joint ownership and joint possession, which made him a joint tenant with Kuldip. This title could not legally be renounced by his guardian in 1856, and continued till his death, when it devolved on Kuldip. In his opinion, therefore, "the tamliknama passed the share of Kuldip in the joint estate to Biseswar, and that share, in the absence of any allegation to the contrary, might be presumed to have been half the entire estate on the date of the gift."

Both parties appealed against this decision, and both appeals were dismissed.

As to the legal result of the mode in which Kuldip had dealt with his brother, the High Court (WILSON and O'KINEALY, JJ.) were of opinion that it had the effect of giving a new and good title to Sadhoram, either by way of family arrangement, or by virtue of the law of limitation, and that this title was in force in 1856.

They then proceeded to examine whether the suit was barred by limitation by virtue of what took place in 1856 and 1867. As to this, they said that in 1867, Kuldip claiming to be the sole owner conveyed to Biseswar, and the conveyance in the clearest and most express terms was not of an eight annas, but of the whole sixteen annas. This conveyance they pointed out was followed by absolute and exclusive possession on the part of Biseswar and this respondent after him.

They added :—"Supposing, then, that limitation did not run during the lifetime of Sadhoram, it certainly ran from the moment of his death. It appears to us that the very latest point of time at which the present cause of action can be placed is the death of Sadhoram, and that is the time at which the plaintiff has placed it in his plaint. From that time, which is in the year 1869, down to the institution of the present suit, is a period which clearly bars the suit. The result is that the suit is barred by limitation."

Mr. *R. V. Doyne* and Mr. *J. H. A. Branson*, for the appellant, argued that the right of suit did not accrue to him until the death of Ramlochun Koer, which occurred in 1880; and that the suit was therefore within the period of limitation. Ramlochun Koer **[345]** was entitled as the daughter and only child of Kuldip Narain, whose brothers died childless and before him: and she had not, by assenting to the tamliknama of 1867, disturbed the right of the heir to the inheritance coming after her. To have done so would have been beyond the power of a daughter inheriting family estate. Her son died before her, and the title of the collateral heir, the present appellant, was therefore made out. Again, the tamliknama of 1867 could not transfer the interest of Sadhoram, which, notwithstanding his disqualification according to the Shastras, had been treated as a subsisting interest, and was the effect of family arrangement confirmed by long recognition of his being entitled. Thus the possession of Biseswar by favour of his mother was not adverse as regarded the interest of Sadhoram to a collateral claiming after the death of Ramlochun Koer. They referred to the Transfer of Property Act, IV of 1882, ss. 13 and 14.

Mr. *J. Graham*, Q.C., and Mr. *J. D. Mayne*, for the respondent, contended that, in fact, Sadhoram had no interest whatever, and that if he had, he having died before Kuldip, the transfer of 1867 was entirely within Kuldip's right to make. Kuldip originated the tamliknama for the benefit of his daughter's son. The previous conduct and acts of Kuldip

1890 DEC. 13. — PRIVY COUNCIL. — 18 C. 341 (P.C.) = 18 I.A. 9 = 15 Ind. Jur. 93 = 5 Sar. P.C.J. 676.

in recognizing an interest in Sadhoram, when there was a hope of his cure, could not be taken to alter the state of things, which was that Sadhoram remained from first to last totally disqualified to inherit. When Ramlochun Koer assented to the tamliknama, she accelerated the vesting of the interest in Biseswar, her son. They referred to *Gungapersad Kur* v. *Sumbhoonath Burwan* (1), which decided that if a Hindu female, entitled to the succession, relinquishes her right, a complete title is vested in the reversionary heir. The effect of Ramlochun Koer's assenting to the tamliknama was to relinquish her estate, and when she did so was a question of fact found by both the Courts below in favour of the respondent. By that means the inheritance was accelerated, with the result that the complete title was in Biseswar, and after that could not devolve, on the death of his mother, upon the next heir of her father, but remained vested in Biseswar and his heirs, of whom his widow was the representative during her life. Thus, upon the **[346]** merits the appellant could not succeed, and the suit had been rightly dismissed. There were concurrent judgments below as to the facts, and the suit was barred by limitation; while both the Courts below had, without any real cause, weakened the case for respondent by their mistaken opinion that the acts and conduct of Kuldip showed intention to create, or did create, a new title in Sadhoram.

Mr. *R. V. Doyne* replied.

At the conclusion of the arguments, their Lordships' judgment was delivered by :—

JUDGMENT.

LORD MACNAGHTEN :— Kishen Jewan Lal, who seems to have acquired, or succeeded to, considerable property, moveable and immoveable, was the head of a Hindu family governed by the Mitakshara law. He died in the year 1835. He left issue three sons and no more. Kuldip was the eldest, and it is upon his acts and conduct that the question in this case mainly turns. The second son was Madhoram. He died about a year after his father's death, without issue, leaving a widow named Rajbunsi. The third son, Sadhoram, was not more than two or three years old when his father died.

Twenty-two years afterwards the position of the family was this :— Kuldip was advanced in years. He was apparently a widower, and without issue living, except one daughter, Ram Lochun, and one grandson, the son of that daughter, who was named Biseswar. Rajhunsi was living, and entitled to maintenance under a compromise following litigation and a previous ineffectual compromise. Sadhoram was a widower, and childless; but it appears that he had been deaf and dumb from his birth, and it is found that he was incapable of inheriting or succeeding to roperty according to Hindu law.

In this state of things, on the 18th June 1867 Kuldip executed a document called a tamliknama, stating the deaths of Sadhoram's mother and wife, and the particular circumstances which showed that Sadhoram, by reason of his incapacity, had no interest in the property, and making over the whole of the property to Biseswar; and Biseswar was then publicly invested with possession. Kuldip died on the 9th May 1870, Sadhoram having died in the previous **[347]** year. Biseswar died in 1876, without issue, leaving his wife Khikhinda, who is the present respondent. On

(1) 22 W. R. 393.

1890 DEC. 13 — PRIVY COUNCIL. — 18 C. 341 (P.C.) = 18 I.A. 9 = 15 Ind. Jur. 93 = 5 Sar. P.C.J. 676.

Biseswar's death she succeeded to the property, and continued to enjoy it, without any interruption from Biseswar's mother, Ram Lochun, who lived till 1880.

In 1882 the appellant Muddun Gopal brought the present suit. By his plaint he made no claim to the estate left by Kuldip. He left over that claim, he said, for another occasion. His case was that Sadhoram survived Kuldip, and that on Sadhoram's death, Biseswar illegally took possession under the tamliknama, and he sued for recovery of possession of the property of Sadhoram, whose nearest heir he claimed to be. The Subordinate Court dismissed the suit, having found that Sadhoram was incapable of inheriting. and also that he died before Kuldip. Muddun Gopal appealed to the High Court. The High Court agreed with the Subordinate Court both as to the incapacity of Sadhoram and the survivorship of Kuldip; but for some reason not very apparent, they seem to have thought that Muddun Gopal ought to be permitted to make out his case in some other way if he could; and accordingly, with the consent of the respondent, given for some reason which is also not very apparent, they remanded the case to the Subordinate Court for the trial of certain issues. One of those issues was whether any and what title passed by the tamliknama. Further evidence was taken, and in the result the Subordinate Court held that though Sadhoram was incompetent to take by inheritance, he might take by gift, and that Kuldip, by recognising him as joint owner after his incapacity must have become apparent, had created a new title in his favour. Both parties took objections to the finding of the Subordinate Court. On the 12th January 1887 the High Court pronounced final judgment. As to the legal result of Kuldip's conduct, the High Court were of opinion that it had the effect of giving a new and valid title to Sadhoram, either by way of family arrangement, or by virtue of the law of limitation. They discussed the effect of the tamliknama, and the effect of Biseswar's possession, which they held to have been exclusive; and they came to the conclusion that the law of limitation ran against Muddun Gopal from Sadhoram's death at the latest, and that the suit was accordingly barred.

[348] Their Lordships are of opinion that the dismissal of the suit may be justified on other and, perhaps, sounder grounds. They are unable to agree with the High Court in thinking that the acts and conduct of Kuldip operated to create a new title in Sadhoram. Undoubtedly up to the year 1856 Kuldip did in every way and on every occasion recognise Sadhoram as jointly interested with him in the family property. Nothing, perhaps, shows this recognition more plainly than the line of defence adopted in the litigation with Rajbunsi, in which her claim was defeated by setting up Sadhoram's interest. It is also shown by a deed of conveyance, by a petition for registration, by leases, and other documentary evidence. But nevertheless their Lordships think it would be wrong to hold that Kuldip's position was prejudiced by his conduct. Kuldip naturally and properly treated his afflicted brother as a member of the family, and entitled to equal rights, until it became absolutely clear that his malady was incurable. Their Lordships think it would not be reasonable, or conducive to the peace and welfare of families, to construe acts done out of kindness and affection to the disadvantage of the doer of them, by inferring a gift when it is plain that no gift could have been intended.

Their Lordships are satisfied that there is no ground for supposing that Kuldip intended to divest himself of his own property or to waive

any rights accruing to him by reason of Sadhoram's incapacity; and they are equally clear that there is no principle of law founded on the doctrine of estoppel, or laches, or the law of limitation or otherwise, which compels them to hold that, under the circumstances of this case, Kuldip's acts and conduct had an effect and operation which he could not have intended or contemplated.

Their Lordships therefore think that the suit was properly dismissed and that this appeal ought also to be dismissed, and they will humbly advise Her Majesty accordingly. The appellant will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant : Messrs. *T. L. Wilson & Co.*
Solicitor for the respondent : Mr. *Samuel George Stevens.*

C. B.

---

18 C. 349 (P.C.) = 18 I.A. 27 = 15 Ind. Jur. 153 = 5 Sar. P.C.J. 681.

[349] PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

CHANDRABATI KOERI AND ANOTHER (*Plaintiffs*) *v.*
E. T. HARRINGTON (*Defendant*).
[18th and 19th December, 1890 and 7th February, 1891.]

Right of occupancy—Act X of 1859 (*Bengal Rent Law*) *ss.* 6 *and* 7—*Bengal Rent Act* (*Bengal Act VIII of* 1869), *ss. 6 and 7—Mostajiri lease—Cultivating possession.*

Under Bengal Act VIII of 1869, ss, 6 and 7, as well as previously under the similar ss. 6 and 7 of the Rent Act, X of 1859, a raiyat paying rent for and cultivating land continuously for a period of twelve years had a right of occupancy, whether he held under a potta or not (1).

In reference to this, it was *held* that a lessee of land continuously in cultivating possession for a period of twelve years, under several written leases or pottas, which were for specified terms of years, but in which there was no express stipulation for the landlord's re-entry on their expiration, had a right of occupancy. The mere existence of a term in a lease was not an "express stipulation" to the contrary within the meaning of s. 7, so as to exclude the right of occupancy.

The decision of the Full Bench in *Sheo Prokash Misser* v. *Ram Sahai Singh* (2) approved and held applicable.

In a suit for the recovery of possession with mesne profits, of land, brought by a lessor against a tenant holding over, the defence was, as to part of the land, that the tenant had a right of occupancy, his cultivating possession having lasted for more than twelve years. The right was established but the burden of proving to which part of the land it attached was upon the tenant, and for proof as to this the suit was remanded.

[Rel., 37 C. 687 (691), 12 C. L. J. 169 = 14 C. W. N. 779 (782) = 6 Ind. Cas. 452.]

APPEAL from a decree (4th June 1888) of the High Court, reversing a decree (31st March 1886) of the Second Subordinate Judge of Bhagulpore.

The appellants, who brought this suit, were the zamindars of a separated one-third share of a mouzah, named Dahia, in pergunnah Naipore, in the Bhagulpore district. The respondent, defendant in the

---

(1) These Acts were wholly repealed by the Bengal Tenancy Act, VIII of 1885, of the Governor-General in Council, which gives the law now in force on the subjects to which they related.

(2) 8 B. L. R. 165.

1891
FEB. 7.
PRIVY COUNCIL.
18 C. 349 (P.C.) = 18 I.A. 27 = 15 Ind. Jur. 153 = 5 Sar. P.C.J. 681.

first Court, was the owner of the estate named Bhugwanpore, belonging to a neighbouring indigo factory, and lessee of land within Dahia. The plaint (13th March 1885) alleged, as the [350] ground of suit, that on the 3rd July 1877 the plaintiffs granted a lease to the defendant of land somewhat less than their share of Dahia, comprising 89 bighas and some fractions, for a term of seven years, which lease expired on the 5th September 1884, when the defendant, though required to give up possession, refused to do so. They claimed possession of the leased land, to be marked out in accordance with maps filed by them, and mesne profits from the above date.

The defendant, by his written statement, admitted the lease and his kabuliyat; but as to 34 bighas 3 cottahs $8\frac{3}{4}$ dhoors, part of the land leased, he alleged that he had long been in possession, before the date of the lease, of 85 bighas in the entire of Dahia, so that before 1870 he had acquired a right of occupancy; and that out of them the 34 bighas odd had under a partition of the revenue-paying estate in which Dahia was with other villages included (a partition made by the Collector in 1874) fallen into the putti or separate one-third share of the plaintiffs; and that of this he had a right to retain possession on his previously acquired title as a tenant with rights of occupancy. He claimed the latter rights under the 6th section of Act VIII of 1869 of the Bengal Council, or the 20th section of the Bengal Tenancy Act IV of 1882 of the Acts of the Government of India (1).

Having fixed issues as to whether the defendant's possession of the disputed land commenced with the lease of July 1877, and whether he had a right to hold after its termination, the Subordinate Judge decided that "the defendant's possession [351] of the plaintiffs' land was all along under one or another mostajiri, or farming lease." The result was a decree for the plaintiffs.

On the defendant's appeal, the High Court (NORRIS and O'KINEALY, JJ.) differing from the first Court, held that, though the defendant had taken a lease from the plaintiffs in 1867 for nine years of their share, during which term the butwara of Dahia had taken place, and the lands of the alleged jote had fallen to the plaintiffs in severalty, the defendant had during those butwara proceedings asserted, without contradiction from anyone, his right as jotedar, and that therefore when the defendant in July 1877 took, on the expiration of the first term, a second lease for seven years of the plaintiffs' whole share, he should, in the absence of any expressed reference to the jote in the lease, be presumed to have continued to be both lessee for a term and jotedar, *i.e.*, with a right of perpetual occupancy as to the lands of the jote, and one limited to seven years as to those outside it. And they remanded the suit for the purpose of having the boundaries of the defendant's jote, in which he claimed a right of occupancy, ascertained and laid down on a

---

(1) Sections 6 and 7 were practically identical in both the Bengal Rent Act X of 1859, of the Legislative Council of India, and the Act of the Bengal Council, VIII of 1869. Section 6 enacted as follows:—"Every raiyat who has cultivated, or held, land for a period of twelve years, has a right of occupancy in the land so cultivated, or held by him, whether it is held under a potta or not, so long as he pays the rent payable on account of the same . . . . The holding of his father, or other person from whom a raiyat inherits, shall be deemed to be the holding of the raiyat within the meaning of this section." Section 7 enacted:—"Nothing contained in the last preceding section shall be held to affect the terms of any written contract for the cultivation of land entered into between a landholder and a raiyat, when it contains any express stipulation contrary thereto."

map. On this remand, an amin was deputed by the lower Court to identify the land, by reference to the butwara, the lease, and other papers, and to make a map. After hearing objections to the return made, under s. 567 of the Civil Procedure Code, the High Court (NORRIS and BEVERLEY, JJ.) held that the remand order had been substantially carried out. They allowed the appeal, dismissing the suit, limiting the costs of the appeal to the first hearing, and making the defendant bear his own costs of the enquiry under the remand order.

1891 FEB. 7. — **PRIVY COUNCIL.** — **18 C. 349 (P.C.) = 18 I.A. 27 = 15 Ind. Jur. 153 = 5 Sar. P.C.J. 681.**

The plaintiffs now appealed.

Mr. *R. V. Doyne*, for the appellants, argued that the respondent had, in fact, failed to show the right of occupancy by him as a raiyat, and therefore could not defend his retention of possession. He could not have derived occupancy rights from other proprietors of the mauza before the partition of 1874, as against the appellants, who were not parties to any such arrangement; and in order to make good his claim to the right of occupancy, he should have shown that he held as a cultivating raiyat under **[352]** them. This he had not shown; and besides this defect in his case, he had, by taking the lease of 3rd July 1877, admitted the absence of such a right, and must be considered as having surrendered it, if any such right had previously existed. The lease expired in 1884, and the respondent was now retaining possession of the whole of the appellants' share of Dahia. It further appeared from the return made by the amin that no defined area was in the respondent's possession, as to which it could be maintained with probability that over such distinct portion of the appellants' share he exercised occupancy rights. The state of things contemplated by ss. 6 and 7 of Act X of 1859, and of the Bengal Act VIII of 1869, did not here exist.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. H. A. Branson*, for the respondent, argued that the right of occupancy had been correctly held to be an incident of the respondent's tenure. He claimed his jote, or tenanted land, of which he had been in cultivating possession for more than twelve years. He therefore had a right of occupancy, as being a tenant who himself took the profits of the cultivation carried on by those whom he employed. The sections of the Bengal Act VIII of 1869 were applicable, and might be shown to correspond with those of the Act of the Government of India, the Bengal Tenancy Act, VIII of 1885, which did not, however, govern this case. The question was only as to the effect of the respondent having held under leases, which, however, as they did not contain anything that was inconsistent with his acquiring rights of occupancy under the enactments in force while he held cultivating possession, did not contain any such "express stipulation to the contrary" as was contemplated in s. 7.

They referred to *Kaleechurn Singh* v. *Ameeroodeen* (1), *Sheo Prokash Misser* v. *Pam Sahai Singh* (2), *Soorut Socndri Debea* v. *Jardine, Skinner & Co.* (3), *Laidley* v. *Gourgobind Sirkar* (4), and *Dhunput Singh* v. *Gooman Singh* (5).

[353] Mr. *R. V. Doyne* replied.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH.--The plaintiffs in this suit and appellants in this appeal alleged in their plaint, which asked for recovery of possession and mesne profits, that they are proprietors and zemindars of a third share of mouzah

(1) 9 W.R. 579.
(2) 8 B.L.R. 165 = 17 W.R. 62.
(3) 25 W.R. 347 = on App. 5 I. A. 164 = 3 C.L.R. 140.
(4) 11 C. 501.
(5) W.R. Act X. 61.

1891
FEB. 7.
——
PRIVY COUNCIL.
——
18 C. 349 (P.C.) = 18 I.A. 27 = 15 Ind. Jur. 153 = 5 Sar. P.C.J. 681.

Dahia, pergunnah Naipore, and that a mostajiri settlement—a lease—of the mouzah, except 3 bighas 14 cottahs of khodkasht land, dated the 3rd July 1877, was made by the plaintiffs and the husband of the first plaintiff to the defendant; that at the expiration of the lease the defendant did not give up possession of the leased share of the mouzah, and was forcibly holding possession thereof. The plaint was filed on the 13th March 1885, the defendant being stated therein to be Mr. T. Poe.

In the order sheet in the record of proceedings, it appears that on the 17th April, before the time allowed for filing the defendant's written statement expired, an order was made on the petition of the plaintiff that E. T. Harrington should be made a defendant in the place of A. T. Pugh, and the plaint be amended accordingly. A. T. Pugh is evidently a mistake for T. Poe, which is not the only inaccuracy in names in the documents in the suit. This order is not in the proceedings, and the reason for making it does not appear. It could not, however, have been made under s. 368 of the Code of Civil Procedure, in consequence of the death of T. Poe, as in that case a summons would have been issued to Harrington, as his representative, to appear and defend the suit, which does not appear in the order sheet to have been done. Apparently the suit was continued against Poe under the name of Harrington. Poe is the person who is stated in the plaint to be holding possession when it was filed, and is described in the title of it as proprietor of the Bhugwanpore concern—meaning the indigo factory. This is material as to the right of occupancy which is one of the questions in the case. A right of occupancy cannot be transferred, and it is necessary that Poe should have been in continuous occupation.

In the written statement of Harrington, filed on the 11th May, the defence set up is "that since a long time the defendant, as tenant, got possession of 85 bighas of land in mouzah Dahia **[354]** while the aforesaid mouzah was joint. Before 1278 F."—1870—" the defendant acquired the right of possession in respect of the aforesaid land. Out of the aforesaid land 34 bighas 3 cottahs $8\frac{3}{4}$ dhoors has under the butwara"—partition—" fallen into the putti"—share—" of the plaintiffs, and it has been held by the defendant as tenant after the expiration of the term of lease. The defendant being a tenant enjoying the right of occupancy is not liable to ejectment." In another written statement of Harrington, filed on the 12th May, the same defence is set up as to the 34, &c., bighas, and it is said that the remaining land is not held by the defendant. Thus there were two questions—(1) Whether the defendant had acquired a right of occupancy in the 34, &c., bighas. (2) Whether the defendant was in possession of the remaining land. The lower Court decided both questions in the plaintiffs' favour. The High Court has reversed the decree, and ordered the suit to be dismissed. Their Lordships have to decide both questions.

As to the first, the evidence is both oral and documentary. The witness Jowhur Lal, 73 years old, an inhabitant of Dahia and a small shareholder in Hurpore Chubar, the principal mouzah, deposed that for 34 or 35 years before the trial 34 bighas in Dahia had been in the possession of the factory under indigo cultivation; and the witness Nund Lal Roy, aged 60 years, a shareholder in Dahia, deposed that indigo was planted by the factory in 34 bighas which now "lie in the putti (or share) of the plaintiffs;" that at the time of the ijmali (the joint ownership) they were in the putti of the other two-third shares; that the 34 bighas were granted to the saheb—meaning the factory—34 or 35 years before the trial, and since that time the factory had been in possession of the 34 bighas cultivating indigo. Other witnesses deposed to the same effect.

1891 FEB. 7. PRIVY COUNCIL. 18 C. 349 (P.C.) = 18 I.A. 27 = 15 Ind. Jur. 153 = 5 Sar. P.C.J. 681.

By a pottah bearing a native date, corresponding with the 29th May 1856, Bahal Roy and Dukha Roy, described therein as shareholding proprietors of mouzah Harpore Jower and two dependent mouzahs, leasd about one-ninth share held and owned by them to Mr. A. B. Lowe, Muktear on behalf of Mr. Kitt Macleod, proprietor of the Bhugwanpore and Surajpore factories. The lease stated that the lessee had been in possession and occupation of the [355] leased property, aud was to cultivate indigo or other crops and get cultivation made.

In April in the following year one Posan Roy presented a petition to the Magistrate under Act IV of 1840, regarding the possession of 29 bighas 11 cottahs 6 dhoors of khodkasht land in mouzah Dahia, the dakhili of mouzah Hurpore Chuhar. The petition stated that certain persons whose names are given, proprietors of a portion of mouzah Hurpore Chuhar and Hurpore Berhal, granted a ticca pottah (in respect of usli and dakhili) in favour of Mr. Macdonald, the proprietor of the Bhugwanpore factory, and that the servants of the factory had ploughed up the crops sown by the petitioner and had dispossessed him, and prayed that possession might be awarded to him.

The record of the Magistrate's judgment is dated the 21st April 1857, and the defendant is stated to be Mr. E. T. Poe, proprietor of the Bhugwanpore indigo factory. The case was dismissed on the ground that the plaintiff had failed to prove any one of three points :—(1) That the land was in the plaintiff's possession as a shareholder in Dahia ; (2) that the land was in Dahia ; (3) that the parties who granted a lease of their share to Mr. Poe had no share in Dahia It is immaterial whether the former proprietor of the factory was called McLeod or Macdonald. Mr. Poe appears to be then the proprietor, and in a receipt for rent in 1859, which will be hereafter noticed, he is called proprietor by purchase of 16 annas (the whole) of the factories of Bhugwanpore, &c. The Subordinate Judge takes a very erroneous view of this judgment when he says of it in his judgment :—" It is conclusive proof showing that the raiyati holding now set up did not then exist." It was not proof as to any holding. It proved only that a charge of dispossession was made against Mr. Poe and was dismissed. As it does not appear that the plaintiffs or any persons through whom they claim were parties to the proceeding, the statements in the petition are not evidence either for or against the plaintiffs.

There are in the evidence six receipts for money received " from the general agent of Mr. E. T. Poe" for rent of land in indigo and jai (oat) cultivation. They are dated as follows :—30th September 1859 (two), 23rd July 1860, 5th July 1862, 3rd February 1864, and 14th March 1868. There is also in the record a [356] kabuliyat executed by Mr. L. G. Crowdy, described as mokhtar of the Bhugwanpore, Surajpore, and other concerns, pergunnah Naipore, which states that he had leased a third out of the whole of mouzah Dahia at an annual rental of Rs. 525 from the beginning of 1275 to 1283 F. (September 1867 to September 1876), being a period of nine years, and on receipt of a pottah from Mussummat Chandrabati Koeri, daughter of Janki Roy, deceased, and mother and guardian of Goman Singh, minor, had entered into possession of the estate leased. Then follow these words :—" For this reason, I do hereby declare that I the declarant shall by good treatment keep the resident and non-resident tenants satisfied and contented, and shall to the best of my ability cultivate or get others to cultivate the aforesaid village with indigo or with other crops." The pottah is not in the record. In 1874

1891 FEB. 7. — PRIVY COUNCIL. — 18 C. 349 (P.C.)= 18 I.A. 27= 15 Ind. Jur. 153=5 Sar. P.C.J. 681.

the owners of Dahia took proceedings to obtain a partition of it, and on the 15th June 1874 Mr. William S. Crowdy, described as the manager and general agent of the indigo factory of Bhugwanpore, presented a petition, complaining that the butwara (partition) amin had omitted to record in his measurement of the lands of the mehal Hurpore Chuhar the indigo cultivations made by the Bhugwanpore factory in about 85 bighas of land of the mehal, which it was his duty to do. The Deputy Collector dismissed this petition on an explanation made by the amin that he had recorded the name of the malik—the owner. On an appeal to the Collector he allowed the appeal, and by an order dated the 6th August 1874, he directed the amin, "to mention the plots under indigo, together with the names of the planter and the concern." This was done, and there is in the record an extract from the khusra (rough paper) of measurement of the lands of mehal Dahia prepared by the partition amins. In this 36 bighas 18 cottahs 6 dhoors of land are stated to be "in the zerat cultivation of indigo of the Bhugwanpore factory.

Of the documents in evidence, the next in date are a lease and kabuliyat thereon, dated the 3rd July 1877, the lease being with other lands of other owners, of the third share of Dahia, which had been awarded to Chandrabati Koeri in the partition. It is the lease referred to in the plaint as the foundation of the suit. In it and in the kabuliyat there is a provision that the lessee is to **[357]** cultivate and get others to cultivate indigo, oats, or any other grain or crop.

Both the first Court and the High Court have found, what in their Lordships' opinion is proved by the evidence, that the defendant had possession of the land in the plaintiffs' putti, which he now states to be 34 bighas 3 cottahs $8\frac{3}{4}$ dhoors, from 1856. But the first Court held that the "possession was all along under one or another mostajiri lease, and that therefore he did not acquire any right of occupancy." The High Court held that there was a right of occupancy, but the grounds of their opinion do not appear to their Lordships to be clearly stated. It appears to their Lordships that the leases were for the purpose of cultivating the land as a raiyat and were not ijaras; and that the decision of the Full Bench in *Sheo Prokash Misser* v. *Ram Sahoy Sing* (1) is applicable to this case. There it was held under Bengal Act VIII of 1869, the law in force during part of the occupation in that case, and under Act X of 1859 previously in force, that a raiyat who has held or cultivated a piece of land continuously for more than 12 years, but under several written leases or pottahs each for a specific term of years, in which there is no express stipulation for re-entry, is entitled to claim a right of occupancy in that land. Therefore, in the opinion of their Lordships, there is a good defence to the suit so far as regards the 34 bighas 3 cottahs $8\frac{3}{4}$ dhoors.

The plaint stated that the quantity of cultivated land in Dahia, except 3 bighas 14 cottahs, which were excluded from the pottah and kabuliyat, was 89 bighas 7 cottahs 7 dhoors 15 dhoorkis. The defendant in his written statement said this was not true; that, "according to the measurement which took place in 1880, only 63 bighas 9 cottahs 13 dhoors 15 dhoorkis of land was found to comprise the entire putti of the plaintiffs which was held by the defendant." As the suit was dismissed by the High Court, this question of the quantity of land included in the lease has not been determined by that Court in this suit. In a suit for rent which by consent of the parties was tried together with this suit, the first Court

(1) 8 B. L. R. 165=17 W.R. 62.

decided this question against the defendant, and there does not appear to have been any appeal upon it. 1891 FEB. 7.

[358] As to the second question—possession by the defendant of the remaining land—the first Court thought there was reliable evidence that the defendant was in possession referring to three of the plaintiff's witnesses as proving it. The defendant appears to have mainly relied upon a lease to one Mannu Chowdry, made by Muna Koeri, the mother-in-law of Chandrabati, dated the 25th November 1884. This lease alone, if really made, would not be evidence of possession by Mannu Chowdry and only one witness, Dukha Mahton, a holder of two bighas, deposed to payment of rent to him. Neither Mannu Chowdry nor Mr. Crowdy, the manager of the factory, who must have known about the possession, was called as a witness, nor any proof given that either of them could not be called. The High Court found that the defendant was not in possession of the land; that it was in possession of the "plaintiff's mother-in-law as owner." They rest this finding mainly upon the report of a police officer made in consequence of a petition of Muni Singh, the husband of Chandrabati, after the suit was instituted, that the defendant had sided with his old co-sharers in the village, and had given orders that whenever he should go to collect the rents a criminal case was to be brought against him. The High Court say—"In that (the report,) the police officer intimates that, *in his opinion*, the case was untrue; that the mother-in-law, Mussummat Muna Koeri, had only one daughter who married Muni Singh, and on that occasion she had made a gift of the property to her daughter and her son; that Muni Singh, on coming into possession, appropriated all the money and left the mother-in-law in a state of starvation; that she in retaliation took possession of the property from the saheb (the factory), and leased it out on receipt of Rs. 600." This report is not in the record. Their Lordships are unable to understand upon what ground the High Court considered that the opinion of the police officer was evidence of Muna Koeri being in possession. A police officer has not authority to make a judicial inquiry about possession, and his opinion most probably was founded entirely upon hearsay. Seeing that Mr. Crowdy was not a witness, it appears to be possible that the allegation in the petition of Muni Singh of collusion was true, and that the lease was made to be used as a defence to the suit. The finding of the first Court on this question [359] of possession was in accordance with the evidence, and should not have been reversed by the High Court.

PRIVY COUNCIL.

18 C. 349 (P.C.) = 18 I.A. 27 = 15 Ind. Jur. 153 = 5 Sar. P.C.J. 681.

Their Lordships' attention has been called to the inquiry which took place for the purpose of ascertaining the lands in which the defendant claimed his right of occupancy. On the hearing of the appeal the High Court rightly held that the onus lay on the defendant to point out these lands, and they referred it to the District Judge to depute an amin to find out the "lands covered by the khusra of the butwara." That appears to be right in principle. The defendant was bound to identify the 34 bighas 3 cottahs $8\frac{3}{4}$ dhoors which he claims, and to show that they are in the khusra and in the putti of the plaintiffs as he alleges in his written statement. But the finding of the amin does not specify any such quantity of land. He finds that the lands now identified as the defendant's jote are 76 bighas and a fraction by one measure and 36 bighas and a fraction by another, and that the indigo plantation land in the khusra is 49 bighas and a fraction. In dismissing the suit the High Court say, "We accept the report of the amin, and we find that the District Judge has substantially carried out the remand order." Perhaps, for the purpose of dismissing

1891 FEB. 7. — PRIVY COUNCIL. — 18 C. 349 (P.C.) = 18 I.A. 27 = 15 Ind. Jur. 153 = 5 Sar. P.C.J. 681.

the suit, the amin's findings were sufficient. But for the purpose of ascertaining the precise land claimed by the defendant the findings are abortive and useless. And as their Lordships hold that the suit should not be dismissed, and that it is necessary to ascertain the lands claimed, there must be a fresh inquiry.

The result is that the plaintiffs are entitled to a decree for possession of the land included in the lease of 1877, except the 34 bighas 3 cottahs $8\frac{3}{4}$ dhoors, in which the defendant should be declared to have a right of occupancy, and the decrees and order of the Courts below ought to be reversed and the suit remanded to the High Court to have an inquiry made as to the situation and boundaries of these last-mentioned lands, and also of the remaining lands included in the said lease, and thereupon to make a decree for possession to the plaintiffs of the remaining lands and mesne profits thereof, with costs to the parties in the Courts below in proportion to the result. Their Lordships will humbly advise Her Majesty accordingly.

[360] In the special circumstances of this case their Lordships are of opinion that the appellants should have the costs of this appeal.

Appeal allowed; *suit remanded.*

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Sanderson, Holland & Adkhin.*

C. B.

---

18 C. 360 (F.B.).

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson, and Mr. Justice Ghose.

MAHOMED ABBAS MONDUL (*Defendant*) *v.* BROJO SUNDARI DEBIA (*Plaintiff*).* [17th March, 1891.]

Bengal Tenancy Act (*VIII of* 1885), *ss.* 13, 195, *cl.* (*e*)—*Sale in execution of decree—Dur-putni Tenures.*

S. 13 of the Bengal Tenancy Act applies to sales of *dur-putni* tenures in execution of decrees.

[F., 19 C. 17.]

REFERENCE to a Full Bench made by TREVELYAN and BEVERLEY, JJ. The referring order was as follows:—

"The plaintiff is the owner of a *putni*. He brought this suit for arrears of rent against the first three defendants, who were *dur-putnidars* under him. Their defence was that their tenure had been sold in execution of a decree and had been bought by one Amirunnessa. Amirunnessa has been added as a defendant.

"The Munsif gave a decree against Amirunnessa only.

"On appeal this decree was set aside, and in the place of it a decree has been made against the first three defendants, who have appealed to this Court, but have not made Amirunnessa a party to the appeal. Amir-

* Full Bench Reference in appeal from appellate decree, No. 273 of 1889, against the decision of the District Judge of Rajshahye, dated 23rd February 1889, reversing the decree of the Sudder Munsif of that district dated the 16th November 1888.

1891 MARCH 17. — FULL BENCH REFERENCE. — 18 C. 360.

unnessa's purchase was not registered in the books of the plaintiff. It has been contended before us by the pleader for the appellants that Amirunnessa alone is liable, and that the plaintiff is bound to recognize her.

[361] "The case of *Kristo Bulluv Ghose* v. *Kristo Lall Singh* (1), decided by a Division Bench of this Court, supports the view put forward on behalf of the appellants, that decision being based on the provisions of the Bengal Tenancy Act; but in a subsequent case decided by the same Bench, *Gyanada Kantho Roy* v. *Bromomoyi Dassi* (2), it was held that the provisions of that Act do not apply to *putni* tenures. In the present case the question relates to a *dur-putni* tenure; but having regard to the observations of the Lords of the Privy Council in the case of *Lucki Narain Mitter* v. *Khettro Pal Singh Roy* (3), and to the provisions of Reg. VIII of 1819, ss. 4, 5 and 6, we are inclined to hold that s. 195 (*e*) of the Bengal Tenancy Act bars the operation of the Bengal Tenancy Act in the case of *dur-putni* tenures also and that the decision in *Kristo Bulluv Ghose* v. *Kristo Lall Singh* (1) was wrong. The question which we refer to the Full Bench, therefore, is whether s. 13 of the Bengal Tenancy Act applies to sales of *dur-putni* tenures in execution of decrees.

"If the section does so apply, the appellants are, in our opinion, entitled to have the suit dismissed as against them with costs. Should the answer be in the negative, the appeal should, in our opinion, be dismissed with costs."

Baboo *Troyluckonath Mitter* (with Baboo *Rash Behary Ghose*) for the appellant, contended that s. 195, cl. (*e*), only applies to *putnis* properly so called, and does not include *dur-putni* tenures, and that s. 13 applies to all kinds of permanent tenures except *putnis*, and therefore applies to sales of *dur-putni* tenures in execution of decrees. The Act was intended to lay down the whole law with regard to the transfer of permanent tenures with the exception of *putni* tenures. "*Putni*" has a well-known specific meaning in the Bengal Code, and is defined in Reg. VIII of 1819 as an estate held immediately under the zemindar. Here the tenure has been sold in execution of a decree against the *dur-putnidar*, and the rent sued for is for a period subsequent to the date of the sale. It is submitted that the defendant's liability ceases upon the sale taking place, and when the purchaser has [362] moreover taken possession. There is no real conflict between the cases mentioned in the referring order. The question should be answered in the affirmative, and the suit dismissed.

Baboo *Mohini Mohun Roy* (with him Baboo *Lal Mohun Das* and Baboo *Mokund Nath Roy*) for the respondent:—There is no conflict between the two cases in the Indian Law Reports; in the case of *Kristo Bulluv Ghose* v. *Kristo Lall Singh* (1) the point was not raised. The effect of dismissing the suit will be to work injustice; the rent will be lost. Until the landlord receives the fee, he is entitled to refuse to recognize the purchaser—*Lucki Narain Mitter* v. *Khettro Pal Singh Roy* (3). In the preamble to Reg. VIII of 1819 two classes of tenures are recognized; and if ss. 5, 6 and 7 of the Regulation apply to transfer of *dur-putni* tenures, I shall show that we come within s. 195 (*e*) of the Bengal Tenancy Act. The distinction which the preamble makes between a zemindar and a *putnidar* is that the zemindar having to pay Government revenue, the privilege of holding half-yearly sales is accorded to him.

(1) 16 C. 642. (2) 17 C. 162. (3) 13 B. L. R. 146=20 W. R. 380.

Sections 1, 3, 4, 6, 7, 11, 12 and 17 apply to *putni* and *dur-putni* and *sepatni* tenures equally; and the special sections which apply to zemindars, who can bring to sale every half-year, are ss. 8, 9, 10, 13, 14 and 15. Section 195 of the Bengal Tenancy Act must be taken to refer to all such tenures as are included in Reg. VIII of 1819.

The opinion of the Court (PETHERAM, C.J., and PIGOT, O'KINEALY, MACPHERSON, and GHOSE, JJ,) was as follows :—

OPINION.

The contention that *dur-putni* tenures are included within the terms of cl. (*e*) of s. 195 of the Bengal Tenancy Act cannot, we think, be supported. The words "in so far as it relates to those tenures" must, we think, be treated as expressly limiting the provision to enactments relating to *putnis* properly and strictly so called, and as intended to exclude those which relate to tenures, which, although resembling *putnis*, as *dur-putnis*, &c., are not strictly *putnis*, not possessing all the qualities of them. We answer the question in the affirmative, and the appellants are therefore entitled to have the suit dismissed as against them with costs.

T. A. P.

---

18 C. 363 (F.B.)

[363] FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson and Mr. Justice Ghose.

SURNOMOYI DEBIA (*Sale purchaser*) *v.* GRISH CHUNDER MOITRA (*Defaulter*).* [24th March, 1891.]

Sale for arrears of rent—Regulation VIII of 1819, *cl.* 3, *s.* 8 *and s.* 14—*Putni sale—Notices, Publication of—Ostum sale.*

It is imperative that the notices referred to in cl. 3, s. 8, of Reg. VIII of 1819, be published previously to the 15th Kartick. Non-compliance with such direction is a "sufficient plea" within the meaning of s. 14 of the Regulation for reversal of a sale held thereunder. *Matungee Churn Mitter* v. *Moorrary Mohun Ghose* (1) dissented from.

[R., 13 C.L.J. 404 (408) = 16 C.W.N. 805 = 10 Ind. Cas. 90.]

REFERENCE to a Full Bench made by PRINSEP and TREVELYAN, JJ.

The facts on which this reference arose were that a petition was made for the sale of a certain *putni* tenure on the 1st Kartick 1293 under the provisions of Reg. VIII of 1819, notice of the sale having been published on the 15th Kartick. The sale took place on the 2nd Aughran. Under s. 8 of this Regulation such notice should have been published "at any time previous to the fifteenth of the month of Kartick."

In a suit brought by the defaulting putnidar for the purpose of setting aside this sale amongst others, the question arose whether such non-compliance with s. 8 was a sufficient plea, within the meaning of s. 14

---

* Full Bench reference in appeal from appellate decree No. 131 of 1890, against the decree of F. E. Pargiter, Esq., Officiating Judge of Rajshahye, dated the 6th November 1889, reversing the decree of Babu Aghore Nath Ghose, Subordinate Judge of that district, dated 25th May 1889.

(1) 1 C. 175 = 24 W.R. 453.

of the Regulation, to set aside the sale. The Court of first instance decided in favour of the purchaser, upholding the sale. The District Judge, however, held that the notice not having been published before the 15th Kartick, the sale must be set aside.

1891
MARCH 24.

FULL BENCH REFERENCE.

18 C. 363

On appeal to the High Court the case was referred to a Full Bench; the referring order was as follows :—

"Having regard to the terms of the more recent judgment of their Lordships of the Privy Council as reported in *Maharajah* **[364]** *of Burdwan* v. *Tarasundari Debi* (1), we find it necessary to refer the point arising in this case to a Full Bench of this Court, inasmuch as the opinion that we are inclined to hold, and which is in accordance with that expressed in the case of *Ahsanulla Khan* v. *Hurri Churn Mozoomdar* (2), is opposed to that expressed by two Benches of this Court in the cases of *Sreemutty Dassee* v. *Pitambur Panday* (3) and *Matungee Churn Mitter* v. *Moorrary Mohun Ghose* (4).

"The point which we desire to refer is, whether the publication of notices relating to an impending *putni* sale, made *on* the 15th Kartick, on a date later than that prescribed by law, is not a sufficient ground for setting aside a sale subsequently held, and whether under the terms of s. 14 (Reg. VIII of 1819) this was a sufficient plea for a reversal of that sale."

Mr. *H. Bell* (with him Baboo *Rash Behari Ghose* and Baboo *Bhuban Mohun Das*) for the appellant:—Section 8, cl. 2, is not imperative but directory as regards the publication of notice. See *Ahsanulla Khan* v. *Hurri Churn Mozoomdar* (2), which is in my favour on this point: the objection, to succeed, must be one of substance, and not merely formal — *Sreemutty Dassee* v. *Pitambur Panday* (3). Clause 3 of the section makes no mention of the date of the proclamation in the mofussil. There is no repetition of the words "before the 15th Kartick." The case of *Maharajah of Burdwan* v. *Tarasundari Debi* (1) turns upon the place at which the publication should be made, not on the time. The rights of defaulters are covered by s. 14 of the Regulation; their remedy is to sue. The case of *Matungee Churn Mitter* v. *Moorrary Mohun Ghose* (4) is exactly to the point, and is in my favour. The Privy Council case does not narrow either this decision or the one by Pontifex, J.,—*Sreemutty Dasee* v. *Pitambur Panday* (3). I would further refer to *Ram Sabak Bose* v. *Monmohini Dasse* (5) and *Maharani of Burdwan* v. *Krishna Kaminee Dasi* (6).

[365] Baboo *Mohini Mohun Roy* and Baboo *Ishan Chunder Chuckerbutti* for the respondent were not called on.

The opinion of the Full Bench (PETHERAM, C.J., and PIGOT, O'KINEALY, MACPHERSON, and GHOSE, JJ.) was as follows :—

OPINION.

It appears that a *putni* was sold on the 2nd Aughran 1293, under the provisions of Reg. VIII of 1819, the notices of sale having been published on the 15th Kartick. And the question that has been referred to us is "whether the publication of notices relating to an impending *putni* sale, made *on* the 15th Kartick, on a date later than that prescribed by law, is not a sufficient ground for setting aside a sale subsequently held, and whether under the terms of s. 14 this was a sufficient plea for a reversal of that sale."

(1) 9 C. 619=10 I. A. 19.
(2) 17 C. 474.
(3) 24 W. R. 129.
(4) 1 C. 175=24 W. R. 453.
(5) 2 I. A. 71=14 B.L. R. 394.
(6) 14 C. 365=14 I.A. 30.

1891
MARCH 24.
FULL BENCH REFERENCE.
18 C. 363

The sale took place under cl. 3 of s. 8 of Reg. VIII of 1819, which runs as follows :—

"On the 1st day of Kartick, in the middle of the year, the zemindar shall be at liberty to present a similar petition, with a statement of any balances that may be due on account of the rent of the current year up to the end of the month of Assin, and to cause similar publication to be made of a sale of the tenures of defaulters, to take place on the 1st of Aughran, unless the whole of the advertised balance shall be paid before the date in question or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartick, to less than one-fourth, or a 4-anna proportion of the total demand of the zemindar, according to the *kistbundi*, calculated from the commencement of the year to the last day of Kartick."

The clause says that the zemindar shall "cause similar publication to be made," that is to say, a publication similar to that which is prescribed by the preceding cl. 2; and we are of opinion that the requirements in that clause, so far as the publication of the notice of sale, and the period at which it is to be published, must be imported into cl. 3 *mutatis mutandis*.

Now, turning to cl. 2 of s. 8 which relates to a sale in the beginning of the year, it prescribes that the notice of sale shall be stuck up in the Collector's *cutcheri* as also in the Sudder *cutcheri* of the zemindar, and at the *cutcheri* or principal town or village upon the land of the defaulter. And it then lays down that [366] "the zemindar, shall be exclusively answerable for the observance of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon who shall bring back the receipt of the defaulter, or of his manager for the same; or in the event of inability to procure this, the signature of three substantial persons, residing in the neighbourhood, in attestation of the notice having been brought and published on the spot. If it shall appear, from the tenor of the receipt or attestation in question, that the notice has been published at any time previous to the 15th of the month of Bysack, it shall be a sufficient warrant for the sale to proceed upon the day appointed," and so on.

The clause distinctly provides that it is where the notice has been published *previous to the 15th of the month*, there shall be a sufficient warrant for the Collector to sell the *putni*. And incorporating this provision in cl. 3 of the same section, we take it that it is when the notice has been published *previous* to the 15th of the month of Kartick that the Collector is authorized to sell. This view is strengthened by a reference to the procedure laid down in s. 10 of the Regulation.

It has, however, been contended before us by Mr. Bell on behalf of the zemindar that what the law regards as essential is the actual publication of the sale notification, and that so far as it prescribes (if cl. 2, s. 8, does prescribe it) that the notice should be served before the 15th Kartick it is merely directory, and that the non-compliance with that direction is not a "sufficient plea" within the meaning of s. 14 of the Regulation for setting aside the sale.

In *Maharani of Burdwan* v. *Tarasundari Debi* (1), which was a suit brought to set aside a *putni* sale, the Judicial Committee of the Privy Council, in referring to Reg. VIII of 1819, expressed themselves as follows :—

(1) 9 C. 619=10 I. A. 19.

"That is a very important Regulation, and no doubt it was enacted for a certain and defined policy, and ought as a rule to be strictly observed. Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the zemindar, who institutes the **[367]** proceeding, exclusively responsible for its regularity." And later on, with reference to a decision of Sir Barnes Peacock, *Sona Bibee* v. *Lall Chand Chowdhry* (1), they say as follows :—

1891 MARCH 24.

FULL BENCH REFERENCE.

18 C. 363

"The material part of cl. 2, s. 8, Reg. VIII of 1819, so far as this case is concerned, is that the notice required to be sent into the *mofussil* shall be served. The zemindar is exclusively answerable for the observance of the forms prescribed by that clause. The subsequent part of the section, which prescribes that the serving peon shall bring back the receipt of the defaulter, or of his manager, or in the event of his inability to procure it, that he shall obtain that which by the Regulation is substituted for it, is merely directory, and if not done, does not vitiate the sale, provided the notice is duly served."

The Judicial Committee use the expression "due publication" of the notice of sale. This, we think, refers, not only to the actual publication of the notice, but also to the time at which it is to be published. The Regulation gives to the zemindar a summary remedy—a power to bring to sale the tenant's estate without a suit; and, therefore, as the Privy Council has also said, it is "to be strictly observed." And if it is to be strictly observed, it is impossible to say that though the notice of sale may not be published until the 15th Kartick (and we have already said that the Regulation prescribes that it must be published before the 15th Kartick), the requirement of the law as to the publication of the notice has been complied with.

Again, in the case of *Ram Sabak Bose* v. *Monmohini Dassee* (2) the Privy Council says that "the reasonable object of the law (*i.e.*, Reg. VIII of 1819) is that the defaulter should have timely notice of the intention to sell;" and if this object is to be kept in view, it is obvious that an essential requirement of the law was not carried out in this case, and that the *putnidar* has made out a "sufficient plea" for setting aside the sale, within the meaning of s. 14 of the Regulation.

The learned Judges who have made this reference refer to the decisions of *Sreemutty Dassee* v. *Pitambur Panday* (3) and *Matungee* **[368]** *Churn Mitter* v. *Moorrary Mohun Ghose* (4) as expressing opinions different from that which they are inclined to hold. In the last case, which was the case of a sale in the beginning of the year, the Court held that "it would be no sufficient plea if the notification had been published on, instead of previous to, the 15th Bysack;" and that even assuming that the publication took place on the 15th, "still the defaulter had two days more than is prescribed by the Regulation," because the sale did not take place until the 3rd Jeyt. For the reasons already expressed, we are unable to agree in the views expressed in this decision.

As regards the other case referred to, we observe that it was decided upon a ground which does not really touch the question involved in this case.

---

(1) 9 W. R. 242.
(2) 2 I.A. 71=14 B.L.R. 394.
(3) 24 W.R. 129.
(4) 1 C. 175=24 W.R. 453.

1891 MARCH 24. — FULL BENCH. — 18 C. 363

Upon these grounds we are of opinion that the question referred to us must be answered in the affirmative. The appeal will be dismissed with costs.

T.A.P.

---

18 C. 368 (F.B.)

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson and Mr. Justice Ghose.

NAGENDRA NATH MULLICK (*Plaintiff*) *v.* MATHURA MAHUN PARHI AND OTHERS (*Defendants*).* [24th March, 1891].

Limitation Act (XV of 1877), *s.* 14—*Computation of period of limitation—Suits for arreas of rent—Act X of* 1859.

The provisions of s. 14 of Act XV of 1877 are not applicable to suits for arrears of rent under Act X of 1859.

[**Diss.**, 21C. 514 (516); **N.F.**, 30 B. 275=7 Bom. L.R. 697 (707); 32 C. 654=1 C.L J. 364 (371); **F.**, 21 C. 428 (430); 30 C. 532=7 C.W.N. 550; 18 M. 99 (**F.B.**); 34 M. 505 (510)=5 Ind. Cas. 884=20 M.L.J. 283=7 M.L.T. 132; **R.**, 33 A. 738 (742)=8 A.L.J. 833=11 Ind. Cas 197; 34 A. 496 (501)=10 A.L.J. 3 (9)=16 Ind. Cas. 149; 20 B. 543 (547); 18 C. 631 (634); 20 M. 476; 5 Ind. Cas. 416; 12 C.W.N. 893=35 C. 990; 4 O.C. 182 (186) (B); **Doubted**, 35 C. 799=7 C.L.J. 426 (430)=12 C.W.N. 888; **Expl.**, 33 C. 832 (843)=14 C.L.J. 284=15 C.W.N. 863=11 Ind. Cas. 207 (210).]

REFERENCE to a Full Bench by Norris and Beverley, JJ.; the referring order was as follows:—

"This was a suit for arrears of rent for the years 1292, 1293 and 1294 of the Amli era. The lower Court has held that under s. 32 of Act X of 1859 (which is the law of landlord and tenant in the district) the rent for 1292 is barred, and this is the sole point that is questioned before us in appeal.

"It appears that the plaint was presented to the Collector of Balasore on 13th June 1888. It should have been presented **[369]** however to the Subdivisional Deputy Collector at Bhuddruck, as the property is situated in that subdivision. It was accordingly returned by the Collector of Balasore on 2nd February 1888, and on the 4th idem (the intervening day being Sunday) was presented at Bhuddruck. On that date the arrears for 1292 Amli had become barred, unless the plaintiff can be allowed the benefit of the provisions of s. 14 of the Limitation Act (XV of 1877).

"We entirely dissent from the grounds on which the Deputy Collector has held that the plaintiff cannot be allowed the benefit of that section. But it has been contended before us that the provisions of the Limitation Act are not applicable to suits under Act X of 1859.

"On this question the authorities appear to us to be in conflict.

---

* Full Bench Reference in appeal from original decree No. 29 of 1890, against the decision of Baboo Satish Chunder Bose, Roy Bahadur, Deputy Collector of Balasore, dated the 21st October 1889.

"In the cases of *Poulson* v. *Madhusudan Pal Chowdhry* (1) *Dinonath Panday* v. *Roghoo Nath Panday* (2), *Unnoda Persaud Mookerjee* v. *Kristo Coomar Moitro* (3), *Purran Chunder Ghose* v. *Mutty Lall Ghose Jahira* (4), it was held that the provisions of the old Limitation Acts did not apply to suits under the Rent Act X of 1859 or Bengal Act VIII of 1869. On the other hand, the following cases decided that certain proisions of the present Limitation Act, XV of 1877, are applicable to suits under special Acts :—*Behari Loll Mookerjee* v. *Mungolanath Mookerje* (5) *Golap Chund Nowluckha* v. *Kristo Chunder Dass Biswas* (6), *Khoshelal Mahton* v. *Gunesh Dutt* (7), *Khetter Mohun Chuckerbutty* v. *Dinabashy shaha* (8).

"More recently in *Girija Nath Roy* v. *Patani Bibee* (9), Tottenham and Ghose, JJ., have ruled that the provisions of s. 7 of the present Limitation Act are not applicable to rent suits.

"We accordingly refer the following point for the decision of a Full Bench :—

"Whether the provisions of s. 14 of the Indian Limitation Act, XV of 1877, are applicable to a suit for arrears of rent under Act X of 1859.

[370] "Besides the authorities above cited, we would refer to the difference in language between Act XIV of 1859, ss. 3 and 14 ; Act IX of 1871, s. 6 ; Act XV of 1877, s. 6 ; and also to the provisions of s. 185 of the Bengal Tenancy Act.

"If the decision of the Full Bench upon the above point should be in the affirmative, the appeal will be allowed with costs ; if in the negative, it will be dismissed with costs.

Baboo *Troylukho Nath Mitter* (with him Baboo *Jagut Chunder Banerjee*) for the appellant :—I contend that s. 14 of the Limitation Act is applicable to this case. That section is a general section, laying down rules for the computation of the period of limitation, and there is nothing inconsistent in that equitable rule applying to suits under Act X of 1859. The decision in *Behari Lall Mookerjee* v. *Mangolanath Mookerjee* (5), a decision under s. 6 of the Limitation Act, is strongly in my favour. To cases under the rent law of 1869, the Limitation Act, 1877, has been held applicable —*Golap Chund Nowlukha* v. *Kristo Chunder Dass Biswas* (6), *Hossein Aly* v. *Donzelle* (10), and see the cases there cited ; also *Khoshelal Mahton* v. *Gunesh Dutt* (7) ; in this last case, the case of *Purran Chunder Ghose* v. *Mutty Lall Ghose Jahira* (4) is dissented from. And in *Phoolbas Koonwar* v. *Lalla Jogeshur Sahoy* (11), s. 246 of Act VIII of 1859 was held to be subject to modification by the Limitation Act then in force. Also in *Girija Nath Roy* v. *Patani Bibee* (9) it has been held that the provisions of s. 7 of Act XV of 1877 are not applicable to rent suits. And on the same principle the time during which a suit is pending should be excluded.

Baboo *Hem Chunder Banerji* (with him Baboo *Mon Mohun Dutt*) for the respondents :—Section 32 of Act X of 1859 provides a special limitation for suits, and therefore the general limitation does not apply—*Poulson* v. *Madhusudan Pal Chowdhry* (1) *Unnoda Persaud Mookerjee* v.

(1) B.L.R. Sup. Vol. 101=2 W.R. Act X, 21.
(2) 5 W.R. Act X, 41. (3) 15 B.L.R. 60, note=19 W.R. 5.
(4) 4 C. 50. (5) 5 C. 110. (6) 5 C. 314. (7) 7 C 690.
(8) 10 C. 265. (9) 17 C. 263. (10) 5 C. 906. (11) 1 C. 226.

1891 MARCH 24. — FULL BENCH REFERENCE. — 18 C. 368.

Kristo Coomar Moitro (1); *Juggernath Roy* [371] *Chowdhury* v. *Raj Chunder Roy* (2); *Dinonath Panday* v. *Roghoonath Panday* (3); *Mohumud Buhadoor Khan* v. *Collector of Bareilly* (4) *Doyal Chunder Ghose* v. *Dwarkanath Misser* (5).

Baboo *Troylokho Nath Mitter* in reply.

The opinion of the Full Bench (PETHERAM, C.J., PIGOT, O'KINELAY, MACPHERSON, and GHOSE, JJ.) was as follows:—

OPINION.

The circumstances which have given rise to this reference are as follows:—Plaintiff sued the defendants under Act X of 1859 for arrears of rent due on account of the years 1292, 1293, and 1294 of the Amli era. It is admitted that the arrears for 1292 Amli have become barred, unless plaintiff can be allowed the benefit of s. 14 of the Limitation Act, and the question which has been referred to us for decision is:—Whether the provisions of s. 14 of the Limitation Act, XV of 1877, are applicable to a suit for arrears of rent under Act X of 1859.

Before the passing of Act X of 1859, summary suits for rent were heard and decided by the ordinary tribunals. That enactment made a complete change. The substantive law was modified, and new procedure was introduced, and special tribunals were established to carry out the provisions of the new law. Since that time Act X of 1859 has always been considered to be a Code complete in itself and unaffected by the general laws of limitation of procedure.

There are several decisions in conformity with this view. Thus in *Poulson* v. *Madhusudan Pal Chowdury* (6), a Full Bench of this Court decided that in a rent suit the plaintiff could not obtain the benefit of s. 14 of Act XIV of 1859. This view of the law was upheld by their Lordships of the Privy Council in the case of *Unnoda Persaud Mookerjee* v. *Kristo Coomar Moitro* (1). Since then Act XIV of 1859 has been repealed. The present law of limitation is Act XV of 1877. Undoubtedly some changes have been made in the law of limitation [372] since 1859, but so far as the present question now before us is concerned we do not think they are of such a nature as to affect the view adopted by their Lordships of the Privy Council, already referred to. Act X of 1859, where it is in force, is still, as then, a Code complete in itself, and s. 14 of the present Law of Limitation is almost identical with s. 14 of Act XIV of 1859. We think, therefore, that the judgment of their Lordships of the Privy Council disposes of this reference, and we hold that s. 14 of Act XV of 1877 does not apply to suits under Act X of 1859.

T. A. P.

Appeal dismissed.

---

(1) 15 B.L.R. 60, note=19 W.R. 5.
(2) W.R. (1864), Act X 120.
(3) 5 W.R. Act X 41.
(4) 13 B.L.R. 292=1 I.A. 167.
(5) W.R.F.B. 47=Marsh, 148.
(6) B.L.R. Sup. Vol. 101=2 W. R. Act X, 21.

18 C. 372.

1891 APRIL 10.

SMALL CAUSE COURT REFERENCE. 18 C. 372.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot and Mr. Justice Macpherson.

WALLIS & CO., *v.* BAILEY.* [10th April, 1891.]

Small Cause Court Presidency Towns—Jurisdiction—Presidency Towns' Small Cause Court Act (XV *of* 1882), *cl.* 2, *s.* 1, *s.* 18—*Army Act*, 44 *and* 45 *Vic.*, *c.* 58, *sub-s.* 1, *s.* 151—51 *Vic.*, *c.* 4, *s.* 7.

The words of s. 7 of 51 Vic., c. 4, amending sub-s. 1 of s. 151 of 44 and 45 Vic., c. 58, are meant to restrict the words "within the jurisdiction, &c." (found in sub-s. 1 of s. 151) to persons resident within it, so as to meet and exclude the case of persons casually within the jurisdiction, and not actually resident within it and are limited to that purpose, and do not therefore affect the powers conferred by s. 18 of Act XV of 1882.

[N.F., 1 P.R. 1893 (F.B.).]

CASE stated for the opinion of the High Court under s. 607 of the Code of Civil Procedure.

The claim in this case was for Rs. 422, the price of goods sold and delivered, and interest. The case stated was as follows:—

"The plaintiffs are Ranken and Company, tailors of Calcutta, and the defendant is an officer of the 5th Lancers described as of Kurpur Tal, Naini Tal. The claim is on a tailor's bill for clothes [373] supplied to the defendant, and interest. The merits are not in dispute except as to the item of interest, which is objected to.

"The defendant is an officer of the army subject to Military law, and was not resident within the local jurisdiction of this Court when the suit was instituted. Leave to sue in this Court was applied for and granted under s. 18 of the Presidency Small Cause Courts Act. At the hearing it was contended for the defendant that the Court had no jurisdiction, having regard to the provisions of s. 151, sub-s. 1 of the Army Act (44 and 45 Vic., c. 58), as amended by s. 7 of 51 Vic., c. 4.

"Sub-s. 1 of s. 151 of the Army Act originally stood thus:—'In India all actions of debt and personal actions against persons subject to Military law other than soldiers of the regular forces *within the jurisdiction* of any Court of Small Causes shall be cognizable by such Court to the extent of its powers.' The language of this section coupled with the provision in s. 18 of the Presidency Small Cause Courts Act relating to leave in the case of non-resident defendants has been held sufficient to give this Court jurisdiction over military officers subject to Military law as over other non-resident persons when the case, in other respects, came within the provisions of s. 18, and leave to sue had been given—*Wallis* v. *Taylor* (1). That case was decided in 1885.

"Sub-s. 1 of s. 151 has since been amended by an Act of 1888 (51 Vic., c. 4), s. 7, as follows:—In sub-s. 1 of s. 151 of the Army Act, 1881, the words 'where the persons so subject are *resident* within the *local* jurisdiction' shall be substituted for the words '*within the jurisdiction*.'

"The amendment makes an important alteration in the law. As it originally stood the words were, 'within the jurisdiction' (and the Court

* Small Cause Court Reference No. 6 of 1890 made by R. S. T. MacEwen, Esq., 2nd Judge of the Court of Small Causes, Calcutta, dated the 9th of September 1890.

(1) 13 C. 37.

1891 April 10. — Small Cause Court Reference. — 18 C. 372.

has jurisdiction beyond its local limits); now the words are, 'where the persons so subject are *resident* within the *local* jurisdiction,' clearly imposing, as it seems to me, a limitation of the jurisdiction to cases where the defendant (being a person subject to Military law other than a soldier) is resident within the *local* limits. I think this is clear from the preamble as well as from the language of the section. The preamble is 'and whereas doubts have arisen as to whether the words "within the jurisdiction [374] of any Court" refer to the persons resident within the jurisdiction, and it is expedient to remove such doubts, &c.'

"The cause of action having arisen in Calcatta and leave having been granted, this Court would have jurisdiction but for the alteration in the law, but in my opinion that alteration has ousted the Court's jurisdiction in this case.

"The only answer the plaintiffs' pleader was able to advance to the objection was—(1) that the Act of 1888 being an *annual* Act, which expired with the year for which it was passed, the amendment expired with the Act; and (2) that sub-s. 1 only applied to actions where the amount sued for did not exceed Rs. 400, whereas the present suit exceeds that sum.

"As to the first point it is only necessary to say that the amendment in the Act of 1888 forms part of the substantive law, and the Act of 1881 must be read as amended by the Act of 1888. The Act of 1889 keeps the Act of 1881 in force in India up to 31st December 1890. It does not repeal the amendment made in the previous year, which therefore continues.

"As to the second point, sub-s. 2 of s. 151 was clearly meant to exclude suits exceeding Rs. 400 from the jurisdiction of Military Courts of Request under s. 148, but the Act of 1888 repeals ss. 148, 149 and 150, and the Act of 1890 repeals sub-s. 2 of s. 151 as being no longer required.

"I have been asked by the plaintiffs' pleader to refer the point for the opinion of the High Court, and as it is one of some importance to the trading community of Calcutta and affects the jurisdiction of this Court in a particular class of cases I do so.

"The question which I submit for the opinion of the High Court is—

"Whether on the facts as stated in this reference this Court has jurisdiction to try this case having regard to the provisions of s. 151, sub-s. 1 of the Army Act, as amended by s. 7 of the Act of 1888 (51 Vic., c. 4).

"I have reserved judgment pending the opinion of the High Court."

Subsequently to his reference being submitted, and prior to its hearing, the learned Judge of the Small Cause Court drew the attention of the High Court to a further point which had [375] previously escaped his notice and consideration, namely, "whether, having regard to the first part of cl. 2 of s. 1 of the Presidency Small Cause Courts Act (XV of 1882), the jurisdiction given by the Small Cause Courts Act, s. 18 (*a*), over non-resident defendants can prevail in this case as against the provisions of the Army Act as amended by 51 Vic., c. 4, s. 7."

Mr. Pugh, for the plaintiffs:—The question raised is the same as that decided in *Wallis* v. *Taylor* (1) under the Army Act of 1881 (44 and 45 Vic., c. 58), s. 151, the point being whether the jurisdiction of the Small Cause Court is ousted by the provisions of the Army Act of 1881 (44 and 45 Vic., c. 58), s. 151, as amended by the Act of 1888 (51 Vic.,

(1) 13 C. 37.

c. 4), s. 7, which substitutes for 'within the jurisdiction' the words 'resident within the local jurisdiction.' The identical point was decided last September by Mr. Justice Wilson in *Watts & Co.* v. *Blackett* (1), and he held that the jurisdiction was not affected. In *Wallis* v. *Taylor* (2) other questions were discussed, and the defendant was stationed at Quetta, where there was a Court of Small Causes. Courts of Request are abolished by s. 6 of the amending Act, which repeals ss. 148—150 of the Act of 1881. Probably the word 'resident' was added to explain 'within the jurisdiction' and meet the case of troops on the march, and not to affect the cause of action. It is not likely that the amendment was introduced on account of *Wallis* v. *Taylor* (2). In that case it is ruled that the jurisdiction should be cautiously exercised (p. 39 of the report). These expressions are explained by Trevelyan, J., in *Collett* v. *Armstrong* (3). [PETHERAM, C.J.—Sections 148—150 established Military Courts of Request in places where there was no Court of Small Causes, and s. 151 says what was apparently not necessary because there is nothing in the Act taking away any jurisdiction from Courts of Small Causes.] Section 151 is unnecessary. Here the Small Cause Court refuses to exercise any jurisdiction, and pending the decision of this reference, the Court has refused to grant any decrees, and keeps all cases similar to this pending. [PIGOT, J.—What was the intention of the Legislature in using the word 'resident'?] I can only suggest that it was intended **[376]** to exclude officers on the line of march. It has no reference to *Wallis* v. *Taylor* (2). The Provincial Small Cause Courts Act (IX of 1887) says nothing as to residence or cause of action (*vide* chaps. 2, 3). A certain jurisdiction is given by the Presidency Small Cause Courts Act, and I contend that if it is taken away by the Army Act, it must be done by apt words of exclusion, such as 'resident only' or 'not elsewhere.' Clear and undoubted language would be required to take away the jurisdiction. The Army Act is re-enacted every year without being debated or considered. There is a consensus of opinion in this Court in favour of the view I put forward. The jurisdiction of Courts of Request was exclusive in cases under Rs. 400, and their abolition leaves all other Courts to exercise their jurisdiction, so that where there is no Court of Small Causes there would be no jurisdiction at all. Thus the limits of the jurisdiction being Rs. 500 at that time, if all other Courts were excluded, a man would only have to incur a debt exceeding Rs. 500, and he would be safe. This question is of great importance to Calcutta tradesmen.

1891 APRIL 10. — SMALL CAUSE COURT REFERENCE. — 18 C. 372.

No one appeared for the defendant.

OPINION.

The opinion of the Court (PETHERAM, C.J., and PIGOT and MACPHERSON, JJ.) was delivered by

PIGOT, J.—In this case the defendant resides outside the local limits of the jurisdiction of the Calcutta Court of Small Causes. Leave to institute the suit was granted under the provisions of s. 18 of the Presidency Small Cause Courts Act.

The defendant is an officer of the army subject to Military law, and the question is whether, having regard to the provisions of s. 151 of the Army Act, 1881, as amended by s. 7 of the Army Act of 1888, the operation of which Act is by the Army Act of 1889 continued up to December

(1) 18 C. 144. (2) 13 C. 37. (3) 14 C. 826.

1891 APRIL 10. — SMALL CAUSE COURT REFERENCE. — 18 C. 372.

1890, the Small Cause Court has jurisdiction to entertain this suit against the defendant.

This question has already been considered in this Court in the case of *In the matter of the proposed suit of Watts and Co.* v. *Blackett* (1). In that case the Chief Judge of the Small Cause Court on being applied to for leave under s. 18 to institute a suit against an officer of the army subject to Military law and resident out of the local limits of the jurisdiction refused to grant such **[377]** leave, on the ground that by reason of the provisions of s. 151 as amended, the Court had no jurisdiction under s. 18 to entertain the suit. Application was then made to this Court on its original side for an order to the Small Cause Court to exercise its discretion under s. 18 as to granting or withholding leave to institute the suit. Mr. Justice Wilson made the order applied for, holding that nothing in the terms of the amended section operated to restrict the jurisdiction of the Small Cause Court under s. 18.

On this reference, which, it may be mentioned, was made before the decision of Mr. Justice Wilson, we are practically asked as an Appellate Bench to overrule that decision.

Section 2 of the Presidency Small Cause Court Act provides that nothing herein contained shall affect the provisions of the Army Act, 1881, s. 151; and this section as amended by the Army Act of 1888 is now to be read as follows:—

"In India all actions of debt and personal actions against persons subject to Military law, other than soldiers of the regular army, where the persons so subject are resident within the local jurisdiction of any Court of Small Causes, shall be cognizable by such Court to the extent of its powers."

This section so amended applies in the present case.

The contention is that this limits the jurisdiction to the case of persons who are resident within the jurisdiction.

We do not think so. We agree with the judgment of Wilson, J., above mentioned. It is not, perhaps, very easy to construe the preamble to the amending section: as it is difficult to suppose that any doubt could have arisen that, at any rate, "persons resident within the jurisdiction" must be referred to by the words "within the jurisdiction." However this may be, we think the words in the amending section must be meant to restrict the words "within the jurisdiction, &c.," to persons resident within it, so as to meet and exclude the case of persons casually within the jurisdiction for a short time and not actually resident within it, and that it is limited to this purpose, and therefore does not affect the powers conferred by s. 18. We answer the question therefore in the affirmative.

Attorneys for the plaintiffs: Messrs. *Sanderson & Co.*

(1) 18 C. 144.

18 C. 378.

[378] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

MOWLA NEWAZ (*Plaintiff*), *Petitioner v.* SAJIDUNNISSA BIBI (*one of the Defendants*), *Opposite party.**
[13th April, 1891.]

Appeal to Privy Council—Appealable value—Suit for restitution of conjugal rights—Valuation of suit—Suit conducted up to appeal as if properly valued—Jurisdiction—Consent of parties.

A suit for restitution of conjugal rights is not one to which any special money value can be attached for the purposes of jurisdiction—*Golam Rahman* v. *Fatima Bibi* (1) followed.

Held, therefore, that no appeal lay as of right to Her Majesty in Council in such a suit although the suit had been valued at Rs. 25,000, and that valuation had been relied on by the defendant who had appealed to the High Court from the decision of the first Court which had gone against him.

[R., 31 C. 849 (854)=8 C.W.N. 705; D., 28 A. 545 (F.B.) =3 A.L.J. 266=A.W.N. (1906) 99 (101); 34 C. 352 (356)=5 C.L.J. 400=11 C.W.N. 458.]

THIS was an application for leave to appeal to the Privy Council from a decision of the High Court, dated 16th September 1890.

The suit was brought by Syed Mowla Newaz against Sajidunissa Bibi and others, defendants, and the plaint stated that the plaintiff was married to Sajidunnissa in Pous 1283 (January 1877), and that she lived with him until Bysack 1292 (April 1885), when in his absence she was persuaded by the other defendants to leave his house, and that those defendants had since put obstructions in the way of his getting his wife back again. The relief prayed for was a declaration of the plaintiff's conjugal rights, and a decree against her for the restitution of his conjugal rights, and an injunction against the other defendants restraining them from interfering with his enjoyment of such rights, and for such further or other relief as the plaintiff might be entitled to.

[379] The suit was brought in the Court of the Subordinate Judge of Burdwan, and was valued at Rs. 25,000. In that Court the suit was decreed in favour of the plaintiff, and the defendant preferred an appeal from that decision to the High Court, which appeal she valued at Rs. 25,000.

In answer to the suit the defendant set up the plea of dissolution of her marriage by reason of an alleged breach of a condition in an agreement set up by her as having been entered into between the plaintiff and his wife's mother, Habibunnissa, under the terms of which the plaintiff was not to take his wife to his own house or to any other places against her will and consent, and that a breach of this condition (and such breach it was alleged had been committed by the plaintiff) had the effect of annulling marriage, as if there had been a divorce.

The Subordinate Judge found that the alleged condition had not been broken, and that there was no dissolution of the marriage, and the decree of that Court was that the suit be decreed with costs, the costs, among others the pleader's fee, being calculated on the estimated value of the suit,

* Privy Council Application No. 18 of 1891, from a judgment of Messrs. Prinsep and Banerjee, JJ., dated the 16th of September 1890, in appeal from Original Decree No. 45 of 1889.

(1) 13 C. 232.

1891 APRIL 13. — APPELLATE CIVIL. — 18 C. 378.

viz., Rs. 25,000. On appeal the High Court held that there had been a violation of the condition, and that the marriage had been thereby dissolved, and they therefore allowed the appeal, and dismissed the suit. From that decision the plaintiff was now desirous of appealing to the Privy Council.

The grounds of appeal were that the judgment was erroneous in finding that there had been any breach of the condition by the plaintiff; that the said agreement was illegal and not binding on him, nor capable of affecting the rights and obligations arising from the marriage which had been contracted; that Sajidunnissa not being a party to the agreement could not avail herself of its provisions; and that no dissolution of the marriage was proved.

The only question now material was as to the proper valuation of a suit for restitution of conjugal rights.

Mr. *J. G. Apcar* and Baboo *Nilmadhub Bose*, for the petitioner.

Mr. *Woodroffe*, Baboo *Upendra Chunder Bose*, Moulvie *Serajul Islam*, Baboo *Rajendra Nath Bose* and Baboo *Mohan Chand Mitter*, for the opposite party.

[380] Mr. *Apcar*, for the petitioner, contended that the suit being for an amount above Rs. 10,000, there was a right of appeal to the Privy Council, under s. 596 of the Civil Procedure Code. The suit was properly valued, and had been tried up to the decision of the appeal in the High Court on the terms of the plaintiff's original valuation and without any objection on the part of the defendants. The costs also had been allowed on that valuation. The defendant had in fact, when appealing to the High Court from the decision of the Subordinate Judge, valued her appeal at the same amount, and had thereby waived any objection, and acquiesced in the valuation of the suit. The jurisdiction of the first Court depended on the valuation of the suit, and in this case the defendant had relied upon the valuation and had obtained an advantage by reason of the jurisdiction given thereby. The suit, moreover, was not one only for restitution of conjugal rights, but practically one for damages. The plaintiff was therefore now entitled to say that the suit was above the appealable value, and to claim a right of appeal.

Mr. *Woodroffe contra* contended that the suit was really one for restitution of conjugal rights, and was a suit which could not be estimated at a money valuation. In *Golam Rahman* v. *Fatima Bibi* (1) it was held that a money value could not be put on a suit for restitution of conjugal rights for the purpose of giving an appeal under the Burma Courts Act (XVII of 1875), s. 49. This decision should govern the present case. Consent of parties does not confer jurisdiction on a Court.

Mr. *Apcar* in reply:—Since the case of *Golam Rahman* v. *Fatima Bibi* was decided, the Legislature have passed an Act (VII of 1887) to prescribe the mode of valuing certain suits for the purpose of determining the jurisdiction of the Courts; and s. 9 of that Act gives power to the High Court, where it is of opinion that a suit does not admit of being satisfactorily valued, to make directions with regard to the valuation of such suits. No such directions have been given with respect to suits of this nature, and it is submitted the Court must fall back on the valuation made by the parties themselves, *i.e.*, made by one party and acquiesced in by the other.

[381] The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

---

(1) 13 C. 232.

JUDGMENT.

This is an application for leave to appeal to Her Majesty in Council.

It is first claimed that the petitioner has a right of appeal, inasmuch as the subject-matter of the suit was of a value exceeding Rs. 10,000. In support of this we have been referred to the amount of the suit as stated in the plaint, and also in the appeal to this Court made by the defendant. We have also been reminded that it was only on a consideration of such value that the suit was tried in the Court of the Subordinate Judge and by this Court in first appeal.

On these grounds, and especially because the defendant in a way consented to the value stated by the plaintiff by adopting it in her petition of appeal, we have been asked to hold that the subject-matter of the suit is above Rs. 10,000, and therefore appealable as a matter of right to Her Majesty in Council. We think that the action of the parties in this case cannot affect the question of jurisdiction. In respect of the trial by this Court of the case on first appeal, we would observe that the point was never raised, and was never considered at the trial. On the other hand, we find that this point has been directly decided by a Division Bench of this Court in the case of *Golam Rahman* v. *Fatima Bibi* (1), with which decision we entirely agree. It was there laid down that a suit of this description for restitution of conjugal rights and possession of a wife was not one to which any special money value can be attached for the purposes of jurisdiction.

We observe that this was a matter which it was apparently contemplated by the Legislature should be dealt with under Act VII of 1887, but no specific rules being passed on the subject, the matter has remained as it was when the judgment to which a reference has been made was passed. Under such circumstances we are unable to hold that, by reason of the value of the subject-matter of the suit, an appeal necessarily lies to Her Majesty in Council.

We have next been asked to certify that this is a fit case for appeal to Her Majesty in Council within the terms of s. 595 **[382]** (*c*) of the Code. We have had some difficulty in deciding this point, but having regard to the facts found in the judgment of this Court read with the allegations made in the affidavit put in by the opposite party, the defendant in the suit, and which statements have not been contradicted on behalf of plaintiff, we are unable to certify that in our opinion this case is a fit one for appeal, and we therefore leave it to the petitioner, if so advised, to make an application to the Judicial Committee.

The application is refused with costs.

J. V. W. *Application refused.*

---

(1) 13 C. 232.

1891
APRIL 7.

APPELLATE CIVIL.

18 C. 382.

18 C. 382.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

KAZEM ALI (*Petitioner*) *v.* AZIM ALI KHAN *Objector.**
[7th April, 1891.]

Appeal—Act XX of 1863, *s.* 18—*Order refusing leave to sue—Decree—Civil Procedure Code*, 1882, *s.* 2.

An order refusing leave to institute a suit under s. 18 of Act XX of 1863 is not a "decree" within the meaning of s. 2 of the Civil Procedure Code and is not appealable.

[**F.**, 19 C. 275 (286); **Appl.**, 34 C. 584 (585)=5 C.L.J. 641 (642).]

AN application was made to the Judge of Moorshedabad by the petitioner as one of the members of the Committee of Management of a Mahomedan endowment for leave to institute a suit under Act XX of 1863, s. 18, the object of the suit being to get rid of the objector as President of the Committee of Management of the endowment, and to have another trustee appointed in the place of one who had died. The Judge gave on the 8th February 1890 the following judgment on the application:—

"This is an application under Act XX of 1863, s. 18, for leave to the petitioner to institute a suit against the objector. The latter having received notice to show cause why leave should not be granted appears by pleader. The petition has been read and the pleaders have been heard. The application does not appear to me to be a *bona fide* one. The charges brought against the **[383]** Nawab are all couched in the vaguest terms, and it is a matter of extreme suspicion that for upwards of ten years during which the petitioner has been a trustee, he has not had a word to say against the Nawab's management until a quarrel has occurred regarding the renewal of an *ijara* lately held by Messrs. Watson and Company. I decline to sanction the institution of a suit and dismiss this application. I need not deal with the other prayers contained in the petition except the one which relates to the appointment of another trustee. Each party has named a gentleman. I will hear the pleaders on the 14th, and then decide which of the two should be appointed. Petitioner will pay objector's costs."

The order made in accordance with this judgment was "that the prayer for bringing a suit against the objector be disallowed; that Nawab Syed Mozuffer Ali is appointed member in the place of Syed Amir Ali, deceased, who was a member in respect of the estate of Basant Ali Khan, deceased; and that the objector's costs be paid by the petitioner."

The petitioner appealed from this decision to the High Court.

Mr. *Woodroffe* and Baboo *Ram Churn Mitter*, for the appellant.

The Advocate-General (Sir *Charles Paul*), Baboo *Mohini Mohun Roy* and Baboo *Dwarka Nath Chuckerbutty*, for the respondent.

The following cases were cited:—*Khuderam Singh* v. *Sham Singh Poojoory* (1), *Kalub Hossein* v. *Ali Hossein* (2), *Delrus Banoo Begum* v. *Abdoor Rahman* (3), *Kaviraja Sundara Murteya Pillai* v. *Nalla Naikan*

---

* Appeal from Original Decree No. 82 of 1890, against the decree of R. H. Anderson, Esq., Judge of Moorshedabad, dated the 8th of February 1890.

(1) W.R. (1864) Mis. 25. (2) 4 N.W. 3. (3) 21 W.R. 368.

Pillai (1), *In re Venkateswara* (2), *Civil Revision Petition* 101 *of* 1882 (3), which were cases in which an appeal from an order refusing leave to sue under Act XX of 1863 was held not to lie; *Minakshi Naidu* v. *Sabramanya Sastri* (4), a Privy Council case, in which it was held that no appeal lay from an order under s. 10 of the Act appointing a member of a Committee of Management; and *Ackeni Sahib* v. *Bava Malimiyar* (5), in which an appeal was allowed against the order of a District Court, under s. 5 of the Act, appointing a trustee.

[384] The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows

JUDGMENT.

This matter arises out of an order by the District Judge under s. 18 of Act XX of 1863, refusing to give leave to the petitioner to institute a suit having reference to a Mahomedan endowment.

The first question raised for our dicision is, whether there is any right of appeal. There is no such right conferred by the Act, but it is argued that, under the new definition of a decree given in the Code of Civil Procedure of 1892, a right of appeal against such an order is given, because such an order would amount to a decree.

We are not prepared to accept such an interpretation of this definition of a decree. The order in question is a refusal to give leave to institute a suit. It does not come within the definition of the term "decree," either as amounting to a formal expression of an adjudication upon a right claimed, or as amounting to an order rejecting a plaint. The order, as we understand it, merely determines that there are no *prima facie* grounds for instituting a suit. There is no adjudication of any right inherent in the petitioner. Nor can it be regarded as an order rejecting a plaint, because it is an order refusing leave to file a plaint. In that view we think there is no ground of appeal.

In giving a special order for the admission of an appeal subject to any objections that may be taken at the hearing, another Division Bench of this Court gave permission to the petitioner to move the Court under s. 622 of the Code of Civil Procedure, or under s. 15 of the Charter Act, with a view to set aside the order of the District Judge. We have accordingly heard all the arguments which could be raised against the merits of the order passed. We think, however, that there are no sufficient grounds for our interference with the order under the special powers thus conferred on this Court, nor do we think, if we were to consider the case of the petitioner on the merits, that there is any sufficient ground to question the correctness of the District Judge's order. The allegations contained in the petition were of the vaguest description, and not such as would warrant the Judge to give permission to the petitioner so as to make any of those allegations the foundation of a suit for misconduct against the **[385]** President of the Committee. We further have the satisfaction of learning that in the course of these proceedings, a third member has been appointed to the Committee, who will thus afford the means of forming a quorum, so as to guarantee the proper management of the endowment and satisfy any complaints that may arise.

The appeal must therefore be dismissed with costs.

J. V. W. *Appeal dismissed.*

(1) 4 M.H.C.R. 93. (2) 10 M. 98. (3) 10 M. 98, note.
(4) 11 M. 26. (5) 4 M. 295.

1891
FEB. 27.

APPELLATE CIVIL.

18 C. 385.

18 C. 385.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

SURENDRA NANDAN *alias* GYANENDRA NANDAN DAS, MINOR, BY HIS GUARDIAN SANTOMONI DASI, AND ANOTHER (*Defendants*) *v.* SAILAJA KANT DAS MAHAPATRA, MINOR, BY HIS GUARDIAN CHOWDHRY RADHA KANT DAS MAHAPATRA (*Plaintiff*).*
[27th February, 1891.]

Hindu Law—Adoption—Validity of adoption—Effect of adoption—Divesting of estate already vested—Mitakshara Law.

The will of *B*, a Hindu, appointed one *K* manager of all his property, and gave his widow *S* power to adopt a son, and went on to state that *S* " shall manage all the affairs with the consent of the said manager " (*K*), " and she will not be able to do any wrongful act or alienate and waste property uselessly and without his consent. If she do so, it will be cancelled by the said manager or the adopted son; and she will adopt a son with the good advice and opinion of the manager." *S*, wishing to adopt the plaintiff, sent a registered letter to *K*, who had refused to give *S* any advice or assistance, intimating her intention and asking him to come and see the ceremony performed, but he declined to receive the letter which was returned to *S* by the postal authorities, and the plaintiff was eventually adopted without the consent of *K*. *Held*, that the consent of *K* was not a condition precedent to the validity of the adoption, and that it was not invalid by reason of its having been made without *K's* advice and consent.

B and *R* were living as a joint-family subject to the Mitakshara law. *B* died on the 28th February 1884, leaving him surviving a widow *S*, to whom he gave power to adopt a son to him, and *R* who succeeded by survivorship to *B's* share in the joint-family property. *S* adopted the plaintiff on [386] the 27th October 1885. *Held*, that on her adoption the plaintiff became entitled to the share of his father *B*, notwithstanding that such share had already vested in *R*.

Mondakini Dasi v. *Adinath Dey* (1) followed.

[**Diss.**, 10 Bom. L.R. 692 (693); **F.**, 4 Bom. L.R, 883 (885); **Appr.**, 29 M. 382=3 A.L.J. 702=8 Bom. L.R. 700=4 C.L.J. 171=10 C.W.N. 921=33 I.A. 145 (**P.C.**) =16 M L.J. 276=1 M.L.T. 260; **R.**, 29 B. 51 (57)=6 Bom. L.R. 268; 25 C. 662 (689); 26 M. 143 (152)=12 M.L.J. 197; **D.**, 22 C. 565; 1 C.W.N. 121.]

THIS was a suit to establish the validity of the plaintiff's adoption, and to recover joint possession of certain lands as well as undivided possession of certain other lands and moveable property, and for mesne profits.

The position and relationship of the parties is explained by the following genealogical table (which was annexed to, and together with the dates attached to the names declared to be part of, the judgment of the High Court) :—

* Appeal from Original Decree No. 88 of 1890, against the decree of Baboo Juggo Bandhu Gangully, Subordinate Judge of Midnapore, dated the 27th of December 1889.

(1) 18 C. 69.

Damudar Das Mahapatra.

Modhusudan Das Mahapatra. | Boidyanath Das Mahapatra. | Nittyanand Das Mahapatra (died Aughran 1273). | Aditya Caran Das Mahapatra.

(Aditya Caran Das Mahapatra:) Gopinath Das. | Mothur Mohan.

(Nittyanand Das Mahapatra:) Srinath = Annapurna. | Raghunath = Sudhamoyee (died 13th Assin 1293). | Bissonath = Santomoni (defendant No. 1) (died 17th Falgoon 1290).

(Raghunath:) Jadabendra (defendant No. 3). | Surendra (defendant No. 2).

From this table it appears that Damudar Das Mahapatra was the ancestor of the family. He had four sons, Modhusudan Das Mahapatra, Boidyanath Das Mahapatra, Nittyanand Das Mahapatra, and Aditya Charn Das Mahapatra. Modhusudan and Bidyanath had no children. Aditya Charn had two children—Gopinath and Mothur Mohan. Nittyanand, who died in Aughran 1273 (November 1866), had three sons—Srinath, Raghunath, and Bissonath. Bissonath died on 17th Falgoon 1290 (28th February 1884), leaving his widow Santomoni (the defendant No. 1) him surviving. Raghunath died on the 13th Assin 1293 (28th September 1886), leaving him surviving two sons—Jadabendra (defendant No. 3) and Surendra (defendant No. 2).

[387] The facts, so far as they were material to this report, were as follows:—

Bissonath made a will on 3rd Falgoon 1290 (14th February 1884), of which the material provisions were—"(2) My ancestral joint taluks and lakheraj lands and paddy and dealings in cash and furniture and articles of gold, silver, brass, &c., all properties moveable and immoveable are under the management of my elder uterine brother, Raghunath Das Mahapatra, and we have been in joint possession. After my death my wife Santomoni Dasi will be entitled to, and in possession of, a moiety of all those properties, and will be able to adopt from one to three sons, *i.e.*, she will be able to adopt a second son if the first adopted son be of bad character and of a different religion or dies, and she will be able to adopt a third son if the second adopted son be similarly guilty or dies. (6) My wife being a female, I appoint Chowdhury Krishna Gobind Das Mahapatra of Srirampur of pergana Sipur, who is my gyanti cousin and well-wisher, manager for management of my ancestral joint and self-acquired properties, moveable and immoveable, and trade, &c., together with *dena-powna* and all affairs. After my death the said manager shall protect and look after all my estate and preform the deb-sheba and all other acts in my share. The manager shall continue to manage the suits which are going on and those which will be instituted in future. If the said manager desires, he will be able to appoint a manager according to his own choice and get all the affairs managed. (9) My wife shall manage all the affairs with the consent of the said manager, and she will not be able to do any wrongful act or alienate and waste property, &c., uselessly and without his consent. If she do so, it will be cancelled by the said manager or the adopted son, and she will adopt a son with the good advice and opinion of the manager."

1891 FEB. 27. — APPELLATE CIVIL. — 18 C. 385.

The plaintiff stated that Krishna Gobind Das, though constantly requested to do so by Santomoni, refused to give her any advice or assistance; that she having determined to adopt the plaintiff, sent a registered letter to Krishna Gobind Das, intimating her intention to do so, and asking him to come and see the ceremony performed; that he declined to receive the letter which was returned by the postal authorities to Santomoni; that on the 8th Kartick [388] 1292 (27th October 1885), the plaintiff was duly adopted by Santomoni, the defendant No. 1; that it had come to the plaintiff's knowledge that Santomoni was denying his adoption by her, and alleging that she had adopted the defendant No. 2, the second son of Raghunath, after Raghunath's death, by taking him in adoption from his mother Sudhamoyee. The plaintiff submitted that this alleged adoption of defendant No. 2 was invalid, and prayed for a declaration that he (the plaintiff) was the validly adopted son of Bissonath, for possession of an eight-annas share of the joint property which belonged to Bissonath and Raghunath, and for sole possession of certain self-acquired property of Bissonath, and for mesne profits.

The defendants Nos. 1 and 2 filed a joint written statement in which they denied the adoption of the plaintiff by Santomoni, and alleged that she had validly and according to the Shastras adopted the defendant No. 2; that even if Santomoni had adopted the plaintiff, such adoption was invalid, not having been made according to the advice and opinion of Krishna Gobind Das, as was required by the will of Bissonath, it being, as they submitted, a condition precedent to the adoption of any boy by Santomoni that such adoption should be according to the advice and opinion of Krishna Gobind Das.

The defendant No. 3 filed a separate written statement in which he denied the adoption of the plaintiff, and alleged that Santomoni had validly adopted the defendant No. 2; that his great-uncle Aditya Charn got the joint family property partitioned many years ago; that his other great-uncles Modhusudan and Boidyanath and his grandfather Nittyanand executed an angsonama (a partition deed) on the 16th of Asar 1261 (28th June 1854) in respect of the remaining joint-properties; that Modhusudan gave to Raghunath certain of the properties of which the plaintiff was now claiming possession, and of which properties he (Raghunath) remained in possession; that in 1273 (1866) Nittyanand executed an anumatipattro in favour of his sons Raghunath and Bissonath, and made provisions with regard to the possession and enjoyment of his ancestral and self-acquired property, and also of the property given by Modhusudan to Raghunath; that Raghunath performed the deb-sheba and the prescribed rights and ceremonies, and before his death [389] appointed the defendant No. 3 the shebait, and that in the teeth of this anumatipattro the plaintiff's suit was not maintainable. He further alleged that Raghunath and Bissonath were members of a Hindu joint family governed by the Mitakshara law; and that on Bissonath's dying without a son, Raghunath succeeded, and on Raghunath's death the defendant No. 3 succeeded to the entire property. He denied that Bissonath died possessed of any self-acquired properties.

On these pleadings issues were framed, of which the following are those material to this report:—

4. Whether Santomoni adopted the minor plaintiff as her son.

5. If she adopted him as her son, whether the adoption took place according to the Shastras.

6. Whether under the directions contained in Bissonath's will such adoption was made with the permission and consent of Krishna Gobind Das. If the adoption did not take place with such consent and permission, whether the adoption is on that account invalid.

10. Whether the Mitakshara law is prevalent in the family of Bissonath and Raghunath. If it be so, whether the plaintiff can sue as the adopted son of Bissonath when his adoption did not take place in the lifetime of Bissonath and when Raghunath was alive.

Issues 7, 8 and 9 as to the execution and validity of the anumatipattro, and as to certain properties which the defendants contended the plaintiff was not entitled to claim, were decided against the defendants.

On the 4th, 5th and 6th issues the Subordinate Judge found that the adoption of the plaintiff was duly made by Santomoni, and that it was a valid adoption. On the 10th issue, he held that the Mitakshara law governed the family of Bissonath and Raghunath; that they lived joint in mess and property; and that Bissonath's share in the property vested after Bissonath's death in Raghunath by right of survivorship, and was divested on the adoption of the plaintiff and vested in him as adopted son of Bissonath.

From this decision the defendants Nos. 2 and 3 appealed to the High Court.

[390] Baboo *Mohini Mohun Roy*, Dr. *Rashbehari Ghose*, Baboo *Omernath Bose*, and Baboo *Manmotho Nath Mitter*, for the appellants,

Baboo *Srinath Das* and Baboo *Golok Chunder Sircar*, for the respondent.

The arguments and cases cited are sufficiently stated in the judgment.

JUDGMENT.

The judgment of the Court (NORRIS and BEVERLEY, JJ.) after stating the facts and the issues, continued as follows:—

These issues 4, 5 and 6 were tried together, and as to them the Subordinate Judge says:—"I am of opinion that there is abundant evidence in the case that No. 1 defendant Santomoni, the widow of the late Bissonath Das Mahapatra, according to the directions contained in her husband's will, dated 3rd Falgoon 1290, which gave her authority to adopt, really adopted as her son the minor plaintiff, who was the natural son of Radha Kant Das Mahapatra, on 8th Kartick 1292, Amli (22nd October 1884) by performing religious ceremonies as provided in the Shastras." This finding is appealed against in the grounds of appeal, but at the bar here it was admitted that it could not be successfully attacked, and therefore it must stand confirmed.

The Subordinate Judge then discusses the question as to the validity of the adoption upon the assumption that Krishna Gobind Das had not advised it or consented to it, and upon this point he says:—"It is urged that as the adoption of plaintiff did not take place with the consent of the executor or manager Krishna Gobind, it is invalid. Plaintiff tried to prove that Krishna Gobind gave secret consent to such adoption, though outwardly he did not give consent, as he was most unwilling to incur the displeasure of Raghu with whom he was on friendly terms. The evidence of plaintiff's witnesses, Radha Kanto and Ram Pershad, that in Assin 1291 Krishna Gobind advised Santomoni to take protection of Radha Kant and Gopi Mohun and to adopt a son of Radha Kant, cannot be believed, for Radha Kant and Gopi Mohun were then on ill terms with Krishna Gobind, as litigation was

1891 FEB. 27. — APPELLATE CIVIL. — 18 C. 385.

then going on between them in the High Court. Then the evidence adduced by the plaintiff that Krishna Gobind's consent was taken before the adoption of plaintiff in Kartick 1292 is also untrustworthy, for it is **[391]** improbable that Krishna Gobind would give such consent when at that time he applied for revocation of the letters of administration taken out by Santomoni. It rather appears that Santomoni wrote a registered letter (Ex. VI) on 14th Assar 1291 to Krishna Gobind to give his consent to the adoption, and Krishna Gobind refused to take the letter. Hence it is clear that Krishna Gobind did not give his consent to the adoption. Santomoni's statement in her petition of objection in the probate case brought by Krishna Gobind that she adopted plaintiff as her son with the consent of Krishna Gobind was only made to give more validity to the adoption of the plaintiff. The will of Bissonath in the first part of its 9th paragraph directs that if Santomoni does any illegal act without any cause, or make any alienation without the consent of Krishna Gobind, her act and alienation would be void. It further directs in the second part of that paragraph, that she should adopt with the সৎযুক্তি ও পরামর্শ of Krishna Gobind, *i.e.*, with the good advice of Krishna Gobind. It will therefore appear that with respect to the first part of the 9th paragraph, penalty is provided if the directions of that part are not complied with, but there is no penalty provided if the directions of the second part of that paragraph are not fully taken into consideration. The spirit of the will (*vide* the 2nd paragraph of the will) is that Santomoni should adopt a son, and in accordance with such directions she adopted the plaintiff as her son. She tried her best to take the consent of Krishna Gobind before such adoption, but Krishna Gobind on the grounds shown above refused to give consent. Santomoni under such helpless condition was obliged to adopt plaintiff as her son in order to save her property by paying off the debts of her husband by taking advances from plaintiff's natural father, Radha Kant. Under such circumstances, the adoption cannot be said to be invalid, merely because Krishna Gobind withheld giving his advice to such adoption. Further, there is no penalty provided if the adoption be made without the consent of Krishna Gobind. The primary desire of the testator, Bissonath, was that his widow should adopt, and the widow carried out such desire by adoption. The case of *Beem Churn Sen* v. *Heera Lall Seal* (1) has, I think, no application to this case, for in that case **[392]** consent was a condition precedent to adoption, and there was a provision in the will that on failure to get consent to the adoption the property would pass over to another. But no such penalty is prescribed in Bissonath's will in the present case. Hence the adoption of plaintiff by Bissonath's widow, Santomoni, is valid."

This finding is attacked in the fifth ground of appeal, and we think, as we intimated in the course of the argument yesterday, that the judgment of the Subordinate Judge on this point is correct and should be confirmed. We think that all the testator intended was to suggest that his wife would exercise a sound discretion if in the matter of choosing a boy to be adopted he consulted Krishna Gobind, a man in whom he, the testator, seems to have reposed confidence. Looking at the religious efficacy that ensues from the adoption of a son by a widow to her deceased husband, we think the Court should not be too astute to defeat an adoption, but should rather do its utmost to support it, unless such adop-

(1) 2 I.J.N.S. 225.

tion is clearly in excess or in breach of the power to make it. There was a case referred to by Baboo Mohini Mohun Roy upon this point, *Rangubai* v. *Bhagirthibai* (1) but as pointed out in the course of the arguments the power of adoption there was entirely different from the power of adoption here, and we think that that case is not applicable to the facts of the case with which we are at present dealing.

With regard to the 7th issue, the Subordinate Judge finds that the anumatipattro is invalid. He says: "It seems to me that the clause for deb-sheba in the so-called agreement of dedication is too general in its nature and cannot properly be given effect to." This finding was attacked in the grounds of appeal, but the objection to it has not been pressed. It was contended, however, that it was in the nature of a family arrangement, and that such family arrangement could not and should not be disturbed by the plaintiff without proper notice being given. This specific ground is not taken in the grounds of appeal. No authority in support of it was cited by the learned pleader who has so ably argued the case for the defendant-appellant, and we cannot give any effect to it.

[393] Issues 8th and 9th were found against the defendants, and the findings with respect to those issues have not been attacked in appeal.

On the 10th issue it has been found that the family is governed by the Mitakshara law, and that finding has not been impeached. But it has been contended, and very forcibly, by Baboo Mohini Mohun Roy for the appellant that as Raghunath succeeded by right of survivorship to Bissonath's share in the joint estate on his (Bissonath's) death in 1290, Raghunath was not liable to be divested of such share by the plaintiff even if the adoption was good. That point was urged in the Court below, and upon that point the Subordinate Judge says as follows:—"The question now is whether Raghu can be divested of such property by the subsequent adoption of the plaintiff by the widow of Bissonath. I think under the authority of the Privy Council ruling in the case of *Virada Pratapa Raghunada Deo* v. *Brojokishore Patta Deo* (2) which has been misunderstood, as pointed out by Mr. Mayne (note (*c*), article or s. 172, Hindu Law, fourth edition) in the case of *Kally Prosunno Ghose* v. *Gocool Chunder Mitter* (3), and as also pointed out by the counsel on both sides in the case of *Nilkomul Lahiri* v. *Jotindro Mohun Lahiri* (4), the subsequent adoption of plaintiff by the widow of Bissonath would divest Raghunath of Bissonath's estate vested in him. But this rule will not apply to the case of collateral succession as laid down in the case of *Nilkomul Lahiri* v. *Jotendro Mohun Lahiri* quoted above. Mr. Mayne (*vide* article or s. 179, Hindu Law, fourth edition) says that some passages in the judgment of *Kally Prosunno Ghose* v. *Gocool Chunder Mitter* are more broadly expressed than they would have been if the Court had not misconceived the facts of the Privy Council case of *Virada Pratapa Raghunada Deo* v. *Brojokishore Patta Deo*. Then he goes on to say that the decision itself, coupled with the other case cited, seems to lead to the following conclusions, one of which is 'that when an adoption is made to the last male holder, the adopted son will divest the estate of any person whose title would have been inferior to his if he had been adopted prior to the death.' Hence the plaintiff as **[394]** adopted son of Bissonath is entitled to claim the property of his adoptive father, Bissonath."

(1) 2 B. 377.
(2) 1 M. 69=3 I.A. 154.
(3) 2 C. 295.
(4) 7 C. 178.

1891
FEB. 27.
—
APPELLATE
CIVIL.
—
18 C. 385.

In support of this contention Baboo Mohini Mohun Roy relied upon, first of all, the case of *Kalidas Das* v. *Krishna Chunder Das* (1). That case was tried on the original side of this Court by Mr. Justice Norman. The facts were that "Deb Chandra Das died in the year 1832, leaving an only son Bireswar Das who had been blind from his birth, and two widows, the survivor of whom, Pyari Mani, died in 1849. Bireswar, the blind son, being according to Hindu law excluded from inheritance; on the death of Pyari Mani, Gurudas, the nephew of Deb Chandra, occupied the position of heir of Deb Chandra. Bireswar having married, a son, Krishna Chandra, was born to him in 1858. Bireswar died in 1861." Upon these facts, Mr. Justice Norman, at p. 106 of the report, says:—"In my opinion, on the birth of Krishna Chandra, he became entitled to the inheritance from which his father had been excluded." The case was heard on appeal by Sir Barnes Peacock, the then Chief Justice, and Mr. Justice A. G. Macpherson and it being found that the decision of Mr. Justice Norman was in conflict with a previous decision arrived at by Bayley and Macpherson, JJ., the case was referred to a Full Bench, and the Full Bench decided that "by Hindu law an estate once vested cannot be divested in favour of the son of an excluded person born after the death of the ancestor. Such ruling does not apply to the case of the son of an excluded person if, having been begotten and being in the womb at the time of the ancestor's death, he is afterwards born capable of inheriting."

The next cases relied upon were a case of *Bhoobun Moyee* v. *Ramkrishore Acharjee* (2) and the case of *Kally Prosunno Ghose* v. *Gocool Chunder Mitter* (3), which was a case tried on the original side of this Court by two learned Judges, Mr. Justice Pontifex and Mr. Justice (now Sir) Romesh Chunder Mitter. Reference was also made to a case which in the course of the argument has been called "the Madras case"—*Virada Pratapa Raghunada Deo* v. *Brojokishore Patta Deo* (4).

[395] With reference to the case of *Kally Prosunno Ghose* v. *Gocool Chunder Mitter* (3), Mr. Mayne, in his last edition of Hindu Law and Usage at p. 189 in a note, says:—"The facts of this case seem to have been misunderstood by the High Court of Bengal in *Kally Prosunno Ghose* v. *Gocool Chunder Mitter* (post, s. 179), where they say (at p. 309 of I.L.R., 2 Calc.)—'The property in dispute in that case was not a joint-family property, and the surviving members of the joint-family unjustly took possession of it, by excluding the widow of the owner, who was entitled by the Mitakshara law to succeed to it.' The property was joint, though impartible, and it was admitted that, as the brothers were undivided, the widow had no right to anything beyond maintenance." And a reference to the facts of the Madras case would seem to show that Mr. Mayne has pointed out an error which really exists in the judgment of the Court in the case of *Kally Prosunno Ghose* v. *Gocool Chunder Mitter*. Then Mr. Mayne goes on to say at p. 198, paragraph 179—"But the decision itself, coupled with the other cases cited, seems to lead to the following conclusions:—*First*, where an adoption is made to the last male holder, the adopted son will divest the estate of any person whose title would have been inferior to his, if he had been adopted prior to the death," and Mr. Mayne relies upon the Madras case, *Virada Pratapa Raghunatha Deo* v. *Brojokishore Patta Deo* (4), as authority for that proposition.

---

(1) 2 B.L.R.F.B. 103.
(2) 10 M.I.A. 279.
(3) 2 C. 295.
(4) 1 M. 69 = 3 I.A. 154.

1891 FEB. 27. APPELLATE CIVIL. 18 C. 385.

Babu Mohini Mohun Roy argues that Mr. Mayne is mistaken in saying that the Privy Council decided any such question in that case; that all that they decided in that case was a pure question of fact: and he contends boldly that an estate once having vested in a male, who is capable of taking an absolute estate, such male is not liable to be divested of that estate except in the case of a subsequent heir being born who was conceived at the time such male who took the absolute estate entered into possession of it, or rather, unless such son who is subsequently born was conceived in the womb at the time of the death when the succession opened out. He says that such person is not to be divested of the estate, except in that one contingency.

[396] We feel ourselves unable to accede to this proposition. It has been pointed out that there is a vast difference between an estate taken by a male and that taken by a female; that a male takes an absolute estate, a female a limited one; and that the divesting of an estate when once vested is repugnant to the Hindu law. It has been pointed out further that so repugnant is it to the Hindu law that even though a man may be guilty of such offences against the Hindu law as to be outcasted, or become a lunatic, or fall a victim to such physical maladies as would prevent his succeeding to an estate, yet once the estate is vested in him he cannot be divested; and it is urged that though there are authorities to show that a female who takes only a limited estate may be divested of it, a male who takes an absolute estate cannot be divested.

In principle we can see no real distinction between the two cases, between the divesting of a female who takes only a limited estate and the divesting of a male who takes a much larger estate than a female. That no such distinction as a matter of fact, actually exists, we think we are warranted to say by reference to the judgment in the case of *Mondakini Dasi* v. *Adinath Dey* (1). The head-note to that case which correctly represents the facts, is this:—"A son adopted to the last male proprietor, who was the full owner of an estate, is entitled to take the whole of that estate and to divest the interest of any person in that estate, whose title by inheritance is inferior to his, and who could not have inherited if the adoption had taken place before the death of the last full owner; but such adopted son is not entitled to claim as preferential heir the estate of any other person besides his adoptive father, when such estate has vested before his adoption in some heir other than the widow who adopts him. When a man died leaving two widows and having given either of them the power to adopt a son, and the younger widow, on the refusal of the elder one to adopt, adopted a son: *Held* that the estate which was in the elder widow was divested by the adoption, and that the adopted son took all the estate of his adoptive father." The judgment of the Court in that case was delivered by Mr. Justice Guru Das Banerjee; and at p. 71 of the report, the learned Judge mentions what points were argued in appeal, and says that the [397] fourth point argued was "that even if the adoption was valid, it could not divest the estate of the elder widow who was no consenting party to it, and that the plaintiff was not entitled to recover the eight annas share of the estate of Raj Narain which had been inherited by her," and at p. 72 of the report, referring to that contention, the learned Judge says:—"The fourth point does not appear to have been raised in the Courts below. But as it is a point of law not requiring for its disposal any further inquiry into facts, we

(1) 18 C. 69.

1891 FEB. 27. — APPELLATE CIVIL. — 18 C. 385.

allowed it to be raised and argued here. The sum and substance of the argument on behalf of the appellant is that an estate vested in any person by inheritance cannot be divested by a subsequent adoption, except when the adoption is made by such person; and that the plaintiff is not, therefore, entitled to recover anything more than the share of Raj Narain's estate inherited by his younger widow by whom the adoption was made, and in support of this argument the cases of *Bhoobun Moyee* v. *Ram Kishore Acharjee* (1) and *Kaliy Prosunno Ghose* v. *Gocool Chunder Mitter*" (2) (the case we have cited) " were relied upon. There can be no doubt that, as a general rule, an estate vested in any person by inheritance is not divested by a nearer heir subsequently coming into existence [see *Kalidas Das* v. *Krishna Chandra Das* (3).] But there are exceptions to this rule, and the question is whether the present case is one of those exceptions. Upon that question the cases cited are not exactly in point, as in those cases the adoptions which were held inoperative in divesting vested estates were made not to the last full owners to whom inheritance had to be traced, but to other persons, that is, to the father of the last full owner in the first-mentioned case, and to his brother's son in the second. The cases of *Annammah* v. *Mabba Bali Reddy* (4), *Drobomoyee* v. *Shama Churn* (5), and *Rup Chand* v. *Rakhmabai* (6) are similarly distinguishable from the present, the adoption having been made to the father of the last full owner in the first and the second, and to his brother in the third. On the other hand, there are cases (some of which are exactly in point) which support the respondents' view that a son **[398]** adopted by one of several widows to her deceased husband takes the whole of his estate, divesting the estate of all the widows. In *Virada Pratapa Raghunada Deo* v. *Brojokishore Patta Deo* (7), the widow of Raja Adikonda Deo, the holder of an impartible zemindari, having adopted a son under the authority of her deceased husband the adopted son was held entitled to recover the estate from Raghunada, the half brother of the deceased zemindar, who, as the Judicial Committee observed, must be taken to have been an undivided brother, and the person who, according to the ordinary law of succession, was entitled to the zamindari on the death of Adikonda without a legitimate son, either procreated or adopted. In *Rukmabai* v. *Radhabai* (8) it was held that a son adopted by an elder widow without the consent of the younger was entitled to take the whole estate of his adoptive father, and to defeat the interests of the younger widow." Then the learned Judge refers to an unreported case decided by this Court, and he goes on to say:—" The true rule deducible from all these cases is, as stated by Mr. Mayne in his learned work on Hindu Law and Usage (s. 179), this, namely, that a son adopted to the last male proprietor, who was the full owner of an estate, is entitled to take the whole of that estate and to divest the interest of any person in that estate whose title by inheritance is inferior to his, and who could not have inherited if the adoption had taken place before the death of the last full owner, though he is not entitled to claim as preferential heir the estate of any other person besides his adoptive father, when such estate has vested before his adoption in some heir other than the widow who adopted him. There is nothing unjust in this. Indeed there would be great injustice if the opposite view were to prevail, and if the lawfully adopted son of the last full owner, who is to bear all the obligations of a son, were to be deprived of any part

(1) 10 M.I.A. 279. (2) 2 C. 295. (3) 2 B.L.R. F.B. 103.
(4) 8 M.H.C. R. 108. (5) 12 C. 246. (6) 8 B.H.C.R.A.C. 114.
(7) 1 M. 69= 3 I A. 154. (8) 5 B.H.C.R.A.C. 181.

of his adoptive father's estate. The case is wholly different where an adopted son claims not the estate of his adoptive father, but that of another person after it has vested in some other heir who was entitled to it before the adoption. It would obviously lead to inconvenience and injustice to allow vested interests to be divested in such cases. The contention of the [399] appellant is, therefore, wholly opposed to the authority of decided cases. It is equally repugnant to the spirit of the Hindu law."

1891 FEB. 27. — APPELLATE CIVIL. — 18 C. 385.

It is quite true that this paragraph which I have last read is an *obiter dictum*, and that it was not necessary for the decision of the precise case which the learned Judges had before them; but though it is an *obiter*, it is an *obiter* of a very learned Judge and one whose opinion upon a matter of this sort is entitled to the greatest possible respect; and it entirely coincides with our own view, because we are unable to appreciate the distinction which Baboo Mohini Mohun Roy has drawn between the relative value of an estate as taken by a male and that taken by a female, which is the basis of his argument.

We would desire to add this, that it seems to us that by acceding to the argument advanced by Baboo Mohini Mohun Roy, we should be striking an almost fatal blow at adoption, at any rate in Mitakshara families, and though Baboo Mohini Mohun has this morning in reply called our attention to certain passages in the Mitakshara and Dattaka Mimansa, which he says show that in the Mitakshara school adoptions are not to be favoured, it seems to us that, having regard to the religious efficacy which is said to result from an adoption to a deceased father, this is an additional reason for not acceding to the argument which he has laid before us.

Therefore in the result we think that the appeal fails, and must be dismissed with costs.

J. V. W. *Appeal dismissed.*

---

18 C. 399.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Trevelyan.

RASAMAYA DHUR CHOWDHURI AND OTHERS (*Defendants*) *v.* ABUL FATA MAHOMED ISHAK AND OTHERS (*Plaintiffs*).*
[24th February, 1891.]

Mahomedan Law—Wakf, constitution of—Dedication of property with temporary intermediate interests—Uncertain contingency.

To constitute a valid wakf there must be a dedication in favour of a religious or charitable purpose, although there may be a temporary intermediate application of the whole or part of the benefits thereof to the [400] family of the appropriator or wakif and the dedication must not depend upon an uncertain contingency, such as the possible extinction of the wakif's family.

[**Diss.**, 19 C. 412 (426); **Affir.**, 22 C. 619 (**P.C.**)=22 I.A. 76=6 Sar. P.C.J. 572; **Appl.**, 20 C. 116 (**F.B.**); **R.**, 7 A.L.J. 1095=8 Ind. Cas 578 (579); 4 C.L.J. 442 (454); 8 O.C. 379 (382, 385); **Cited**, 2 P. R. 1905=129 P.L.R. 1904.]

BY a deed dated 21st December 1868, duly registered and purporting to be a deed of wakfnamah, two brothers, Abul Hossein Mahomed

---

* Appeal from Original Decree No. 156 of 1889, against the decree of Baboo Jibun Krishna Chatterjee, Subordinate Judge of Sylhet, dated the 30th of March 1889.

1891 FEB. 24. — APPELLATE CIVIL. — 18 C. 399.

Abdur Rahman (defendant No. 1) and Abu Mahomed Abul Kadir (defendant No. 2), made a settlement of all their immoveable properties in the following terms:—

"For perpetuating the names of our father and forefathers and for protecting our properties, we, leaving ourselves to the mercy and kindness of God and relying upon the bounty of Providence and being in possession of sound health of body and mind as enjoined in the Mahomedan law and fully capable of performing and observing all the religious rites and ceremonies and of our own free will and accord and without reluctance or compulsion, make this permanent endowment (wakf) of all our shares and rights in the immoveable properties, that is, all our pergunnahs, zemindaris, talook, segas, rent-free lands, and all ancestral and self-acquired properties such as purchased at private or auction sale, and all properties either standing in our own names or in the names of others, and all our rights and interest in connection with the same, that are in our possession and enjoyment, for the benefit of our sons and children and the members of our family from generation to generation and in their absence for the benefit of the poor and beggars and widows and orphans. We two brothers take upon ourselves the management and supervision of the same in the capacity of mutwalis for such time as we may live, and as mutwalis we enjoy all rights and interest in the wakf properties * * * * . We shall deal in the following way with the net profit that will come to our hands. If it be necessary to bring any suit or put in any answer or objection or claim in respect of these wakf properties or the profits, etc., of the same in the Civil Courts, * * * then we the mutwalis shall do those acts according to the laws and rules for the time being and we shall pay the expenses for the same from the profits of the wakf properties. In order to maintain the name and prestige of our family, we the mutwalis shall make reasonable and suitable expenses according to our [401] means and position in life. We shall according to our choice fix allowances for the support and maintenance of the persons who are now living or may be born afterwards for whose benefit the wakf is made, and we shall pay the same to them every month and also the expenses of their marriage and mourning ceremonies whenever they may be required. It will be competent for us, the mutwalis, and our successor mutwalis, to enhance or reduce the allowance of the persons who are now living or who may hereafter be born for whose benefit the wakf is made, in consideration of course of their position and circumstances and the state of the income of the wakf properties, * * * * * to use the wakf properties as security and grant putni and durputni and permanent and temporary ijara settlements and to purchase some other properties with the money to be received as *salami* for the aforesaid settlements, and to exchange any of the lands in this wakf with some other lands and to include the lands so acquired by purchase or in exchange in the wakf, and to spend the profit of the same towards the expenses of the wakf and keep the surplus profit in stock in the *thavil*, and to try to increase the wakf properties, and the amount in cash, whatever properties may be acquired by us the mutwalis or our successor mutwalis after execution of this document shall be included in this wakf. * * * * * None of the persons for whose benefit the wakf is made shall be able to make any claim for taking any of the wakf properties or to sell or mortgage or to make any gift of his allowance and the allowance shall not be attached and

sold in execution of any money decree against any of those persons because the wakf properties have been settled only for the support of our sons, grandsons, etc., from generation to generation. It will not be competent for any of the persons for whose benefit the wakf is made to call upon the mutwali or mutwalis to submit any accounts in respect of the wakf properties, or to bring any suit in any Court against the mutwali or mutwalis for increasing his allowance or for taking possession of the wakf properties or for any accounts in respect of the same, and if any such suit is brought it shall be rejected by the Court, but it will be competent for any of the persons for whose benefit the wakf is made to ask the mutwalis for increasing his allowance or for any occasional expenses, and [402] if the mutwalis are satisfied that he is actually in need or want then the mutwali will increase his allowance or meet his demands. The principal object of this wakf is that there be no loss to the properties, and that the name and the prestige of the family be maintained, and that the profits of these properties be appropriated towards the maintenance of the name of the family and the support of the persons for whose benefit the wakf is made * * *. Be it known here that up to the time of executing this document we are not indebted to any one, that, without keeping in our possession even a very small portion of the properties that are in our possession, we make a permanent wakf of all our properties and take in our possession and custody the documents and other papers in connection with the wakf properties that will furnish sufficient information and description regarding the wakf properties, and so no schedule thereof is given below."

1891 FEB. 24.

APPELLATE CIVIL.

18 C. 399.

The deed also contained provisions regarding the appointment of new mutwalis and for the appointment of any of the settlors' male descendants as mutwalis.

After the execution of this deed Abdur Rahman and Abdul Kadir dealt with the properties as wakf properties. They held themselves out as mutwalis and for some years described themselves as such in collection and other papers connected with the management of the properties. In 1281 (1874) Abdur Rahman was in difficulties: and on 13th Kartick 1281 F.S. (7th November 1874) he executed an ijara pottah for Rs. 4,200 per annum of his share in the properties in favour of his brother Abdul Kadir, and Abdul Kadir executed a kabuliat or counterpart thereof in favour of Abdur Rahman on 12th Joisto 1282 F.S. (1st June 1875). Both the deeds were duly registered, and in them the two brothers declared that by reason of their necessities they had revoked the wakf of the 21st December 1868.

In 1288 (1881) Abdur Rahman and Abdul Kadir made a formal partition of all the wakf properties. In this deed of partition, which was executed on 27th Bhadro 1288 F.S. (11th September 1881), it was stated that the wakf of 21st December 1868 was invalid, as the wakf-namah did not contain the word sadkah or charity, and was not made according to the provisions of the Mahomedan law. After the execution of the deed of partition, Abdul Kadir and [403] Abdur Rahman each dealt with his share as exclusively his own. And Abdur Rahman, who had now become heavily involved, mortgaged and alienated several parcels of the property.

On the 6th March 1888, Abul Fata Mahomed Ishak on behalf of himself and his minor brothers, the sons of Abdul Rahman, instituted this suit as beneficiaries under the wakf *inter alia* to have it declared that all the properties were wakf, to recover from the transferees the properties

1891 FEB. 24. — APPELLATE CIVIL. — 18 C. 399.

alienated by their father, Abdur Rahman (defendant No. 1), and to have him removed from the post of mutwali.

The issues material to this report were the following:—

11*th*.—Whether the wakf deed propounded by the plaintiffs is valid? If so, what relief the said plaintiffs are entitled to?

12*th*.—Whether the wakf deed in dispute is bad in law, fraudulent and collusive, and whether it was ever acted upon?

13*th*.—Whether the disputed wakf was cancelled by the subsequent acts and conduct of the defendants Nos. 1 and 2?

The Subordinate Judge found that Abdur Rahman and Abdul Kadir (defendants Nos. 1 and 2) had executed the wakfnamah; that at the time of its execution they were joint-owners in possession of the wakf properties, that they were free from debt, sound in mind and body, and had of their own accord and free will and in good faith made the wakf for the purpose of dedicating their properties to the service of God; that after the execution of the deed they had acted as mutwalis, supported the beneficiaries, kept up a madrassa for teaching the Koran and other religious books of the Mahomedans, and had described themselves as mutwalis in collection papers, chittas, terij taujee, and other documents connected with the management of the wakf; that five or six years after the execution of the wakfnamah, defendant No. 1, Abdur Rahman, was much involved in debt, and on 27th Bhadro 1288 (11th September 1881) had partitioned the wakf properties with his brother Abdul Kadir (defendant No. 1); that shortly after the partition Abdur Rahman, without the knowledge or consent of Abdul Kadir, had transferred. mortgaged and granted leases of some of the wakf properties, and that he had been guilty of waste and misconduct. The Subordinate Judge held that the deed was valid and irrevocable under Mahomedan Law, that Abdur **[404]** Rahman should be removed from the office of mutwali; that defendant No. 2 should be appointed sole mutwali, and that the transfers, mortgages, and leases, etc., executed by the defendant Abdur Rahman were invalid and should be set aside. Accordingly he gave the plaintiffs a decree.

The defendants Nos. 3, 9, 12, 13, 88 and 89, who had defended the suit, appealed to the High Court.

Mr. *Woodroffe*, Mr. *Evans*, Baboo *Srinath Das*, Baboo *Taruk Nath Palit* and Baboo *Bhuban Mohan Biswas*, for the appellants.

The Advocate-General (Sir *Charles Paul*), Mr. *Bell*, Moulvie *Mahomed Yusoof*, Moulvie *Shams-ul-Huda*, Moulvie *Seraj-ul-Islam*, Moulvie *Mahomed Ishfalk* and Baboo *Tarakishore Chowdhry*, for the respondents.

Mr. *Evans*.—The deed is bad on the face of it. The object of the wakf is uncertain; the properties are not specified, so that the public might not be able to obtain any information as to what properties are the subject of the wakf. The mutwalis are left absolutely unfettered to spend whatever they like on the beneficiaries and for perpetuating the prestige of the family. They may even use the wakf property as security. The only charitable object in the deed is the formal reference to "the poor and needy." The "acts of religion" mentioned are too vague to be of any effect. The settlors never treated this deed as a valid wakfnamah. This is clear from the ijara pottah executed by Abdur Rahman in favour of Abdul Kadir, and the deed of partition between the brothers, and from their conduct afterwards. Settlements of this kind are entirely opposed to public policy. If this deed be held to be a good wakfnamah, then any Mahomedan will be able to create a perpetuity, if he be willing that on

failure of descendants to himself and all his relations his land shall go to the poor rather than escheat to the State.

This is merely an attempt to defraud the creditors of Abdur Rahman. As regards his indebtedness at the time the deed was executed, it is true there is evidence only of a trifling sum, but we find that in 1875 he was in difficulties, and borrowed Rs. 20,000 on an ijara pottah from his brothers. There is also documentary evidence to show that he was in debt at the time he executed this **[405]** deed, and, that being so, it is for the other side to satisfy the Court that the wakf is valid, as we are *bona fide* purchasers, and the sales were made with the knowledge of all the members of the family.

On the authorities the settlement is clearly bad. To constitute a valid wakf there must be a dedication solely, or at least primarily and substantially, to religious or charitable objects. In *Mahomed Ashanulla Chowdhry* v. *Amarchaud Kundu* (1), the Privy Council held that the deed was not a valid deed of wakf. In the course of the argument Lord Watson observed that there must be an actual dedication to make a wakf. There must not be a mere *spes successionis*. Their Lordships said that they knew of no authority "showing that, according to Mahomedan Law, a gift is good as a wakf unless there is a substantial dedication of the property to charitable uses at some period of time or other." They held that the use of the word 'wakf' and similar expressions was of no effect when the object of the deed was to benefit the settlor's family and make their property inalienable. In that case there was no mention in the deed, as there is in the present one, of the poor and needy; but on this point they say "they are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the gantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India." In *Mahomed Hamidulla Khan* v. *Lotful Huq* (2), it was held that a settlement in favour of the settlor's daughters and her descendants, how low soever and when they no longer existed, then in favour of the poor and needy, was not valid as a wakf. To the same effect is the ruling in *Fatima Bibee* v. *Ariff Ismailjee Bham* (3) (see pp. 70 and 75 of the report). The Bombay High Court held in *Abdul Gane Kasam* v. *Hussen Miya Ruhmutula* (4) that to constitute a valid wakf there must be a dedication solely to the worship of God or to religious or charitable purposes. In the two cases of *Fatma Bibi* v. *The Advocate-General of Bombay* (5) and *Amrutlal Kalidas* v. *Shaik Hussein* (6), which are against me, **[406]** the Bombay Court held that the mere mention of the poor and needy was sufficient to create a valid wakf. But this Court is not bound to follow those decisions. See also *Nizamudin Gulam* v. *Abdul Gafur* (7). Baillie's view that the mention of the poor in a wakf is immaterial has been overruled by the Privy Council. Under the Mahomedan law, therefore, this is not a valid wakf.

Mr. *Woodroffe* on same side referred to *Pathukutti* v. *Avathalakutti* (8).

The Advocate-General, for the respondents.—This Court is bound to apply Mahomedan law as it is to be found, and our modern ideas should not be allowed to interfere with Mahomedan customs and law. It is an unchangeable law and cannot be altered, being based entirely on their

(1) 17 I.A. 28=17 C. 498. (2) 6 C. 744. (3) 9 C.L.R. 66.
(4) 10 B.H.C. R. 7. (5) 6 B. 42. (6) 11 B. 492.
(7) 13 B. 264. (8) 13 M. 66.

1891 Feb. 24. — Appellate Civil. — 18 C. 399.

religious books. The Mahomedan law favours perpetuities; and the English rule against perpetuities is wholly unknown to it, and has never been applied to it. The case of *Yeay Cheah Neo* v. *Ong Cheng Neo* (1) shows that the laws of England prevail in the Straits Settlements, because they were introduced there.

This is a perfectly legitimate device to secure fatherless children sharing in their grandfather's estate. That it is a device is no objection: since both English and Mahomedan laws are full of devices. A settlement upon the owner and his descendants for ever is a valid wakf, if it be made in proper form and if, as in the present case, there be an ultimate dedication of the profits to the poor. The Privy Council in *Mahomed Ashanulla Chowdhry* v. *Amarchand Kundu* (2) do not decide whether a gift to a man and his heirs and then to the poor is an illusory gift; they leave the question open, and say that there are conflicting decisions on it in India. They do not decide what is a valid wakf. They say there is no authority showing that a gift is good as a wakf unless there is a substantial dedication to charitable uses at some time or other: but there is authority for this proposition—Hedaya, vol. 2, p. 341. *Doe d Jan Bibee* v. *Abdullah Barber* (3) is conclusive. According to the judgment of Ryan, C.J., in that case this is a valid wakf. There **[407]** is nothing in the case of *Abdul Ganne Kasam* v. *Hussen Miya Ruhmutula* (4). In *Fatma Bibi* v. *The Advocate-General of Bombay* (5) the deed was drawn for the aggrandisement of the family, and because it had a proviso for the poor, it was held to be a good wakf. This case was followed in *Amrutlal Kalidas* v. *Shaik Hussein* (6). These two cases are irreconcilable with *Abdul Ganne Kasam* v. *Hussen Miya Ruhmutula* (4) and *Mahomed Hamidulla* v. *Lotful Huq* (7), which are erroneous, and in the last case the judgment of Ryan, C. J., could never have been placed before the Court. In *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (8), Kemp, J., says "a person may make an endowment settling lands on himself and enjoying the profits during his lifetime, and after his lifetime devoting the profits to the support of the poor." According to the text-writers this is a good wakf. Ameer Ali's Tagore Law Lectures, pp. 178, 315. Baillie's Mahomedan Law, 2nd ed., Appropriation, Chapter III.

As regards indebtedness, we have sworn there was no debt, and the Judge finds we were not in debt at the time we made the wakf. Our conduct has been consistent with the wakf.

Mr. *Bell* on the same side.—A settlement by a man on himself and his family can only be impeached by creditors if at the time of the settlement the settlor was in debt. Story's Equity Jurisprudence, paragraph 362. *Freeman* v. *Pope* (9). This is a good settlement under Mahomedan law. (Hedaya, vol. 2, pp. 341, 349 and 352. Baillie's Mahomedan law, pp. 580—583, 598, 601 and 602. Shama Charan's Tagore Law Lectures for 1874, pp. 130, 142—144). The English rule against perpetuities has no application, because the Courts are bound to administer in these cases Mahomedan Law. All the Calcutta cases relied on by the appellants mainly follow *Abdul Ganne Kasam* v. *Hussen Miya Ruhmutula* (4). In that case there was no ultimate dedication of the property to charity. There is no force in the objection that the wakf properties are not specifically mentioned, as it is clear that a verbal dedication of all a man's property is

(1) L.R. 6 P.C. 381. (2) 17 I.A. 28 = 17 C. 498. (3) 1 Fulton 345 = 1 I.D. (O.S.) 849.
(4) 10 B.H.C.R. 7. (5) 6 B. 42. (6) 11 B. 492.
(7) 6 C. 744. (8) 13 W.R. 235. (9) L.R. 5 Ch. Ap 538 (54).

sufficient; Ameer Ali's Tagore [408] Law Lectures, 308; Baille's Mahomedan Law, pp. 564, 566, 578; Hedaya, Vol. 2, p. 345.

On the evidence it is perfectly clear that the wakf was for many years acted upon, and that the various defendants to whom the properties were mortgaged or sold took them with the full knowledge that they were wakf properties.

Mr. *Evans* in reply.

The judgment of the Court (TOTTENHAM and TREVELYAN, JJ.) was as follows:—

JUDGMENT.

The question which we have to decide in this appeal is whether a certain deed, dated the 21st December 1868, and purporting to be a wakfnamah, did create a valid wakf according to Mahomedan law.

The deed was executed by the defendants 1 and 2 in respect of all their immoveable property without particularizing the various items of which that property consisted. They appointed themselves mutwalis, and for some years described themselves as such in collection papers and other documents connected with the management of property. But in 1874 they declared that they had revoked the wakf by reason of their necessities, and thenceforth they dealt with the property as if no wakf existed. The defendant No. 1, who had become much involved in debt, mortgaged and alienated numerous parcels of the property. This suit was instituted in 1888 by his sons as beneficiaries under the deed of wakf to have it declared that all the property was wakf, to recover from the transferees all the property alienated by their father, and to have him removed from the post of mutwali. The plaintiff No. 1 in his evidence before the lower Court stated that before instituting the suit he consulted various legal authorities in Calcutta, and ascertained from them that the wakf was valid according to Mahomedan law. The lower Court decided that it was so, and made a decree accordingly.

In the hearing of this appeal against that decree we have been assisted by learned counsel on both sides, who have dealt with the case exhaustively from their respective points of view.

We would premise by saying that if the instrument in question did create a valid wakf when it was executed, no subsequent [409] conduct of the wakifs could affect its validity; and unless from that conduct it can be inferred that they never intended to make a wakf at all, the consideration of it is not material to the question which we have to decide.

It is necessary next to state what the declared objects of the instrument were. In its opening sentences it states as follows:—"For perpetuating the names of our fathers and forefathers and for protecting our properties, we . . . . . of our own free will and accord and without reluctance or compulsion make perpetual wakf of all our shares and rights in the immoveable properties pergunnahs zamindaries talooks . . . . . that are in our possession and enjoyment for the benefit of our children and grandchildren and the members of our family from generation to generation and upon failure of them for the benefit of the poor and beggars and widows and orphans." And in a subsequent part of the deed it is stated that "the principal object of this wakf is that there be no loss to the properties; that the name and prestige of the family be maintained; and that the property be appropriated towards the maintenance of the name of the family and the support of the persons for whose benefit the wakf is made; and for acts of religion," &c. The

1891
FEB. 24.
APPELLATE CIVIL.
18 C. 399.

appropriators make themselves the mutwalis for their lifetime, and provide that none of the beneficiaries shall be entitled to call for accounts from them or to sue them for increase of their allowances or for possession of any of the property.

From the passages above quoted it is quite clear that the purposes for which this wakf was made were, so to speak, secular rather than religious; and that it was intended to operate as a perpetual tying up of the properties for the sole benefit of the appropriators and their descendants for so long as any of them should exist in the world. The only definite religious or charitable object indicated is the support of the poor, the widows and orphans; and this object is contingent upon the total extinction of the appropriators' family in some future age.

Such being the character of the wakf, we have to decide whether it is one that is valid and irrevocable according to Mahomedan law.

[410] The contentions of the parties are: (1) for the defendants appellants, that a wakf is not valid unless the property is dedicated solely, or, at least primarily and substantially, to religious or charitable objects; and (2) for the plaintiffs respondents, that a settlement upon the owner and his descendants for ever is a valid wakf, if made in proper form, and if, as in the present case, there is an ultimate destination of the profits to the poor. Indeed, it is said on this side that even with its express mention of the poor a wakf for the benefit of the owner's descendants is valid. And the learned Advocate-General goes so far as to suggest that the intention of the Mahomedan law is that, " wakf " should be a device to enable perpetual family settlements to be made under the veil of religious trusts.

Mr. Evans for the appellants relied on the following cases as authorities for the proposition that a wakf will not be recognized by the Court as valid, unless the property is substantially appropriated to religious or charitable purposes—*Mahomed Ashanulla Chowdhry* v. *Amarchand Kundu* (1); *Mahomed Hamidulla Khan* v. *Lotful Huq* (2); *Abdul Ganne Kasam* v. *Hussein Miya Rahmutula* (3); *Fatima Bibee* v. *Ariff Ismailji Bham* (4). This last case was, as regards the point in question now decided upon the authority of the second and third; and the second case proceeded to a great extent upon the authority of the third, *viz.*, the case of *Abdul Ganne Kasam* v. *Hussain Miya Rahmutula* (3). In that case the Judges came to the conclusion that the balance of authority was strongly in favour of the view that to constitue a valid wakf there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes. They referred for support in this view to the Calcutta case of *Bibee Kunees Fatima* v. *Bibee Saheba Jan* (5) and to *Jewan Doss Sahoo* v. *Shah Kabeeroddeen* (6).

On the other side, the learned Advocate-General contended that the decision in *Abdul Ganny Kasam* v. *Hussen Miya Ruhmutula* (3) and *Mahomed Hamidulla Khan* v. *Lotful Huq* (2) were **[411]** erroneous; and he dismissed the Privy Council decision in *Mahomed Ashanulla Chowdhry* v. *Amarchand Kundu* (1) as not settling anything that is material to the case now before us.

It appears to us, however, that their Lordships in that case did say enough to negative the learned Advocate-General's rather bold proposition that the Mahomedan law intended to allow perpetual family settlements

(1) 17 I. A. 28=17 C 498. (2) 6 C 744. (3) 10 B. H. C. R. 7.
(4) 9. C. L. R. 66. (5) 8 W.R. 313. (6) 2 M. I. A. 390.

to be made under the veil of religious trusts. At any rate they expressly refused to countenance it in the case they were then deciding. And the judgment shows that they accepted as an undisputed proposition that to constitute a valid wakf in the case before them the property must be in substance given to charitable uses.

The learned Advocate-General contended that the decisions in *Abdul Ganny Kasam* v. *Hussen Miya Ruhmutula* (1) and *Mahomed Hamidulla Khan* v. *Lotful Huq* (2) were wrong upon the authority of *Doe d. Jan Bibee* v. *Abdullah Barber* (3), a case tried in the Supreme Court of Calcutta before Ryan, C.J., and Grant, J. He also relied upon *Fatima Bibi* v. *The Advocate-General of Bombay* (4), and *Amrutlal Kalidas* v. *Sheik Hussein* (5), and upon the authorities cited by Mr. Ameer Ali in the Tagore Law Lectures for 1884, including Mr. Bailie.

The judgment of Ryan, C.J., based as it was upon the opinions of the Moulvies to whom the questions of Mahomedan law were referred, is certainly entitled to very great weight; but all that that judgment decides in respect of the validity of a wakf is that an endowment to charitable uses is valid, though qualified by a reservation of the rents and profits to the donor himself during his life; and that the donor may appoint himself mutwali and need not deliver possession to another. It does not declare that a wakf which on the face of it is not an endowment to religious or charitable uses is valid; and that is the question now before us. That judgment does show that the decisions in *Abdul Ganny* **[412]** *Kasam* v. *Hussen Miya Rahmutula* (1) and *Mahomed Hamidulla Khan* v. *Lotful Huq* (2) went too far in holding that a valid wakf must *from its creation be solely* and *exclusively* for religious or charitable purposes; but it does not show that they were wrong in laying down that the primary and substantial objects must be of that nature. And in the case of *Doe d. Jan Bibee* v. *Abdullah Barber* the benefit to the religious purposes indicated in the deed were not wholly and indefinitely postponed to the interest of the donor and his descendants so long as any of the latter should continue to exist; but the reserve was in favour of the donor himself and of certain persons only who were already in existence.

The other two cases relied upon by the Advocate-General, *Fatma Bibi* v. *The Advocate-General of Bombay* (4) and *Amrutlal Kalidas* v. *Shaik Hussein* (5), are really in direct conflict with the decisions in *Abdul Ganne Kasam* v. *Hussen Miya Ruhmutula* (1) and *Mahomed Hamidulla Khan* v. *Lotful Huq* (2), cited by Mr. Evans; and we agree with him that they are irreconcilable with the latter.

The cases of *Fatma Bibi* v. *The Advocate-General of Bombay* (4) and *Amrutlal Kalidas* v. *Shaik Hussein* (5) seem to lay down practically that a perpetuity in favour of the donor and his descendants is a valid wakf, if an ultimate dedication be made in favour of some religious or charitable object upon the occurrence of a contingency, however remote and improbable. And we are not prepared to follow this ruling, unless we find it irresistibly supported by unquestionable authority. Baillie no doubt as well as the learned Tagore Law Lecturer of 1884 seem to favor this interpretation of the law; but the Hedaya, as translated by Hamilton, and most of the cases laid before us, seem to us to establish the fact that wakf must be in favour of a religious or charitable purpose, although there may be a temporary intermediate application of the whole or part of the

(1) 10 B.H.C.R. 7. (2) 6 C. 744. (3) 1 Fulton, 345.
(4) 6 B. 42. (5) 11 B. 492.

1891 FEB. 24. — APPELLATE CIVIL. — 18 C. 399.

benefits to the appropriator's family. All the cases that expressly sanction this latter arrangement were cases in which at least the ostensible and [413] principal object of the wakf was religious or charitable. And that the dedication must not depend upon an uncertain contingency, such as the possible extinction of the family, has recently been well laid down by the Madras High Court in *Pathukutti* v. *Avathalakutti* (1).

We have the authority of the Privy Council in the case of *Mahomad Ashanulla Chowdry* v. *Amirchand Kundu* (2) cited by Mr. Evans for refusing to recognize as a valid deed of wakf an instrument which uses a particular form of words as a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable.

Precisely such, in our judgment, is the deed before us, and notwithstanding the fact that for a few years after its execution the owners of the property dealt with it nominally as mutwalis, it is certain that they had not really intended to give up their proprietary rights in it. And before very long they abandoned even the semblance of mere trusteeship. We cannot believe that the authors of Mahomedan law intended that, under cover of a pretended dedication to Almighty God, owners of property should be enabled to secure it for their own use, protect it for ever from their own and their descendants' creditors, and repudiate alienations in respect of which they have received full consideration. In our opinion, then, the deed before us cannot be sustained as a valid wakfnamah, and consequently we decree this appeal, reversing the decree of the Court below, and dismissing the plaintiffs' suit with costs of the other Courts.

C. D. P. *Appeal allowed.*

---

18 C. 414 (P.C.) = 18 I.A. 73 = 15 Ind. Jur. 284 = 6 Sar. P.C.J. 26 = 70 P.R. 1891.

[414] PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Hobhouse, Lord Morris, and Sir R. Couch.

[*On appeal from the Chief Court of the Punjab in* 32 *P.R.* 1888.]

MUHAMMAD NEWAZ KHAN AND ANOTHER (*Plaintiffs*) *v.* ALAM KHAN (*Defendant*). [30th, 31st January and 28th February, 1891.]

Arbitration—Award—Refusal to file award—Civil Procedure Code, 1882, *ss.* 13 *and* 525—*Res judicata.*

The refusal of an application for the filing of an award, under s. 525, Civil Procedure Code, merely leaves the award to have its own ordinary legal effect; and it cannot be contended that an award is not to be relied on as a defence in a suit relating to the subject-matter dealt with by it only because such an application has not been granted. Separable claims, *viz.*, (*a*) to share property by right of inheritance, and (*b*) for the office of lumberdar, had been disposed of, on the reference of the present parties, without the intervention of a Court by an arbitrator's award between them. An application under s. 525 had been rejected, for the reason, among others, that (*b*) was not a matter of civil jurisdiction. *Held*, however, that the present suit, which was grounded on (*a*), was barred by the award made.

[**F.**, 5 Ind. Cas. 425 = 6 N.L.R. 1; 13 M.L.J. 275 (276); 11 Bom. L R. 20 (24); **Appr.**, 14 M.L.J. 356 (359); **R.**, 17 A. 21 (23) (**F.B.**) = (1894) A.W.N. 187; 28 A. 21 (23) = 2 A.L.J. 450 = A.W.N. (1905) 165; 33 B. 401 = 11 Bom. L.R. 406 = 2 Ind. Cas. 431; 33 C. 881 (887) = 4 C.L.J. 162; 37 C. 63 (64) = 10 C.L.J.

---

(1) 13 M 66. (2) 17 I. A. 28 = 17 C. 498.

41=14 C.W.N. 75=2 Ind. Cas. 414; 2 C.L.J. 80 (83); 4 L.B.R. 130; 9 O.C. 205 (206, 207); **Cons.**, 25 C. 757 (**F.B.**).]

1891
FEB. 28.

PRIVY COUNCIL.

18 C. 414 (P.C.)= 18 I.A. 73= 15 Ind. Jur. 284=6 Sar. P.C.J. 26=70 P.R. 1891.

APPEAL from a decree (12th December 1887) of the Chief Court, reversing a decree (15th January 1886) of the Subordinate Judge of the Bannu district.

The suit related to the inheritance of Maddat Khan, who died on 6th June 1883, leaving two widows, sons, four grandsons of a deceased son, and also daughters. The plaintiffs were the eldest and second son by the first wife, and the defendant was the eldest son by the second wife. In September 1863 the two present plaintiffs for themselves and as guardians of their nephews, and the defendant, Alam Khan, appointed Hosain Ali arbitrator for the decision of their disputes as to the inheritance, and also as to their respective claims to the lumberdari of village Muddutwali.

The award, dated 6th October 1883, was that a distribution of his lands, made by Maddat Khan in his lifetime, was binding and conclusive upon all his male descendants; that the present plaintiffs, the sons of Muhammad Khan and Fateh Khan, had received all **[415]** that they ought to obtain; and that the office of lumberdar should remain with Alam Khan as heretofore. The latter applied, under s. 525 of the Civil Procedure Code, Shah Nawaz, now plaintiff, objecting to have the award filed in Court. This application was rejected for several reasons, of which one was that the Court had no jurisdiction to allow it to be filed, since it related in part to the office of lumbardar—a matter beyond the jurisdiction of the Civil Courts.

The present suit was founded on the alleged right of all the sons of Maddat Khan to equal shares. The defendant, Alam Khan, set up the award as a bar to the suit. The Subordinate Judge, after the proceedings which are set forth in their Lordships' judgment, decreed equal division. On appeal the Chief Court (PLOWDEN and TREMLETT, JJ.) gave effect to the award as a bar to the suit, which they dismissed except as to a sum of money not in dispute. The Judges observed that "the award dealt separately with the claim of each of the parties to the reference, and the claim of the sons of Muhammad Buksh and of Fateh Khan in respect to the land; and that it dealt separately with the claim to the office of lumberdar. The finding upon this point as a separate matter, unconnected with the proprietary shares of the parties, distinguished this case from a previous one (1) where the Court held that part of an award relating to lumberdari profits could not be separated in that particular instance. This award, on the contrary, gave separate decisions; and also it could receive effect, without prejudicing the rights of any one not a party to the reference. There was no condition that the award should accord with the Mahomedan law; and it was clear, and had been admitted, that in inheritance the parties were governed by custom. If the law had to be administered, the four surviving sons and the son of the fifth son who had died before his father, would not have taken the land in equal shares. The son of Muhammad Buksh would have been excluded, and the widow and daughters of Muhammad Khan would have been entitled to a share."

Having observed that there was no evidence of misconduct in the arbitrator, the Judges added that, "however favourable to Alam **[416]** Khan the award was in its result, there was no ground for imputing an intention to favour him unjustly. It could not be said to be opposed to ascertained custom that a father should divide unequally among

(1) No. 56 of Punjab Record, 1886.

1891 FEB. 28. — PRIVY COUNCIL. — 18 C. 414 (P.C.) = 18 I.A. 73 = 15 Ind. Jur. 284 = 6 Sar. P.C.J. 26 = 70 P.R. 1891.

his sons and their issue during his own lifetime property which he had himself acquired. It was the basis of the award that Maddat Khan did this, and that he was competent to do so. They knew from experience in that Court that it was not unusual for a selected son, in a frontier family of good position, to receive a larger portion of the estate even when it was ancestral, and that it was sometimes contended that the head of the family was entitled to the whole estate, and the other sons to maintenance only. In the present instance Maddat Khan seemed to have desired to put one of his sons in a position to maintain the dignity of the family, and to have taken steps in that direction in his own lifetime. The arbitrator had set forth in his award Maddat Khan's action, which he had upheld, if his assumption was true." They therefore decided that the award must receive effect.

Mr. *C. W. Arathoon*, for the appellants, argued among other points that the order of the Subordinate Judge dismissing the application under s. 525 of the Civil Procedure Code had the effect of precluding the insisting on the award as valid. His reasons had been given on the question whether the award was legally binding or not, and he had decided in the negative.

There was no appearance for the respondent.

Afterwards, on the 28th February, their Lordships' judgment was delivered by :—

JUDGMENT.

LORD MORRIS.—The plaintiffs and appellants are two of the sons of Maddat Khan, who died on the 6th of June 1883, leaving four sons and the children of a fifth son, him surviving. The defendant, Alam Khan, is one of the sons.

The plaintiffs claim two-fifths of their father's property, moveable and immoveable. The moveable inheritance is not in dispute, the plaintiffs being clearly entitled to two-fifths thereof. They would be also *prima facie* entitled to the same proportion of the immoveable property. After the death of Maddat Khan the plaintiffs, for themselves and purporting to be guardians of the sons of their deceased brother, entered into an agreement, dated the **[417]** 20th of September 1883, with the defendant, who also purported to be the guardian of his younger brother Fatteh Khan, whereby it was agreed to appoint a private arbitrator for a decision of the dispute relating to their father's lands and the office of lumberdar, and that Mian Sultan Ali, who was intimately connected with the circumstances of the family and was their *pir*, should act as the private arbitrator, and they agreed to accept whatever the said Mian Sultan Ali might decide in respect of the dispute between them. The said arbitrator soon after made his award, whereby he found in effect that the plaintiffs were not to get any land of the deceased except the portion given to them by him in his lifetime, and that the defendant Alam Khan should remain the owner of the whole of the remaining landed property. He also awarded to Alam Khan the office of lumberdar.

Shortly after, Alam Khan applied to the Extra Assistant Commissioner, Mr. Homan, to have the award filed, pursuant to s. 525 of the Civl Procedure Code, and on the 5th November 1883 that official decreed that the award be filed in Court. Against that decision the plaintiffs in the present suit appealed upon several grounds, first, that Mr. Homan, by reason of the value of the subject-matter, had no jurisdiction, next that the award disposed of the lumberdari, a matter over which the arbitrator could have no

1891 FEB. 28.

PRIVY COUNCIL.

18 C. 414 (P.C.) = 18 I.A. 73 = 15 Ind. Jur. 284 = 6 Sar. P.C.J. 26 = 70 P.R. 1891.

jurisdiction; and also for the misconduct of the arbitrator. The Civil Judge held that the award could not be filed by reason of the pecuniary limit of the lower Court's jurisdiction and by reason of the lower Court having no jurisdiction to deal with the lumberdari, and remanded the case to the Court of the Deputy Commissioner, Colonel Connolly, who transferred the case to the Subordinate Judge, Nawab Alladad Khan, who by his order of the 15th of December 1885, decreed that the claim of the defendant, Alam Khan, to file the award should be dismissed. His grounds for the said decree are set forth in his judgment. Some of them are entirely at variance with the functions of a Judge. He states that the arbitrator misconducted himself in making the award contrary to the custom of the parties and the Mahomedan law, and that he, the Judge, knew that the arbitrator was an intimate friend of Alam Khan, and that he had consequently made his award in Alam Khan's favour. Alam Khan thus **[418]** failed to have the award filed. On the same day the plaintiffs filed their plaint, which is the commencement of the present suit. Alam Khan on the 22nd of December 1885 put in his statement in writing in answer to the plaintiffs' claim. He therein relied on the award of Mian Sultan Ali. Issues were settled, and amongst them is number ten, the issue on the result of which the decision of this case rests, namely, what is the legal effect as against the plaintiffs, of the arbitrator's award. The case came on for hearing before the same Subordinate Judge, who in effect reaffirmed his former judgment on the application of Alam Khan to file the award. He decided that the award was invalid. The defendant appealed to the Chief Court of the Punjab. That Court reversed the decision of the Subordinate Judge. They held that the award was valid as against the plaintiffs, and dismissed their claim in respect of Maddat Khan's landed property.

Their Lordships concur in the judgment of the Chief Court. The first contention on the part of the appellants before their Lordships has been that the decree of the Subordinate Judge, dismissing the claim of Alam Khan to file the award, pursuant to s. 525 of the Civil Procedure Code, has the effect under s. 13 of the same Code of a *res judicata*. One of the Judges of the Chief Court says that that contention was not very strongly pressed before them. It has been most strenuously urged before their Lordships who cannot accede to it. Though the application under s. 525 was refused, that merely left the award to have its ordinary legal validity. It could not be successfully contended that an award is not valid because the party in whose favour it was had never applied to have it filed in Court. Can then the refusal to file, or of an application made to do so, have the effect that the award can never be relied upon in any suit relating to the subject-matter dealt with by it? Their Lordships are of opinion that s. 13 has not that effect. It enacts that "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, **[419]** in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court." Section 525 says that the application to file the award is to be registered as a suit. Assuming for the purposes of this argument that such an application is a suit such as is contemplated in s. 13, what is decided in it? Only that the award ought not to be filed. That question is not raised in this suit, so that their Lordships have not to discuss how

1891 FEB. 28. — PRIVY COUNCIL. — 18 C. 414 (P.C.) = 18 I.A. 73 = 15 Ind. Jur. 284 = 6 Sar. P.C.J. 26 = 70 P.R. 1891.

far the refusal is conclusive on that point, or how far the circumstance that one of the two matters referred was beyond the control of the arbitrator constitutes an objection to filing the award. In order to make the refusal to file an award a binding judgment against its validity on the ground of the partiality of the arbitrator, it would be at least necessary to show that the point was definitely raised and put in issue and made the subject of trial. The validity of the award as an award was never directly and substantially at issue in that application. In this action respecting the land alone, the award can be separated as to it from the office of lumberdar. Consequently, their Lordships are of opinion that the contention of *res judicata* is unsustainable. The plaintiffs then rely on misconduct of the arbitrator as invalidating his award. There is no independent case or testimony to sustain, or indeed to give colour to, such a charge. They merely rely on the award itself as showing such partiality and making such statements as to amount to misconduct. That contention seems to be mainly founded on an entire misconception of the agreement to arbitrate. It was not an agreement that the arbitrator was to be controlled in his decision by any custom or Mahomedan law or otherwise. It was an agreement to refer the matter in dispute generally to his decision. He appears to have decided according to what he conceived was the wish and intention of the deceased Maddat Khan. He was within his right in so doing. Some criticisms have been offered on some of the reasons assigned by the arbitrator for arriving at his decision. These criticisms, even if justified, could not amount to any proof of misconduct. The arbitrator appears to have acted on the broad view of giving effect to the deceased's intentions. He was selected by reason of his knowledge **[420]** of the circumstances of the family. Their Lordships see no ground for imputing misconduct to him. They will humbly advise Her Majesty to affirm the judgment of the Chief Court of the Punjab.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

---

18 C. 420 (F.B.).

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson, and Mr. Justice Ghose.

PREM SUKH CHUNDER AND OTHERS (*Defendants*) *v.* INDRO NATH BANERJEE (*Plaintiff*).* [18th March, 1891.]

Interrogatories—Civil Procedure Code (Act XIV of 1882), ss. 121, 127, 136—*Interrogatories, omission to answer, effect of.*

Omission to answer interrogatories, delivered after leave granted under s. 121 of the Civil Procedure Code, does not render the party so omitting to answer liable to have his defence struck out under s. 136 of the Code.

Lalla Dabee Pershad v. *Santo Pershad* (1) overruled.

[F., 19 B. 307; 8 O.C. 172 (173).]

---

* Full Bench Reference in appeal from Appellate Decree No. 283 of 1890 from the decision of the District Judge of Burdwan, dated the 19th December 1889, affirming the decree of the Munsif of Cutwa, dated the 17th June 1889.

(1) 10 C. 505.

1891 MARCH 18.

FULL BENCH.

18 C. 420 (F.B.).

REFERENCE to a Full Bench by Prinsep and Beverley, JJ. The referring order was as follows:—"In this case certain interrogatories were, by leave of the Court, served on the defendant. On the day fixed for trial the defendant asked for further time to answer, which was refused. The Munsif, therefore, under s. 136 of the Code of Civil Procedure, struck out the defence. The District Judge on appeal affirmed this order, following the case of *Lalla Dabee Pershad* v. *Santo Pershad* (1). His attention was drawn to the decision in *Neckram Dobay* v. *The Bank of Bengal* (2), in which a contrary opinion was expressed, but he preferred to follow the first-mentioned case, because it was more directly in **[421]** point. These two decisions appear to us to be in conflict, and as we doubt the correctness of the decision in *Lalla Dabee Pershad* v. *Santo Pershad* (1) we refer this case to a Full Bench. The point we desire to refer is, whether a Court is competent to act under s. 136 of the Code of Civil Procedure, merely because it may have given leave to have interrogatories served."

Baboo *Jogesh Chunder Roy*, for the appellants:—The order made by the Court was "Let the interrogatories be served;" there was no order to answer. In the case of *Lalla Dabee Pershad* v. *Santo Pershad* (1), there was an order to answer within 10 days. The case of *Sham Kishore Mundle* v. *Shoshi Bhoosan Biswas* (3) shows what is the effect of an order under s. 121.

(The Court here called on the respondent.)

Baboo *Rash Behari Ghose* (with him Baboo *Golap Chunder Sirkar*), for the respondent:—An order giving leave to interrrogate contains an implied order on the other side to answer. If the party served with the order declines to answer some of the interrogatories, then an order may be made requiring him to answer, but if he objects generally, then no order is required. The Judicature Act, order XXXI, rules 6, 7, and the case of *Sammons* v. *Bailey* (4) were referred to.

The opinion of the Court (PETHERAM, C.J., PIGOT, O'KINEALY, MACPHERSON, and GHOSE, JJ.) was as follows:—

OPINION.

We think that when the Court, under the provisions of s. 121 of the Civil Procedure Code, gives leave to one of the parties to deliver interrogatories, it does not thereby make "an order to answer interrogatories" under chap X, within the meaning of s. 136. The grant of leave to one party to deliver interrogatories to another does not amount to an order requiring the other party to answer them; that party may perhaps have good ground for refusing to answer them or some of them (s. 125). The order to answer interrogatories contemplated by s. 136, upon failure to comply with which the party in default is liable to have his defence struck out, is an order made under s. 127 upon application made by the party interrogating.

[422] We think the case of *Lalla Dabee Pershad* v. *Santo Pershad* (1) was wrongly decided, and that the omission to answer interrogatories delivered after leave granted under s. 121 does not render the party so omitting to answer liable to have his defence struck out under s. 136.

(1) 10 C. 505.
(2) 14 C. 703.
(3) 5 C. 707.
(4) L.R. 24 Q.B.D. 727.

1891
MARCH 24.

FULL BENCH.

18 C. 422
(F.B.).

18 C. 422 (F.B.).

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson and Mr. Justice Ghose.

NANA KUMAR ROY (*Judgment-debtor*) *v.* GOLAM CHUNDER DEY (*Decree-holder*).* [24th March, 1891.]

Sale in execution of decree—Proclamation—Civil Procedure Code, Act XIV of 1882, *ss.* 289, 311, 312—*Substantial injury—Irregularity.*

A sale of revenue-paying land is not *ipso facto* void by reason of a copy of the sale proclamation not having been fixed up in the Collector's office as required by s. 289 of the Code of Civil Procedure.

An omission so to fix up such notice is an irregularity the remedy for which can only be by an application under s. 311.

An order of an appellate Court under s. 312 confirming a sale cannot be the subject of a second appeal.

[F., 22 C. 802 (804); 28 C. 4 (6) = 5 C.W.N. 124; 19 M. 29 (30); 6 C.L.J. 102 (104); 1900 P.L.R. 157 (161).]

CASE referred to a Full Bench by Prinsep and Banerjee, JJ. The referring order was as follows:—

"This is an appeal by the judgment-debtor against an order of the Judge of Bankura, upholding an order of the Munsif of Bishenpur, confirming a sale in execution of decree. The lower appellate Court has held that as the judgment-debtor has failed to show that the slight damage that he has sustained was brought about by reason of the irregularity complained of, the sale cannot be set aside.

"It is contended for the appellant that as the sale was held without fixing a copy of the sale proclamation in the Collector's office as required by s. 280 of the Code of Civil Procedure (the property sold being land paying revenue to Government) it **[423]** was not merely vitiated by a material irregularity, but was absolutely null and void, and should be set aside even if no substantial injury was shown to have resulted by reason of the defect in publishing it.

"In answer to the objection that s. 588 of the Code bars an appeal against an appellate order confirming a sale, it is urged that the application of the judgment-debtor, being one for setting aside a sale that was absolutely void, ought to be regarded, not as one under s. 311 of the Code, but as an application invoking the inherent power of the Court to set aside an act of its own which was a nullity; that the order rejecting that application was not an order contemplated by s. 312 or s. 588, cl. 16; that as the decree-holder is the purchaser that order should be regarded as determining a question under cl. (*c*) of s. 244, and that in that view it is a decree as defined in s. 2 of the Code, and a second appeal consequently lies. In support of his contention, the learned vakeel for the appellant cited the cases of *Bakshi Nand Kishore* v. *Malak Chand* (1), *Sadhusaran Singh* v. *Panch Deo Lal* (2), and *Ballodeb Lall Bhagat* v. *Anadi Mohapattur* (3), and also an unreported decision of this Court in

* Full Bench Reference on appeal from Order No. 27 of 1890 from the order of the District Judge of Bankura, dated the 16th November 1889, affirming an order of the Munsif of Bishenpur, dated the 27th June 1889.

(1) 7 A. 289. (2) 14 C. 1. (3) 10 C. 410.

1891 MARCH 24, — FULL BENCH. — 18 C. 422 (F.B.).

appeal from order No. 324 of 1888, *Manada Sunduri Debi* v. *Ramranjan Chuckerbutti.*

"In our opinion the appellant's contention does not appear to be sound. We do not see any reason why the defect in the publication of the sale proclamation here complained of should be regarded as anything more than a material irregularity as contemplated by s. 311. This is the view that has been taken of the matter in several cases, of which we may notice the following:—*Bandy Ali* v. *Madhub Chunder Nag* (1), *Tripura Sunduri* v. *Durga Churn Pal* (2), and *Satis Chunder Rai Chowdhry* v. *Thomas* (3).

"If this view is correct, the appeal will fail as well on the merits as on the preliminary ground that a second appeal is barred in this case under s. 588, the order complained of being one [424] specified in that section, and therefore not being a decree as defined in s. 2.

"The reported cases cited for the appellant are not exactly in point. But the unreported decision referred to above does support the appellant's contention; and as it is in conflict with our view and with some of the cases mentioned above, we think it necessary to refer the following questions to a Full Bench:—

"*First.*—'Whether an appeal lies against an order of an appellate Court upholding an order of the first Court confirming an execution sale of land paying revenue to Government, when such sale is held without fixing a copy of the sale proclamation in the Collector's office, as required by s. 289 of the Code of Civil Procedure, and the decree-holder is the purchaser.'

"*Second.*—'Whether an execution sale of land paying revenue to Government, held without fixing a copy of the sale proclamation in the Collector's office, as required by s. 289 of the Code of Civil Procedure, is liable to be set aside without any proof of substantial injury by reason of the defect in publishing the sale.'"

Baboo *Karuna Sindhu Mukerji*, for the appellant:—As to the objection taken before the Division Bench that no second appeal lies in this case, inasmuch as s. 588 of the Code bars an appeal against an appellate order confirming a sale, I say that the application of the judgment-debtor being one to set aside a sale which was absolutely void, ought to be regarded, not as one under s. 311 of the Code, but as an application invoking the inherent power of the Court to set aside an act of its own which was a nullity. The order rejecting the application was, the decree-holder being the purchaser, appealable as having determined a question under cl. (c) of s. 244 of the Code.—*Balladeb Lall Bhagat* v. *Anadi Mohapattur* (4), *Basharutulla* v. *Uma Churn Dutt* (5), *Viraraghava Ayyangar* v. *Venkatacharyar* (6), *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (7). On the merits, s. 289 of the Code has not been complied with, the proclamation not having been fixed up in the Collectorate. This makes the sale void, and it ought to be set aside [425] even though no substantial injury has been shown to have resulted from the defect in publishing. I refer to *Sadhusaran Singh* v. *Panch Deo Lal* (8), *Bakshi Nand Kishore* v. *Malak Chand* (9), *Ganga Prasad* v. *Jag Lal Rai* (10). An infringement of s. 290 of the Code has been held to be not merely an irregularity, but a vitiation of the sale—*Sadhusaran Singh* v. *Panch Deo Lal* (8). The general rule to be deduced from s. 311 is that

(1) 8 C. 932. (2) 11 C. 74. (3) 11 C. 658. (4) 10 C. 410.
(5) 16 C. 794. (6) 5 M. 217. (7) 11 C. 376. (8) 14 C. 1.
(9) 7 A. 289. (10) 11 A. 333.

1891 MARCH 24. — FULL BENCH. — 18 C. 422 (F.B.).

every irregularity vitiates a sale and makes it void. The case of *Mohendro Narain Chaturaj* v. *Gopal Mundul* (1) points out what is an irregularity in publishing, and that non-publication of a notice is not an irregularity, but is a defect vitiating the sale. In *Indro Chunder* v. *Dunlop* (2), which was a case of the validity of an attachment, it was held that the omission to fix the notice up in the Collectorate rendered the attachment bad. The unreported case of *Manada Sunduri Debi* v. *Ramranjan Chuckerbutti* (3) is in my favour.

Baboo *Srinath Das* (with him Baboo *Nil Madhub Sen*), for the respondent:—As a principle of interpretation of statutes a distinction must be drawn between cases in which an official omits to do something which a statute enacts shall be done, and cases in which he does something which a statute enacts shall not be done. In the former case the omission may not amount to more than an irregularity in procedure; in the latter the doing of the thing prohibited is illegal—*Rameshur Singh* v. *Sheodin Singh* (4). In the present case the omission to fix up the notice is an irregularity of procedure only, and that is not sufficient alone to set aside a sale—see *Joy Tara Dossee* v. *Mahomed Hossein* (5), *Nilmonee Shaha* v. *Ram Churn Deb* (6), *Sheo Prokash Misser* v. *Hurdai Narain* (7). As to the question whether an appeal lies, the definition of the word "decree" in s. 2 of the Code shows that an order determining a question referred to in s. 244 not specified in s. 588 is a "decree." Here the matter is specified in s. 588.

[426] The opinion of the Court (PETHERAM, C.J., PIGOT, O'KINEALY MACPHERSON and GHOSE, JJ.) was as follows:—

OPINION.

The answer to both question put to us on this reference depends, in truth, upon one point alone, namely, whether the sale of revenue-paying land is *ipso facto* void by reason of a copy of the sale proclamation not having been fixed up in the Collector's office as required by s. 289 of the Code of Civil Procedure. That question, we think, must be answered in the negative. There is nothing in the Code of Civil Procedure which renders that formality a necessary preliminary to the validity of the sale. We express no opinion in answering the questions now before us upon the question which has been decided by the Allahabad Court in *Jasoda* v. *Mathura Das* (8), and *Ganga Prasad* v. *Jag Lal Rai* (9), namely, whether non-compliance with the requirements of s. 290 of the Code of Civil Procedure does or does not invalidate a sale held, or purporting to be held, under ch. XIX. That question is not before us, and we do not deal with it. In the present case we are of opinion that the omission to fix up a copy of the sale proclamation in the Collector's office, in neglect of the provisions of s. 289 of the Code, was an irregularity the remedy for which can only be by an application under s. 311.

Being of opinion that the sale in question is not invalidated by the omission referred to, we think that the first question must be answered in the negative, inasmuch as an appeal from an order dismissing an application under s. 311 of the Code cannot be the subject-matter of a second appeal. Both questions submitted to us by the referring Bench must therefore be answered in the negative.

T. A. P.

---

(1) 17 C. 782. (2) 10 W.R. 264. (3) Mis. App. No. 324 of 1888.
(4) 12 A 510. (5) 2 W. R. Mis. 2. (6) 6 W. R. Mis. 45.
(7) 22 W. R. 550. (8) 9 A. 511. (9) 11 A. 333.

18 C. 427.

1891 APRIL 10.

SMALL CAUSE COURT REFERENCE.

18 C. 427.

[427] SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Kt. Chief Justice, and Mr. Justice Pigot, and Mr. Justice Macpherson.

CHOGEMUL AND OTHERS (*Plaintiffs*) *v.* THE COMMISSIONERS FOR THE IMPROVEMENT OF THE PORT OF CALCUTTA (*Defendants.*)* [10th April, 1891.]

Carrier—Carriers by Railway, liability of—Railway Act (*IV of* 1879), *s.* 210—*Common carriers—Insurer—Act of God.*

A carrier by Railway is, under Act IV of 1879, liable as an insurer of goods entrusted to him, and not merely for loss occasioned by negligence.

[R., 19 B. 165 (171); D., 17 B. 417 (421).]

REFERENCE to the High Court made by R. S. T. MacEwen, Esq., 2nd Judge of the Calcutta Court of Small Causes.

The following was the referring order:—

"The first set of plaintiffs are the consignors and the second set the consignees of 4 bundles of piece-goods and 1 box of woollen goods delivered to the defendants for conveyance to Mongal Hat, a station on the Northern Bengal State Railway. The goods were delivered at the Armenian Ghat station of the Port Trust Railway in Calcutta on 23rd October 1889, and a receipt note No. 162 was granted for them. The goods had to be carried by the Eastern Bengal and Northern Bengal State Railways.

"The suit is one for damages for the non-delivery of the goods, and is for Rs. 1,836-1-9, being the price of the goods and certain other charges. The following matters were admitted; by the defendants, the receipt of the goods and the price at which they have been valued by the plaintiffs: by the plaintiffs, that the goods were lost on board a flat, A1 attached to the Eastern Bengal State Railway's steamer *Soorma* in transit from Kooshtea to Sara.

"The defendants denied their liability to pay damages, and pleaded that their responsibility for loss was governed by ss. [428] 151 and 152 of the Indian Contract Act. They took upon themselves the *onus* of proving that they had taken as much care of the goods as a bailee is bound to take, under s. 151, of goods entrusted to him.

"The plaintiffs called no witnesses: the defendants called four—the commander of the steamer *Soorma*, the native pilot, the sookaney of the steamer, and the serang of the *Tura* belonging to the India General Steam Navigation Company. The commander's evidence was that the *Soorma* with 2 flats, A1 and A2, left Kooshtea at 9-10 a.m. on the 26th October last for Sara: the draught of the steamer was 3 feet 10 inches forward and 4 feet 7 inches aft; that of the flat A1 was 2 feet 9 inches forward and 3 feet aft; A2 was 2 feet 4 inches forward and 4 feet aft. These were lighter draughts than usual. Flat A1 was lashed on the starboard side and A2 on the portside of the steamer. They were lashed on either side by one 12, one 8, two 7, and two 6-inch hawsers, fore and aft. The hawsers were new and strong, and had only been about 10 days in use. The steamer had one 13 cwt. anchor at her starboard bow, one 11 cwt. at her port bow, and three 5 to 8 cwt. kedge anchors on deck. The

* Small Cause Court Reference No. 7 of 1890, from the judgment of R.S.T. MacEwen, Esq., 2nd Judge of the Calcutta Court of Small Causes, dated the 11th October 1890.

1891 APRIL 10.

SMALL CAUSE COURT REFERENCE.

18 C. 427.

flats had each two anchors (one at either bow) and two 5 cwt. kedges. The steamer was a paddle in good order. Everything that was necessary for working the steamer and flats was on board and good; the flats were in good sound working order; the steamer and flats were sufficiently manned and found in tackle. The steamer carried a native pilot who knew the channel and gave the course and the soundings. The pilot had a boat and 4 men, whose duty it was to watch the shifting of the sands and channel, and mark with bamboos tipped with grass the dangerous parts of the navigable channels. All went well till about 10-45 a.m., when the steamer and flats came to a long bend in the river. There was a low sand bank on the right hand side and a high bank on the left. The channel at that point was about 80 yards wide, and the river (the Gorai) about 3½ miles. The channel is close to the river bank. The dangerous sand banks to the right were marked by the bamboo stakes. At 10-40 a squall was seen approaching, which struck the steamer and flats end on, and drove them back with the current which was running with great force against them at the time. [429] The engines were going full speed. At this time another steamer, the *Ospray*, with two flats passed the *Soorma* on the left and under the high bank on shore. The *Soorma* gave way a little to allow the *Ospray* pass her. After she had passed, the *Soorma* got back into mid-channel, when the squall increased and sent the steamer and flats on the sand bank. The engines were still going full speed, but the steamer could not make way against the wind and current. The commander's evidence was that he did everything in his power to prevent the steamer going on the bank, but was powerless. The stern of the steamer took the ground first; two of the hawsers of flat A1 were carried away, and the stern of the flat got away from the steamer. The other flat did not part. The rush of water caused the sand to accumulate between the steamer and flat A1, and raise the steamer, but not the flat, causing greater tension on the hawsers. Another line was passed to the flat, and attempts were made to bring her back into position, but these failed. An anchor from flat A2 was thrown out to prevent the steamer and flats from being carried down with the current, and an endeavour was made to get them into the centre of the channel. This failed, as the anchor would not catch.

"The steamer's starboard anchor was next thrown out to prevent the vessels swinging back into their old position; it held and had the desired result. The steamer's port anchor with 30 fathoms of chain and a coil of new 7-inch rope was passed to flat A2, and thrown out at the stern and made fast to the steamer's capstan. After waiting for an hour the steamer and flats got away with the current leaving the anchor on the port bow of A2: the starboard anchor was then picked up as the steamer was swinging off into the channel, and to prevent the flat going over it in case she should again go ahead. It was hauled up to the bow of the steamer and hung there out of the water. It was so left to be ready at a moment's notice in case of need. This is said to have been the safest position for all emergencies. It was now 7-30 p.m., dark and raining. The steamer and flat A1 were still aground. There was another steamer about 600 yards ahead, also aground. By observing the light on board that steamer, it was seen how the *Soorma* was swinging; a sound of something bursting was heard, [430] and it was found that the 8-inch backing hawser of A1 had carried away, the result of the strain caused by the swinging of the steamer into the channel. A1 immediately crossed the steamer's bow, going on the top of the starboard anchor which made a hole in her side, and she began at once to fill with water. An attempt was made to beach the flat by going

full speed ahead: an order was given when the starboard steering gear was carried away, as the steamer swung off. The port anchor's hawser was also carried away. The engines were stopped, and the steamer and flats were carried down by the force of the current against the opposite bank. A1 was attached to the steamer by one forward hawser only: A2's port anchor was let go. All the men and what could be saved from the deck of A1 were got off: she was sinking fast, dragging the steamer down with her, so that the only remaining hawser had to be cut. She sank in about 5 minutes after striking the anchor, and at 5 minutes to 8 o'clock at night. The commander and sookaney further said that immediately the flat A1 was seen to be coming across the steamer, the order was given to put the helm round to get out of the way of the flat and to let go the anchor; but before it could be carried out, the flat struck. To secure it the anchor had beeen chained to the lower part of the capstan, and could have been released in 12 seconds, but the flat struck in half that time. The men were at their posts and carried out all orders given to them promptly. The reason assigned for the breaking of the starboard steering gear was that the rudder had got buried in the sand and when the helm was ported, the strain caused the chain to break. The pilot's evidence on this point was that the chain gave way at 11 o'clock in the morning, when the steamer and flats were working against the squall, and that this was the cause of their being unable to hold up against the wind, which drove them on the sand. The sookaney was positive that it was not until he got the order to put the helm round at night, so as to get out of the way of the flat, just before she struck, that the chain gave way. The commander says it was not till then, when he gave the order to go full speed ahead, that he discovered the steering gear would not work. The sookaney was at the wheel in the morning, when the steamer first took the ground, during the day and again at night, when the collision occurred. [431] He attributed the breaking of the chain to the same cause as the commander. He and the commander were in a much better position to judge of the matter than the pilot, who had nothing to do with the working of the ship; he was unable to state at what place the chain gave way, and yet he said it had been mended during the day. There was nothing to account for its breaking in the morning before the steamer touched the sand. The sookaney said he had examined it before leaving Kooshtea, when it was in good order. On this point I held in favour of the commander's evidence.

"It is unnecessary to enter more fully into the details of the evidence. The pilot, the sookaney, and the serang of the *Tura* all corroborated the commander as to the state of the weather on the 26th October; the pilot and sookaney also describe the squall as of unusual force and the current as very strong. They and the commander stated that all possible efforts were made during the day to get the steamer and flats off the sand, but without effect; that these efforts were of the usual kind, and were carried out in a proper manner; that the steamer and flats were well found and manned; the engines were properly worked and orders carried out promptly; all that it was possible to save out of the flat was saved before she sank; no other assistance was available. Another steamer, the *Lakeea*, passed the *Soorma* about noon after she had got aground, but at that time the *Soorma's* position was not considered dangerous, and the commander expected to get off in the ordinary way. He whistled to the *Lakeea* to let it be known he was aground that it might be reported, but she could not have assisted the *Soorma* by reason of the weather, and could

1891 APRIL 10. — SMALL CAUSE COURT REFERENCE. — 18 C. 427.

not have left her flats in safety; there were no country boats anywhere in the neighbourhood which could have been availed of, it was raining with a strong wind blowing, and the current running all day. The witnesses were cross-examined, and the evidence was uncontradicted in any material particular except as to the time when the rudder chain broke, already referred to.

"It was proved that the transhipment of the goods to a flat at Kooshtea was necessary, and that at the time of their loss the route taken from Kooshtea to Sara by water was the only one open for goods traffic. In the dry weather the route is by Damookdea, but [432] in October of last year that route was only open for passengers, passengers' luggage and small parcels.

"On a full and careful consideration of the facts relating to the accident and the measures taken to save the flat and cargo I held for the defendants. I found as a fact, in terms of s. 151 of the Contract Act, that they had taken as much care of the goods bailed to them as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

"Mr. Upton for the defendants contended, in the first instance, that the measure of the defendants' liability as carriers by railway was governed by s. 72 of Act IX of 1890. That section is as follows:—

'(1) The responsibility of a railway administration for the loss, destruction, or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of the Act, be that of a bailee under ss. 151, 152, and 161 of the Indian Contract Act, 1872.'

* * * *

* * * *

(3) Nothing in the common law of England or in the Carriers' Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration.'

"This Act only came into force on the 1st May 1890. It has no retrospective effect except that by s. 2, cls. (2) and (3), it declares all rules, declarations, appointments, sanctions, directions, forms, powers, and notifications made, given, approved, conferred and published under previous enactments to be in force as if made, &c., under that Act: and any enactment or document referring to any of those enactments, so far as may be, is to be construed as referring to the Act of 1890, or to the corresponding portion thereof. The matter is not saved by these provisions, nor is it merely a matter of procedure, but of the rights and liabilities of the parties.

[433] "'Where an enactment would prejudicially affect vested rights or the legal character of past Acts, the presumption against a retrospective operation is strongest. Every statute which takes away or impairs vested rights acquired under existing laws, creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation.' And 'when the law is altered pending an action, the rights of the parties are decided according to the law as it existed when the action was commenced, unless the new statute shows a clear intention to vary such rights.' (Maxwell on the Interpretation of Statutes, pp. 192-93.) I take it, then, that the Act of

1890 has no retrospective effect as applied to the present case, and that the defendants cannot claim the benefit of s. 72 of that Act.

1891 APRIL 10. — SMALL CAUSE COURT REFERENCE. — 18 C. 427.

"It was subsequently contended that if the defendant's reponsibility was to be measured by the law as it stood before 1st May 1890, the effect was still the same, as the law then applicable was s. 10 of Act IV of 1879.

"That section enacts :—

'Every agreement purporting to limit the obligation or responsibility imposed on a carrier by railway by the Indian Contract Act, 1872, ss. 151 and 161, in the case of loss, destruction, or deterioration of, damage to property shall, in so far as it purports to limit such obligation or responsibility, be void unless :—

'(*a*) it is in writing signed by or on behalf of the person sending or delivering such property, and

'(*b*) is otherwise in a form approved by the Governor-General in Council.'

"In the present case there was no special contract signed by or on behalf of the consignors of the goods.

"The question then arises, what was the measure of the defendant's responsibility as carriers by railway in October 1889? It will be observed that there is a great difference in the language of s. 72 of Act IX of 1890 and s. 10 of Act IV of 1879. The former declares what shall in future be the responsibility of a carrier by railway; the latter merely *assumes* that ss. **[434]** 151 and 161 of the Contract Act apply to carriers by railway. The Bombay High Court in *Kuverji Tulsidas* v. *The Great Indian Peninsular Railway Company* (1) held that the bailment sections of the Indian Contract Act applied to carriers by railway; but the High Court of Calcutta in *Mothoora Kant Shaw* v. *The India General Steam Navigation Company* (2) dissented from that view, and it may be that s. 72 of the Act of 1890 is the outcome of that decision. It is true the point was not in fact decided in that case, because the defendants were carriers by water, and the case was decided with reference specially to the Carrier's Act, 1865. So that the question which arises in this case has not been decided by the High Court of Calcutta; but having regard to the observations of the learned Judges in that case (which was a Full Bench decision), and to the doubts expressed by Mr. Justice O' Kinealy in *Moheswar Das* v. *Carter* (3) that the question is by no means free from doubt, it would appear to be the view of the High Court of Calcutta that s. 10 of Act IV of 1879 effected no change in the law on the subject.

"It was contended for the plaintiff in the present case, and as it seems to me rightly, that the defendants at the time the goods were lost were common carriers, to whom the English common law, as applicable to common carriers, applied, and that they were insurers of the goods, except only as to an act of God or the Queen's enemies, and such other conditions of the contract as appear on the back of the receipt note, none of which affect the present question.

"It was argued in *Mothoora Kant Shaw's* case, on the authority of *Pooley* v. *Driver* (4), that where an existing law is different from what the Legislature supposes it to be, implication arising from statutes cannot be followed, and it was suggested that s. 10 was passed on the assumption that the Bombay case had been rightly decided. It was distinctly held in *Mothoora Kant Shaw's* case that at the time of the passing of the Indian Carrier's Act in 1865 the English law relating to common

(1) 3 B. 109. (2) 10 C. 166. (3) 10 C. 210 (213). (4) L.R. 5 Ch. D 460.

1891 APRIL 10. — SMALL CAUSE COURT REFERENCE. — 18 C. 427.

carriers was in force in this country, and that that Act effected no alteration in the law in relation to the responsibility of a common carrier for goods entrusted [435] to him for carriage. That Act did not apply to railways. Did s. 10 of Act IV of 1879 alter the law as applied to railways? Garth, C. J., in that case says, referring to that section (p. 187), 'From this section we are asked to infer that the Legislature has put a construction upon ss. 152 and 161 of the Contract Act which relieves all carriers in India from any common law liability. But if, in our opinion, the Contract Act was not intended to have that effect, but, on the contrary, was intended to leave the liability of common carriers as it was before the Act passed, the fact that the Railways Act several years afterwards alluded to ss. 152 and 161 as applying to carriers by railway, is not, I think, sufficient to justify us in giving the Contract Act a construction which we disapprove and which we believe to be contrary to its meaning. Besides, it is really difficult to say what the Legislature did intend by s. 10 of the Railways Act. Very possibly it may have taken for granted that the view of the Bombay Court was right, or it may have supposed that carriers by railway were not common carriers.' The result of the decision in this case is that the bailment sections of the Contract Act were never intended to apply to common carriers, and do not apply. Having regard, then, to that decision, and to the views expressed with reference to s. 10 of the Railway Act of 1879, I am of opinion that that section effected no change in the responsibilities of railways as common carriers, or of the position of the defendants as such in 1889, and that they were, at the time of the occurrences out of which this case has arisen, common carriers, and as such, insurers of the goods, the act of God and the Queen's enemies only excepted.

"The next question is, can the accident be said to have been the act of God? The point was not argued before me, but Mr. Upton said he was prepared to argue that it was. I think it is clear on the authorities that the act of God, which excuses a carrier, must be a direct and violent act of nature. The words of the exception designate the immediate operation of purely natural agents, such as lightning, earthquake and tempest, exclusive altogether of human intervention, and not so extensive as to comprehend what is merely inevitable (McLachlan on Shipping, 2nd edition, 499). In *Smith* v. *Shepherd* (referred to in Abbott [436] on Shipping, 11th edition, pp. 338-39) it was held that the act of God which could excuse the carrier must be immediate and not remote. Even allowing that the primary cause of the accident was the violent squall which sent the steamer and flats on the sand bank, the grounding was not the sole or the immediate cause of injury to the flat which caused her to sink and destroy the plaintiffs' goods. *Smith* v. *Shephard* seems to me very much in point; in the present case likewise the act was too remote. I held, therefore, that this was not an act of God which excused the defendants.

"It was suggested that if Act IX of 1890 was inapplicable to the case, the plaintiffs were not entitled to the benefit of s. 80 (which allows a suit to be brought either against the railway administration to which the goods were delivered or against the railway administration on whose railway the loss occurred); and inasmuch as the accident occurred when the goods were in the custody of the Eastern Bengal State Railway, the suit ought to have been brought against that Railway. Now, whether s. 80 applies to the present case or not, I think that the defendants have been properly sued. The contract was with them, and

they were bound to the plaintiffs under that contract. In the *Great Indian Peninsular Railway Company* v. *Radhakisan Khusal Das* (1) it was held that the appellants had been rightly sued, although the goods had been delivered to the Madras Railway Company on the ground that the appellants were the agents of the Madras Railway Company. It has not been shown in the present case what agreement exists between the defendants and the other railways over which the goods were to be carried; but the defendants received the goods for carriage to Mongal Hat and granted a receipt note for them, which constituted the contract between the parties, and on that contract the defendants may be sued, whether or not the suit would also lie against the Eastern Bengal State Railway. There is a question as to which of the two sets of plaintiffs ought to receive a decree. The goods are deliverable to the consignees or to any person to whom the receipt note may be endorsed. There is no contest as between the consignors and consignees, and it was stated that the **[437]** goods had not been paid for by the consignees, and as they are parties plaintiffs, and have made no objection to a decree in favour of the consignors, I have made the decree in their favour with costs.

" My judgment is contingent on the opinion of the High Court on the following question, which I have been requested by Mr. Upton on behalf of the defendants to submit:

' Whether or not upon the facts of the case as they have been found and stated the judgment is correct in law? "

At the hearing of the reference before the High Court the following authorities were referred to in the course of the arguments given below:— The Indian Railway Act (IV of 1879), ss. 10 and 13; the Common Carriers' Act (III of 1865), ss. 6, 8 and 9; the Indian Railways Act (IX of 1890), s. 72; the Railways Act (XVIII of 1854), ss. 9, 10, 11; the Indian Contract Act (IX of 1872), ss. 150, 151 and 161; *Mothoora Kant Shaw* v. *The India General Steam Navigation Company* (2); *Moheswar Das* v. *Carter* (3); *Kuverji Tulsidas* v. *The Great Indian Peninsular Railway Company* (4); *Nugent* v. *Smith* (5); Abbott on Shipping, edition 11, p. 338, and the case of *Smith* v. *Shephard* there cited; *Pooley* v. *Driver* (6); *Queen* v. *Mayor of Oldham* (7); *Peek* v. *North Staffordshire Railway Company* (8); *India General Steam Navigation Company* v. *Joykristo Shaha* (9); *Abdulla* v. *Mohan Gir* (10); Wilberforce on Statutes, pp. 15, 16.

Mr. *Evans* (with him Mr. *Stokoe*)—The questions are (1) whether upon the findings of fact this is an act of God, (2) as to the liability of Railway Companies as carriers of goods under the repealed Act (IV of 1879). As regards the first question, the leading authority is *Nugent* v. *Smith* (5). The accident must have been directly caused by elemental force which could not have been averted by any amount of reasonable skill and care. The carrier does not insure against acts of Nature, and here the facts found bring us within the ruling in *Nugent* v. *Smith*. That case was not before the lower Court, which relied on *Smith* v. *Shephard*, **[438]** a case cited in the notes to Abbott on Shipping (11th Ed,, 338, 339) and McLachlan on Shipping (2nd Ed., 499), which was a very different case.

---

(1) 5 B. 371. (2) 10 C. 166. (3) 10 C. 210. (4) 3 B. 109.
(5) L.R. 1 C.P.D. 423. (6) L.R. 5 Ch. Div. 460. (7) L.R. 3 Q. B. 474.
(8) 32 L. J. Q. B. 246. (9) 17 C. 39. (10) 11 A. 490.

1891 APRIL 10. — SMALL CAUSE COURT REFERENCE. — 18 C. 427.

As to the second question, I admit that, having regard to the Full Bench decision in *Mothoora Kant Shaw* v. *The India General Steam Navigation Company* (1), common carriers are governed by the common law, and are liable as insurers subject to any statutory law affecting them. Then the effect of the Carriers' Act (III of 1865) was to provide that the known liability of common carriers as insurers was to be capable of being cut down by special contract to a minimum (s. 6). There was upon them a higher liability which could be cut down, but not so as to excuse negligence (s. 8) or criminal acts. It is provided by s. 9 that the onus of proof lies on the defendant to rebut negligence, and there is a corresponding provision in the case of railway carriers in Act IV of 1879, s, 13 which is imported into the latter Act from the Carriers' Act, and must be read in the same sense. If the Carriers' Act be excluded, I say that railway carriers are free from all liability except that governing bailees as defined in the Contract Act, (ss. 151, 152, 161). A railway carrier's liability, then, is that of the ordinary bailee, and we may limit even that by s. 10 of the Carriers' Act. All that s. 13 says is that the loss itself is evidence of negligence: *res ipsa loquitur.* Section 11 of the Railway Act of 1854 makes railways liable only on proof of negligence. The definition of a common carrier is wide enough to include all railways other than Government, and railways are a species of common carriers. The Contract Act does not affect statutes not expressly, repealed by it, so the Contract Act could not apply without affecting the Carriers' Act. The Bombay decision in *Kuverji Tulsidas* v. *The Great Indian Peninsular Railway* (2) held that the Contract Act does not *affect* the Carriers' Act, but effects its purpose and renders it unnecessary. The Full Bench case here could not follow that, and said that if the Act is rendered unnecessary and the insurance liability of the carrier is lowered down to a liability for negligence, that must have the effect of affecting the Act.

[439] I put a case which was not before the Full Bench in *Mothoora Kant Shaw's* case. The course of decision for many years show that it has never been held that railways were liable if they took reasonable care. Now it is sought to place upon them an insurance liability which cannot be upon them unless by virtue of the Act of 1879. The Contract Act would apply to all bailees if it does not affect the Carriers' Act which applies to railways, and renders it unnecessary for them to have a special Act. The liability for negligence is an irreducible minimum. The Act of 1879 allowed railway carriers to reduce their liability by a special contract. The result of removing the Carriers' Act is that they become bailees under s. 151, 152 and 161 of the Contract Act, which is identical with their obligations under the Carriers Act, as they are a specially favoured class. The Act of 1879 must be interpreted with reference to the history of the matter and the probabilities. An erroneous recital in an Act may become correct by reason of the changes it has effected—Wilberforce on Statutes, pp. 15, 16; *Queen* v. *Mayor of Oldham* (3); *Abdulla* v. *Mohan Gir* (4). They are bailees clear of statute, and their liability is governed by s. 151, which is practically identical with s. 8 of the Carriers' Act except that they may limit it. An intelligent purpose must be attributed to the legislature. Railways have never been liable for more than negligence, and three Judges in the case of *Moheswar Das* v. *Carter* (5) assumed that the Contract Act applied to railways. The express pro-

---

(1) 10 C. 166. (2) 3 B. 109. (3) L.R. 3 Q. B. 474.
(4) 11 A. 490. (5) 10. C. 210.

vision in s. 72 of the new Railway Act (IX of 1890) was intended to get rid of the doubt raised by O'Kinealy J., at p. 213. It would be unreasonable to say that there was an interval between 1879 and 1890 in which the liability of insurers was imposed upon railways. It is more reasonable to assume the continuity and consistency of the legislature culminating in the Act of 1890.

1891 APRIL 10.

SMALL CAUSE COURT REFERENCE.

18 C. 427.

Mr. *Henderson*—The primary and immediate cause of the accident in this case was not the squall which took place eight hours before. There was, therefore, no act of God within the principles in *Nugent* v. *Smith* (1). As to the other question, my argument shortly is that the Contract Act when passed in 1872 was never **[440]** intended to apply to carriers, there being two Acts expressly dealing with them—the Railway Act of 1854 and the Carriers' Act of 1865—and it was at that time intended to amend and consolidate the law relating to carriers (2). This being the case, the Railway Act of 1879 repealed entirely the two previous Acts, and nothing else being substituted, and the Contract Act not being made expressly applicable, the English common law revived, and they became liable as insurers. The legislature was under a misapprehension as to what the law really was. There was nothing to prevent them from expressly declaring in the Act of 1879 the law to be what it was afterwards stated to be in the Act of 1890, when the legislature appears to have been alive to the fact that there was some doubt. It was necessary to use clear and unmistakeable words, in order that the liability imposed by s. 151, 152 of the Contract Act should attach. Section 161 could only apply on loss or deterioration of goods after the time the goods were to be delivered.

Mr. *Evans* was heard in reply.

OPINION.

The opinion of the Court (PETHERAM, C.J., PIGOT and MACPHERSON, JJ.) was delivered by

PETHERAM, C.J.—The facts of this case are so fully and clearly set out in the judgment of the Judge of the Small Cause Court that it is not necessary to re-state them.

The two questions which have to be considered are, first, whether the liability of a carrier of goods by railway in India was, between the passing of the Railway Act of 1879 and the passing of the Railway Act of 1890, that of insurer against everything but what is known as the act of God, or was that of a bailee as defined in the Contract Act; and second, if the liability was that of an insurer, whether this particular loss was caused by the act of God within the legal meaning of the term.

In order to answer the first question, it is necessary to ascertain what has been the history of the law relating to carriers by railway, in this country. The first legislation on the subject is that contained in Act XVIII of 1854, s. 11 of which is as follows:—"The liability of such Railway Company for loss or **[441]** injury to any articles or goods to be carried by them other than those specially provided for by this Act, shall not be deemed or construed to be limited, or in anywise affected by any public notice given, or any private contract made by them; but such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants." This continued to be the case until the passing of the Carriers' Act, 1865, s. 7 of which related specifically to the owners of

(1) L.R. 1 C. P. D. 423. (2) 10 C. 192.

1891 APRIL 10. — SMALL CAUSE COURT REFERENCE. — 18 C. 427.

railways, and was in these words:—"The liability of the owner of any railroad or tramroad constructed under the provisions of the said Act XXII of 1863, for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any special contract; but the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried, only when such loss or damage shall have been caused by negligence or a criminal act on his part or on that of his agents or servants."

On the 10th of September 1867 it was decided in the case of *East Indian Railway Company* v. *Jordan* (1) by a Division Bench of this Court (Peacock, C. J., and Macpherson, J.) that Railway Companies in India were common carriers, and liable as such, that is to say, as insurers of goods delivered to them. Sections 151, 152 and 161 of the Contract Act, 1872, limit the liability of bailees of goods to a liability for negligence, but a Full Bench of this Court on September 13th, 1883, in the case of *Mothoora Kant Shaw* v. *India General Steam Navigation Company* (2) decided that the liability of common carriers was not affected by these sections, and as this Court had before, in the case first cited, decided that Railway Companies in India were common carriers, these sections do not affect the present question.

We now come to the Railway Act of 1879. Section 2 of that Act contains the following provisions: "Nothing in the Carriers Act, 1865, shall apply to carriers by railway." I cannot read these words in any other sense than as repealing all the provisions of Carrier's Act which relate exclusively to carriers by Railway, **[442]** and confining the operation of the remaining provisions to carriers other than carriers by railway, so that by the repeal of so much of the Carriers' Act of 1865 as related to railways and that of the whole of the Railway Act of 1854, the liability of carriers by railways as it stood before the Acts of 1854 and 1865 was restored. The case of the *East Indian Railway Company* v. *Jordan* decided that carriers by railway are common carriers, and the case of *Mathoora Kant Shaw* v. *India General Steam Navigation Company* decides that the liability of common carriers was not affected by the Contract Act, so that, unless there is something in the Act of 1879 itself which limits it, their liability after the passing of that Act was that of common carriers according to English law, that is to say, of insurers. On behalf of the defendants s. 10 is relied on. That section is in the following words:—"Every agreement purporting to limit the obligation or responsibility imposed on a carrier by railway by the Indian Contract Act, 1872, s. 151 and 161, in the case of loss, destruction, or deterioration of or damage to property shall, in so far as it purports to limit such obligation or responsibility, be void unless—

(*a*) it is in writing signed by or on behalf of the person sending or delivering such property, and

(*b*) is otherwise in a form approved by the Governor-General in Council."—

And it is said that by it ss. 151 and 161 of the Contract Act are declared to be the law relating to carriers by railway; but even if that were so, it would not avail the defendants, as those sections merely impose a liability for negligence, and s. 152, which is the section which limits the liability of the bailee, is not mentioned in s. 10 of the Act of 1879. It follows

(1) 4 B. L.R. O.C. 97.

(2) 10 C. 166.

that after the passing of the Act of 1879 the liability of carriers in India, including carriers by railway, was not limited to a liability for negligence but was a liability as insurers of the goods delivered to them.

1891 APRIL 10. — SMALL CAUSE COURT REFERENCE. — 18 C. 427.

This being my opinion, it is necessary to decide whether or not the loss in this case was caused by what is known as the act of God, and as to this I am clearly of opinion that it was not. The [443] legal meaning of the phrase is clearly defined in *Nugent* v. *Smith* (1), and there can be no doubt that the present case does not come within that definition. So far from the loss having been caused by any convulsion of nature, it appears that for these steamers and flats to get ashore is quite a usual occurrence, and that the loss was occasioned by a variety of causes, which happened after this steamer with the flats attached to it had got aground and during the many hours which elapsed before the flat sunk, no one of which was occasioned by any tremendous or even unusual disturbance of the elements. For these reasons I would reply that upon the facts of the case as they have been found and stated, the judgment is correct in law.

Attorney for plaintiffs : Mr. *E. O. Moses.*

Attorney for defendants : Mr. *R. L. Upton.*

T. A. P.

---

18 C. 443.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

GOMES *v.* GOMES.* [24th March 1891.]

Practice—Divorce—Decree absolute—Notice of application to make decree absolute.

When a decree *nisi* has been served on the respondent in a divorce suit, it is not necessary to give him notice of an application to make such decree absolute.

THIS was an application to have a decree *nisi*, which had been passed on the 10th April 1890, made absolute, the case being set down in the list of cases for hearing in the ordinary way on March 23rd, 1891. The decree had been passed in the suit which was for dissolution of marriage on the ground of the adultery and cruelty of the respondent, and had been served on the respondent in the usual way, but no notice of the application to make it absolute had been served on him.

[444] The petition, on which the application was made, set out that the period of six months allowed by the decree had expired; that no cause had been shown by the respondent why the marriage should not be dissolved as directed by the decree within that period; and that no leave to intervene had been applied for or affidavit filed by any one desiring to show cause why the decree should not be made absolute.

Mr. *Acworth* appeared in support of the application and submitted that the petitioner was entitled to have the decree made absolute. He referred to Belchambers' Practice, pp. 419 and 420, and to the cases there cited, and contended that according to the practice now prevailing notice of the application was unnecessary.

The Court (WILSON, J.) took time to consider the judgment, which was delivered on March 24th, as follows :—

---

* Original Civil suit No. 1 of 1890.

(1) L. R. 1 C. P. D. 423.

1891
MARCH 24.

ORIGINAL CIVIL.

18 C. 443.

JUDGMENT.

WILSON, J.—This was a divorce case in which the decree *nisi* was made in due course. That decree has been properly served upon the respondent. Yesterday, when the case was set down for the purpose of making the decree absolute, a point arose which I took time to consider. The point was whether notice of the application to make the decree absolute ought to be given to the respondent. I find there has been a variation in the practice. Formerly the practice seems to have been strictly observed of requiring service of such notice. But the more usual practice of late appears to have been not to require it; and it seems to me that, as a matter of principle, it ought not to be required. For all purposes for which the respondent is entitled to come before the Court, as for instance, for the purpose of an appeal, or for the purpose of making an application for review, the service of the decree *nisi* is sufficient. Therefore I think the more modern practice of not requiring notice to be given of the application for a decree absolute when once the decree *nisi* has been served, is the proper one. The decree must be made absolute with costs.

H. T. H. *Application granted.*

Attorney for the petitioner: Baboo *N. C. Bural.*

---

18 C. 445.

ORIGINAL CIVIL.

[445] *Before Mr. Justice Wilson.*

NORENDRONATH BOSE *v.* ABINASH CHUNDER ROY.*
[16th April, 1891.]

Presidency Small Cause Courts Act (XV of 1882), ss. 38 and 71—Practice—Stamp—Re-hearing, application for—Petition insufficiently stamped—Deficiency of stamp, power to make good, after period of limitation allowed for presentation of application.

On the 7th April, being the last day on which such application could be made under the provisions of s. 38 of the Presidency Small Cause Courts Act, an application was made to the High Court under that section for the re-hearing of a suit which had been dismissed by the Small Cause Court. The application was made by petition at the rising of the Court, and not being a regular motion day, the hearing of the matter was postponed till the 9th April. On that day, on the application being brought on, it appeared that the petition only bore a 7-rupee stamp instead of one of the much larger value required by s. 71 of the Act. It was contended on behalf of the petitioner that the deficiency could then be made up, and that he was entitled to have the application heard.

Held, that this could not be done. The eight days allowed by s. 38 expired on the 7th April, and had the application been then considered, it could not have been received, but must have been rejected, as s. 71 requires the proper fee to be paid before the application can be received. Although the consideration of the application was deferred to the 9th April, that made no difference, as the eight days had expired before the petition was in such a condition that it could be received.

THIS was an application under the provisions of s. 38 of Act XV of 1882 (The Presidency Small Cause Courts Act) for an order that two suits in which the petitioner was plaintiff might be re-heard in the High Court. The suits were for the recovery of the respective sums of Rs 1,800

* Original Civil Motion, in the matter of s. 38 of Act XV of 1882, and in the matter of suits Nos. 23172 and 23173 of 1890.

and Rs. 1,900 alleged to be due on two promissory notes of which the plaintiff stated he was the holder for value, the defendants being the alleged maker of the notes, the payee, and a subsequent endorser. The suits came on for hearing before the Chief Judge of the Small Cause Court and resulted in both being dismissed by one judgment. The petition on which the application was made was presented at the rising of the Court on Tuesday, the 7th April, that being the last day on which the application could be made under the section. **[446]** That day not being the regular motion day, Thursday, the 9th April, was fixed for hearing the matter.

1891 APRIL 16. — ORIGINAL CIVIL. — 18 C. 445.

At the sitting of the Court on the 9th April, Mr. *Chowdhry* applied for an adjournment of the matter on the ground that he was not in a position to go on owing to the lengthy nature of the depositions which he had not had an opportunity of reading. This application was refused, and the Court directed that the matter must come on its usual turn.

Later in the day Mr. *Pugh* (Mr. *Chowdhry* with him) appeared in support of the application, when it was brought to the notice of the Court that the petition was not properly stamped, as it bore only a stamp of the value required on an ordinary petition in place of the amount required under s. 71 of Act XV of 1882. On this being pointed out, His Lordship observed that the defect would appear to be fatal to the application; as the previous Tuesday was the last day on which the petition could be presented, it was then, not being properly stamped, improperly admitted, but that after the petition had been properly stamped he would hear Mr. *Pugh* as to whether the Court had any power to hear the application.

The matter accordingly stood over till later in the day, when it was brought on again by Mr. *Pugh*, who stated that the petition had not been stamped, as there was some doubt as to the exact amount of the stamps required.

Mr. *Pugh.*—The Court having received the petition on Tuesday and permitted the matter to stand over till to-day, has in fact extended the time for making the application. It is the practice on the appellate side to permit appeals to be properly stamped if any deficiency be discovered subsequent to their presentation, but I have been unable to find any rule on the subject. In this case there is a doubt as to the proper amount of the stamp, as the Chief Judge tried only one of the two suits, though in one judgment he dismissed them both. The question is whether the stamp duty is to be calculated on the aggregate value of the two suits or on the value of each suit taken separately, and a reference to the Registrar is necessary to determine that question. The petition could not, therefore, be stamped till that reference had been made.

[447] WILSON, J.—I think it would be safer for your client to treat the present application as one to perfect the petition by affixing the proper stamp.

Mr. *Pugh.*—There are no decisions of this Court on the point. The Bombay Court in *In re Jaikissondoss Purshotamdas* (1), while dealing with the question, does not actually decide this point. *Balkaran Rai* v. *Gobind Nath Tiwari* (2) is an authority against me, though that is not a decision of this Court. I am bound, however, to admit that I have been informed that a bench of this Court, consisting of Norris and Beverley, JJ., has within the last fifteen days followed it. See also *Waterton* v. *Baker* (3), and *Park Gate Iron Company* v. *Coates* (4). I would submit, however,

(1) 12 B. 408.
(2) 12 A. 129.
(3) L.R. 3 Q.B. 173.
(4) L. R. 5 C. P. 634.

1891 APRIL 16. — ORIGINAL CIVIL. — 18 C. 445.

that the Court having extended the time till to-day for hearing this application, has in fact extended my time for making it, and that I should now be at liberty to do what I could easily have done last Tuesday, had the application been heard and the defect been pointed out, namely, affix a stamp of the proper value.

The judgment of the Court was delivered on the 16th April, and was as follows :—

JUDGMENT.

WILSON, J.—This is a petition under s. 38 of the Presidency Small Cause Courts Act. The section (cl. i) is as follows :—"Any party may, within eight days after the judgment in any suit in the Small Cause Court in which the amount or value of the subject-matter exceeds one thousand rupees, apply to the High Court for an order that such suit may be reheard in the High Court." Section 71 of the Act says :—" A fee not exceeding (the scale is given) shall be paid on the plaint in every suit and every application under section thirty-eight or section forty-one, and no such plaint or application shall be received until such fee has been paid."

According to the practice of this Court petitions are presented in chambers, or by counsel in open Court on days when motions are heard. In urgent cases, however, it is common to allow them to **[448]** be presented on days other than motion days and to hear counsel in support of them the next motion day.

In this case the eighth day from the Small Cause Court judgment was Tuesday last, and it was not a motion day. Mr. Chowdhry on that day asked leave to present the petition ; this was allowed, and the next motion day, Thursday, Mr. Pugh rose to move in terms of the petition. It then appeared that the petition was not duly stamped, bearing only a 7-rupee stamp instead of the very much larger one required by s. 71.

Mr. Pugh then asked to be allowed to stamp the petition properly, and that it might then be treated as a good petition from the first. I think this cannot be done. Eight days are by s. 38 allowed, within which an application can be heard ; and by s. 71 the application is not to be received unless the proper stamp duty has been paid. This petition was presented on the last possible day ; if considered then it could not have been received, but must have been rejected. The consideration was deferred to Thursday, but that can make no difference ; eight days had expired before the petition was in such a condition that it could be received.

Attorney for the petitioner : Mr. *C. N. Manuel.*

H. T. H. *Application refused.*

18 C. 448 (P.C.) = 18 I.A. 59 = 15 Ind. Jur. 155 = 6 Sar. P.C.J. 19.

1891 FEB. 21.

PRIVY COUNCIL.

18 C. 448 (P.C.) = 18 I.A. 59 = 15 Ind. Jur. 155 = 6 Sar. P.C.J. 19.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Morris and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

FAZL KARIM AND ANOTHER (*Plaintiffs*) v. MAULA BAKSH AND OTHERS (*Defendants*). [29th and 30th January and 21st February, 1891.]

Mahomedan law—Custom—Public worship in mosque—Injunction restraining defendants from interrupting religious ceremonies in a musjid—Right of Imam and of Matwali to be protected in their offices—Differences of opinion between the Imam and certain of the worshippers as to observances at prayer.

Among Sunni Mahomedans, neither on the ground of any general and express rule of Mahomedan law, nor on the ground of the growth of [449] customs separating different schools in so marked a manner that the followers of one school could not properly worship with those of another, did the introduction by the Imam of (*a*) the loud-toned Amen, and of (*b*) the Rafadain, show such a change of tenets. Nor was it in itself such an important departure from the custom of Sunnis as that it would disqualify the Imam for officiating in a musjid where those ceremonies had not previously been used. Nor did the introduction of (*a*) and of (*b*) justify a section of the worshippers in setting up another leader of prayer at the same time that prayer was being conducted by the duly authorized Imam.

On the lower appellate Court's findings of fact there was nothing in the constitution of the mosque which prohibited the adoption of (*a*) and (*b*), and those findings were conclusive. For the purpose, however, of considering the case from other points of view, their Lordships examined the whole of the evidence, and they agreed with the Subordinate Judge that there was no evidence showing that the mosque was not intended for the worship of all Sunnis or for all Mahomedans. Nor was there any rule of law that, when public worship had been performed in a certain way for twenty years, there could not be any variation, however slight from that way. The question in each case of dispute must be as to the magnitude and importance of the alleged departure. There had not been produced any text to show that a follower of Abu Hanifa would do wrong in following a practice recommended by others of the four Imams. Nor was there any usage, having the force of law among Sunni communities, forbidding the introduction of (*a*) and (*b*) into ceremonial prayer, as shown by the evidence of learned Mahomedans, and by proof of their actual practice. The judgments in the *Empress* v. *Ramzan* (1) and *Ata-ulla* v. *Azim-ulla* (2) referred to.

The Court ought not to declare that the Imam or matwalis of the musjid had authority to eject the dissentients, if and when they interfered. The plaintiffs must rely on the prohibitory order or injunction, which could be enforced according to law if the occasion arose.

[**F.**, 2 M.L.T. 94; **Rel.**, 35 C. 294 = 7 C.L.J. 433 = 12 C.W.N. 289 = 3 M.L.T. 191; **R.**, 30 M. 158 (165) = 17 M.L.J. 1 = 2 M.L.T. 69; 35 M. 681 (683) = 18 Ind. Cas. 195; 1 C.W.N. 76 (79); 15 P. R. 1902 (**F.B.**) Cr. = 104 P.L.R. 1902.]

APPEAL from a decree (6th December 1887) of the High Court reversing a decree (15th March 1886) of the Additional Subordinate Judge of Tirhoot, and restoring a decree (27th December 1884) of the 2nd Munsif of Mozufferpur.

The present appeal raised questions relating to the interruption of worship conducted in a musjid at Tajpore in the Tirhoot district, of which the property forming its endowment was entrusted to the management of the late Kazi Ramzuddin as matwali, in whose time, in 1858, the musjid

---

(1) 7 A. 461. (2) 12 A. 494.

1891
FEB. 21.

PRIVY
COUNCIL.

13 C. 448
(P.C.)=
13 I.A. 59=
15 Ind. Jur.
155=6
Sar. P.C.J.
19.

was rebuilt on land belonging to him. His two sons succeeded him as matwalis on his death, [450] and in this suit they joined the Imam—whom their father had appointed in 1862—in claiming a declaration of Imam's right to conduct the prayer in the musjid; also relief by the issue of an order prohibiting the defendants, originally twelve in number from interfering with the Imam, as they had done, in the discharge of his office.

The Imam died before the decision of the High Court. Leave to appeal was granted to the matwalis, who had the duty of appointing his successor. It was granted because their rights were affected by the judgment, although their own title as matwalis was upheld by all the Courts. Some of the defendants withdrew their opposition in the interval.

When first filed this suit was dismissed on the ground that the dispute was not cognizable as a question of civil right. This, however, was reversed (5th July 1884) on appeal to the Subordinate Judge, and the suit was remanded for trial on the merits. The High Court affirmed the order of remand. Another Munsif then decided the suit on the merits. He found that the mosque had been rebuilt by men of the sect termed Hanifi, and that these appellants, whose title as matwalis he affirmed, belonged to a class of the Sunnis. He found that the musjid had been erected under the supervision of Munsif Maulvi Abdul Wajak, who was of the Hanifi sect, by subscriptions from worshippers of the same school. He also found that the only allegations borne out were that the defendants themselves gave azans, and prayed as a separate congregation under an Imam of their own selection, and he decided that, as the plaintiffs had given up their old faith, or Hanifi mezhab, or creed, the defendants were justified in acting under their own Imam in the mosque.

He therefore declared that these appellants were the matwalis, but that plaintiff No. 1 could not be the Imam of the contending defendants, and that these had a right to pray according to their own practice under an Imam of their selection.

On appeal the Additional Subordinate Judge reversed the above, stating in his judgment the nine findings set forth in their Lordships' judgment. And he was of opinion that by the uttering of the loud Amen and performing the Rafadain, alleged by the defendants to justify their conduct, the first plaintiff, the Imam, [451] had not done acts that were forbidden, or that disqualified him for his office. He granted the declaratory decree applied for, and the injunction to restrain the defendants from causing interruption. This judgment in its turn was reversed by the High Court, a Division Bench (O'Kinealy and Macpherson, JJ.) holding that the lower appellate Court was wrong in setting aside the decree of the first Court. They therefore decreeing the appeal, restored the decree of the Munsif with costs.

On this appeal, which was preferred by the second and third plaintiffs, Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the appellants, argued that the decision of the High Court was wrong, and should be reversed, and that the decree of the Subordinate Judge should be restored. The findings of fact in the first appellate Court were in favour of the appellants, and must be accepted. It could only have been on a point of law, or usage having the force of law, that the High Court would have had authority to reverse on second appeal. However, it appeared from the judgment that the following had been the reasons for the reversal by the High Court of the judgment of the first appellate Court, *viz.*, that the Imam should have made no innovation upon the customary ritual, and

1891 FEB. 21.

PRIVY COUNCIL.

18 C. 448 (P.C.) = 18 I.A. 59 = 15 Ind. Jur. 155 = 6 Sar. P.C.J. 19.

that, change having been introduced, it was for the Imam to justify it. According to the judgment, he had failed to justify it. In this the High Court had entered upon facts. The lower appellate Court had found that the utterance of the loud Amen and the performing Rafadain were not contrary to the ritual ordained by the custom of the Sunnis, and were no ground for objection on the part of the defendants to the leadership of Hafiz Maula Baksh. The Subordinate Judge had also found that it was not proved that the mosque was exclusively devoted to worship as approved by the followers of the Imam Abu Hanifi; and that, even if it had been so devoted, still there would have been in that no reason for prohibition upon worship according to Sunni customs. The constitution of the mosque, the nature and effect of the deviation, if deviation from custom there had been—were all questions of fact, and upon these the first appellate Court had given findings. Reference was made to the *Empress* v. *Ramzan* (1) and to *Ata-ulla* v. *Azim-ulla* (2).

[452] There had been no usage having the force of law established as having been contravened, nor had any departure been shown sufficient to authorise the defendants in setting up another Imam in place of one who had been shown as a Sunni to have followed the four Imams, all equally orthodox. though not precisely agreeing upon all details of worship recommended by them.

The High Court in reversing, on second appeal, findings of fact had not been within s. 584 of the Code of Civil Procedure. These also were well borne out by the evidence.

The respondents did not appear.

JUDGMENT.

Afterwards, on 21st February, their Lordships' judgment was delivered by

LORD HOBHOUSE.—When the plaint in the suit was filed, the plaintiffs were the two present appellants and one Hafiz Maula Baksh. The last named plaintiff was the Imam and Moazzin of a mosque in Tajpore, and the two others were matwalis of the same mosque. The defendants were 12 persons who worshipped at the mosque. The plaint alleged that the defendants, being dissatisfied with certain variations in the ceremonial which the Imam had introduced, interfered with his performance of the service, and claimed to conduct the service in their own way, and otherwise misbehaved themselves.

The relief prayed was as follows:—

"(*a*) That it be declared by the Court that the plaintiff No. 1 is Imam and Moazzin of the musjid at Tajpore, pergunnah Saresa, and that plaintiffs Nos. 2 and 3 are matwalis thereof; and that, as Imam and matwalis, the plaintiffs have a right, as they have all along hitherto had, to deliver the Friday oration and perform the daily prayers before the congregation from the pulpit and mosulla.

"(*b*) That the defendants have no right to interfere therewith, nor any to do the acts referred to in paragraph 5 of the plaint.

"(*c*) That it be declared that the defendants, as a sect of Mussulmans, have simply the right to visit the musjid at the time of prayer only, and to say prayers, **[453]** led by plaintiff No. 1; otherwise they have no right to visit the musjid with any other intention.

(1) 7 A. 461. (2) 12 A. 494.

1891
FEB. 21.
PRIVY COUNCIL.
18 C. 448 (P.C.) = 18 I.A. 59 = 15 Ind. Jur. 155 = 6 Sar. P.C.J. 19.

"(*d*) That it be declared by the Court that in case the defendants interfere with the rights of the plaintiffs as Imam and matwalis, and do the acts referred to in paragraph 5 of the plaint, the plaintiffs have the authority to turn out all the defendants—or any one who may do such acts—from the musjid."

The suit was therefore in the first instance a declaratory suit, but the plaint was amended by adding a prayer for substantive relief as follows:—

"That the defendants may be prevented from interfering in any way in the Moazzin's right and the Imam's right enjoyed by the plaintiff No. 1, and in the towliat right of the plaintiffs Nos. 2 and 3, and that a prohibitory order may be issued to the defendants, to the effect that the defendants must not do any act mentioned in paragraphs 4 and 5 of the plaint within the mosque of the plaintiff, nor should the defendants enter the mosque of the plaintiffs with that object."

In their written statement, the defendants did not deny that Hafiz Maula Baksh has been Imam and Moazzin for 25 years, nor that the other plaintiffs acted as matwalis; but they defended themselves by alleging in effect that the plaintiffs had forfeited their offices by reason of heresy. The two material pleas are as follows:—

"Prior to this, the plaintiff No. 1 was Moazzin, and led people to prayer. But he has renounced his Hanifi religion and embraced the Wahabi religion. That being so, the plaintiff No. 1 can by no means now, according to Mahomedan law and rule, claim to be Imam and Moazzin, and therefore he has no right to bring the suit.

"The plaintiffs Nos. 2 and 3 are, on their own showing, not matwalis. They are certainly sons of the deceased matwali Kazi Ramizuddin. But they can have, in Mahomedan law, no right to the matwaliship simply because they are sons (of the deceased matwali). Besides this, the plaintiffs Nos. 2 and 3 have renounced their previous and paternal religion, and joined the Wahabi sect. **[454]** That being so, they have no right whatever to the management of the disputed musjid."

The plaintiffs filed what is called "a refutation" of the defendants' statements. It is not in the Record, and is probably immaterial except as a general denial of the matter urged in defence.

In the months of August, September and November 1884, three petitions were presented by eight of the defendants, stating their regret at having been persuaded to take part against the plaintiffs, and their wish that the plaintiffs might obtain the decree they prayed for. It does not appear that any order was made for stay of proceedings against these converted defendants; but by the time the suit reached the High Court the eight names had disappeared from the proceedings.

In the course of taking the evidence, it became clear what was the real quarrel between the parties. The general charge against the plaintiffs of having become Wahabis (whatever the defendants may have meant by it) resolved itself into this, that they had adopted two observances which the defendants think to be wrong—one being the pronunciation of the word "Amen" in a loud instead of a low voice, and the other the performance of Rafadain, which is a ceremonial gesture of raising the hands to the ears at a particular point of the service.

All the parties are, or claim to be, Sunni Mahomedans. Hafiz Maula Baksh says: "I obey equally all the four Imams," which is the mark of the Sunni school. Omed Ali, the first defendant, says: "Even

now I would say prayers under the leadership of Maula Baksh if he only gave up uttering 'Amen' loudly and raising his hands to his ears . . . I call him a Wahabi because he utters 'Amen' and raises his hands, and says prayers standing with the two legs apart, and he crosses the hands on the breast." It is clear that the defendants make no charge of false or heretical doctrine, except so far as it is to be inferred from the offending ceremonial; and it is the two first acts of worship mentioned by Omed Ali to which the whole evidence and argument has been addressed. The two last are not mentioned again. The question is whether the use of the loud Amen and of Rafadain is inconsistent with Hafiz Maula Baksh's retention of the office of Imam and Moazzin.

[455] That it is consistent with his being a sound Sunni is clear, for both practices are prescribed by one or more of the four Imams whom the Sunnis follow. But the defendants allege that the mosque was built by Sunnis of the school of Abu Hanifa, who, they say, prescribes the low-toned Amen and the omission of Rafadain. Thence they infer, *first*, that no person who is not a Hanifi can properly be Imam, Moazzin or matwali of the mosque; and, *secondly*, that to use the loud Amen and Rafadain is inconsistent with being an Hanifi. The plaintiffs deny both these inferences.

Their Lordships have been careful to state the precise constitution and nature of the suit, because it appears to them that it has not always been sufficiently borne in mind. The next step is to see how it has been judicially dealt with.

After a decision by the Munsif that he had no jurisdiction to deal with the matter—which was reversed on appeal—the case was heard by the then Munsif in December 1884. He took the views of the defendants as regards the office of Imam and Moazzin, but he did not think that the matwalis were disqualified. The decree passed by him is as follows:—

"That the plaintiffs Nos. 2 and 3 do continue to remain matwalis of the musjid; that the plaintiff No. 1 cannot be considered as Imam and Moazzin as against the contending defendants, nor are the defendants bound to follow his leadership in prayer; that the defendants have every right to say prayers in the musjid in their own way behind their own Imam."

On appeal by the plaintiffs, the case was heard by the Additional Subordinate Judge in March 1886. It is important to see precisely what his findings are, because, so far as they relate to matters of fact, no appeal from them lay to the High Court. The material findings appear to their Lordships to be in substance as follows:—

(*a*) The plaintiffs belong to a school known as Amil-bil-Hadis or Ahil-Hadis.

(*b*) The Amil-bil-Hadis are Mahomedans, Sunnis, and members of the Sunnat Jamait.

(*c*) There is no authority to say that an Amil-bil-Hadis cannot lead the prayer of an Hanifi.

(*d*) **[456]** The only difference is that the Amil-bil-Hadis perform Rafadain and say Amen in a loud tone.

(*e*) The difference is no ground for a religious objection on the part of a Hanifi to pray behind an Amil-bil-Hadis.

(*f*) The Amil-bil-Hadis follow the authority of the kias and the ijma, if not inconsistent with the Koran and Hadis, in which they do what every Mahomedan should do.

(*g*) It is doubtful whether the mosque is an Hanifi mosque.

1891
FEB. 21.

PRIVY COUNCIL.

18 C. 448 (P.C.) = 18 I.A. 59 = 15 Ind. Jur. 155 = 6 Sar. P.C.J. 19.

(h) Granting that the founder was a Hanifi, still there is nothing to show that he prohibited an Amil-bil-Hadis from praying in the mosque or acting as Imam therein.

(i) The defendants are not entitled to pray behind an Imam of their own selection.

From these findings the necessary conclusions were—that Hafiz Maula Baksh was not disqualified to be Imam; that he was entitled to protection against the defendants, and that the Munsif's decree must be reversed. This was done, and a decree made for the plaintiffs according to the prayer of the plaint, with costs of suit.

The defendants then appealed to the High Court, and the case was heard before a Division Bench (O'Kinealy and Macpherson, JJ.) in December 1887. The Court discharged the decree of the Subordinate Judge and restored that of the Munsif. They considered that the Subordinate Judge had addressed himself to matters which were altogether irrelevant and had nothing to do with the suit, *viz.*, whether it was lawful for Hanifis to pray behind Amil-bil-Hadis, whether Amil-bil-Hadis are respectable members of society, and whether it is lawful for them to perform the duties of an Imam. Their ground of decision is thus stated:—

"The only questions we have to decide are, whether these plaintiffs, who were appointed by members of the Hanifi sect, and who performed the duties of the mosque in accordance with the observances and ceremonies of that sect for twenty years, can now turn round and claim to have the right to discharge their duties in a different manner. No authority for any such proposition has been brought to our knowledge. The learned Counsel who argued the case on behalf of the plaintiffs declined to enter into the matter, [457] being one of great difficulty. *Prima facie*, it appears to us that the Imam or matwali should have performed his duties in the customary manner. It is for them to justify the change, and they have been unable to do so.

From that decree the present appeal is brought. Hafiz Maula Baksh died before the decision by the High Court; but leave was given to his two co-plaintiffs to prosecute the appeal, though their own title as matwalis was affirmed by all the Courts. They have, however, a sufficient interest in maintaining the views of their school or party in the mosque, especially as it is stated in evidence that they appoint the Imam. Their Lordships must decide the points raised in the suit just as if Hafiz Moula Baksh were the appellant. The defendants, now three in number, have not appeared. It is very unfortunate that such a case should be decided on an *ex-parte* argument.

It is not apparent from the judgment of the High Court on what ground they considered that a second appeal was sustainable, or, in other words, what was the law, or usage having the force of law, which the Subordinate Judge had decided erroneously, or had failed to decide. The most obvious meaning of their brief judgment is that their decision is rested entirely on the peculiar constitution or trusts of the Tajpore mosque. But that is a question of pure fact, at least in this case, where no written evidence is forthcoming; and the findings of the Subordinate Judge are conclusive in the High Court, and also in this tribunal, seeing that the defendants have not obtained any leave to appeal to Her Majesty in Council from his decree. His findings on this point, as stated above, (g) and (h), are fatal to the defendants' case, but the High Court appear to have paid no attention to them.

1891
FEB. 21.
PRIVY
COUNCIL.
18 C. 448
(P.C.)=
18 I.A. 59=
15 Ind. Jur.
155=6
Sar. P.C.J.
19.

Though it is not competent to their Lordships on this appeal to go behind the Subordinate Judge's findings of fact, they think it right to say that, for the purpose of examining the case from other points of view, it has been their duty to study the whole of the evidence, and that they entirely agree with the Subordinate Judge that there is no evidence whatever that the mosque was intended for Hanifis only, and not for all Sunnis or for all Mahomedans, or that an Amil-bil-Hadis is prohibited by its constitution from being its Imam.

[458] The judgment, however, may mean that there is some rule of law to the effect that when public worship has been performed in a certain way for 20 years, there cannot be any variance from that way, insomuch that the officiating minister who is guilty of a variance is *ipso facto* disqualified for his office. If that is the meaning of the judgment, their Lordships hold that it is not well founded in law. Indeed it is not well founded in fact, because general uniformity of practice in the worship at this mosque is neither proved nor alleged, though the particular practices now objected to are comparatively recent. But passing that by, it cannot be that an Imam should be so bound by his own or his predecessor's previous practice in worship that he cannot make the slightest variation from it in gesture, intonation, or otherwise, without committing an offence. Even a code of ritual can hardly be so minute as absolutely to exclude all individual peculiarity or discretion; and here there is no code of ritual at all. If the principle above stated were allowed, it would follow that the practice of a single Imam (for Hafiz Maula Baksh had been in office for 20 years before the dispute began) might be so stereotyped as to become the constitution of the mosque, and that a single member of the congregation might, against the wishes of the rest, insist that no variation, however innocent or however minute, should be made. The question in each case of dispute must be as to the magnitude and importance of the alleged departure. To that question the Subordinate Judge has very properly addressed himself, but the High Court have set aside all his findings as irrelevant, and have declined to examine the points to which the pleadings, the evidence, and the judgments of the two first Courts are mainly addressed.

Their Lordships cannot follow this course, because the judgment in favour of the defendants might be rested, as the Munsif did in fact rest it, on more general grounds than the private constitution of this mosque, or the obligations resulting from the practice which has prevailed in it, and those grounds must be examined.

Before quitting this point, mention should be made of a case, *Ata-ulla* v. *Azim-ulla* (1), in which the High Court of the [459] North-Western Provinces held that a mosque, being dedicated to God, is for the use of all Mahomedans, and cannot lawfully be appropriated to the use of any particular sect. If that principle were accepted, it would be decisive of the present case, so far as it rests on the judgment of the High Court. But it has not been propounded by Mr. Doyne, nor do the facts of this case properly raise the question, because it does not appear that this mosque ever was intended to be appropriated to any particular sect. Their Lordships therefore express no opinion upon it.

Turning to the question most discussed in the two lower Courts, it appears to be this,—whether the introduction of the loud Amen and Rafadain (which is the offence charged against Hafiz Maula Baksh, and

(1) 12 A. 494.

1891 FEB. 21. — PRIVY COUNCIL. — 18 C. 448 (P.C.) = 18 I.A. 59 = 15 Ind. Jur. 155 = 6 Sar. P.C.J. 19.

which is the reason why he calls himself Amil-bil-Hadis and his opponents call him Wahabi) shows such a change of tenets, or is in itself such an important departure from custom, as to disqualify the Imam from acting in a mosque where those ceremonies had not previously been used. If this question is to be answered in the affirmative, it must be on the ground either of general express rule of Mahomedan law, or of the growth of customs separating different schools in so marked a way that the followers of one school cannot properly worship with those of another.

As regards general law, their Lordships have not been referred to any authoritative code of ritual for Sunnis, such as is the statutory rubric of the Church of England. In the Hedaya there appears to be a long chapter or book on Prayer, which would probably expound the views of Abu Hanifa and those of his two principal disciples, Abu Yusuf and Abdoola Mahommed, as they were understood in the sixth century of the Hegira. But Mr. Hamilton, who was employed by Warren Hastings to translate the Hedaya, did not translate the book on Prayer, because it seemed to him that it could not afford any manner of assistance in decisions concerning matters of property. And so far as their Lordships have been informed, there is no translation of it from the original Arabic, certainly there is none into English. Nor has any text been produced from any source to show that one who follows Abu Hanifa does any wrong in performing ceremonies recommended by the other Sunni Imams, or thereby cuts himself off from communion [460] with other followers of Hanifa. There have been two cases in the High Court of Allahabad in which disputes have arisen about the intonation of the word "Amen." One has already been referred to on another point. The other, *Queen-Empress* v. *Ramzan* (1), was a criminal case, and the decision turned on the question whether those who said "Amen" aloud said it in an indecent way, and with intention to annoy the others. In both cases Mr. Justice Mahmood entered at length into the question how "Amen" should be pronounced. He states that though Hanifa recommends a low tone, the other three Imams recommend a loud tone, and gives it as his opinion that though it is imperative to say "Amen," there is no authority to regulate the tone of voice. In the later of the two cases the first Court treated both the loud Amen and Rafadain as open to all Sunnis to practise. Their Lordships cannot find that there is any general law on the point for Mahomedans, or for Sunnis, and must hold that there is none.

Their Lordships then come to inquire what is the usage among Sunni communities. That ground is completely covered by the findings of the Subordinate Judge, as above set forth, and if the questions are questions of fact, his findings are conclusive. But their Lordships will not on an *ex-parte* argument take it as concluded against the defendants that this inquiry may not involve usage having the force of law. They have therefore thought it right to go into evidence, with the result that they agree with the Subordinate Judge.

The Sunnis follow the four Imams, who appear to agree in placing the sources of their law in the following order :—1, *The Koran*; 2, *The Hadis*, or traditions handed down from the Prophet; 3, *Ijma*, or concordance among the followers; and 4, *Kias*, or private judgment. Beyond that the four differ in many details, including the loud Amen and

(1) 7 A. 461.

Rafadain. No Imam can follow all four in everything. But the followers of any are equally orthodox Sunnis.

This statement, which is common in the text-books, and is supported by the evidence of Nural Hassan, is also illustrated strongly by the learned men of Delhi who have given evidence. A number of them, upwards of 30, framed a Fatwa in the year [461] 1880 in which they appealed solemnly to their co-religionists not to quarrel about minor matters of difference, the tone of Amen and Rafadain being among them. Five of them were examined. One says he does not follow any one of the admitted Imams particularly, evidently meaning that he is at liberty to follow an eclectic process among them. Another says he follows all four, which must mean in essentials, for he cannot do so in many details, including those now under consideration. A third says he follows all four and the Hadis. A fourth says he follows Abu Hanifa, and yet he is a party to the Fatwa, which treats the tone of Amen and Rafadain as matters on which different courses may be followed with equal propriety.

Nurul Hassan is the Munsif before whom this case came in some of its earlier stages, and who would have tried it if the plaintiffs had not prayed that it might be transferred to another Judge, because they wished to have his testimony. He is a learned man, who knows Arabic. He is of the Hanifi sect or school, uses the low Amen and does not use Rafadain. He agrees with the Fatwa, and speaks highly of some of its signatories. He states that "those who do not say the word "Amen," and do not raise their hands, can say their prayer behind those who do the same." And he quotes a number of authorities to support his opinion.

Sheik Ahmedulla was one of the subscribers to the building of the mosque. He was the first witness called to support the defendants. But he says that he himself prays behind an Amil-bil-Hadis and behind an Hanifi also. And having been to Mecca, he says that there "the followers of all four Imams say prayers behind an Amil-bil-Hadis, and the Amil-bil-Hadis says prayers behind the followers of all four Imams." Also that "at Tajpore, and in its neighbourhood, the Hanifis say prayers behind an Amil-bil-Hadis."

What this witness says of Mecca accords with the statement of Mr. Justice Mahmood in *Empress* v. *Ramzan*. He says that in the Kaaba all the four schools are at liberty to pray, from which he justly infers that the prayers of none are heterodox. And what the same witness says of Tajpore would seem to be confirmed by the observation that in this very mosque, where the congregation is said to be largely Hanifi, it does not appear [462] that a single one of the worshippers, except the defendants who appealed to the High Court, objects to the way in which Hafiz Maula Baksh conducted the service.

Against all this evidence of the opinions of learned and devout Mahomedans, and of the actual practice of Mahomedan worshippers, what is there on the other side? The evidence is an absolute blank. No book, no opinion, no practice of any community of worshippers is cited. There is no ground given to dissent from the findings of the Subordinate Judge, nor from his conclusion that the plaintiffs were entitled to relief. In one point he has followed too closely the prayer of the plaint. Paragraph (*d*) asks for a declaration that the plaintiffs have the authority to turn out the defendants when they interfere. The Court ought not to make such a declaration. The plaintiffs must rely on the prohibitory order or injunction for which they pray, and must enforce it, as they may be advised,

1891 FEB. 21. — PRIVY COUNCIL. — 18 C. 448 (P.C.) = 18 I.A. 59 = 15 Ind. Jur. 155 = 6 Sar. P.C.J. 19.

in each case that arises. The High Court should have varied the Subordinate Judge's decree by refusing to grant the declaration asked by paragraph (*d*), and subject to that, should have dismissed the defendants' appeal, with costs. That is the decree which their Lordships will humbly advise Her Majesty to make now, in lieu of the decree of the High Court, which should be discharged. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

C. B.

---

18 C. 462.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

WAJIHAN *alias* ALIJAN (*Judgment-debtor*) *v.* BISHWANATH PERSHAD AND ANOTHER (*Decree-holders*)* [14th April, 1891.]

Limitation—Execution of decree—Civil Procedure Code, 1882, s. 373—Dismissal of application to execute without obtaining leave to make a fresh application.

Section 373 of the Civil Procedure Code does not apply to applications for execution of decrees.

[463] *Tarachand Magraj* v. *Kashi Nath Trimbak* (1) followed. *Radha Charan* v. *Man Singh* (2) dissented from.

[**F.**, 18 C. 515 (518); 18 C. 635 (637); 15 M. 240 (241); **D.**, 13 P.R. 1901 = 137 P.L.R. 1901.]

THIS was an application made on 9th August 1890 for execution of a decree passed on the 11th March 1890 for a sum of money due on a mortgage. A former application had been made on 23rd March 1890 for execution by sale of the mortgaged property. The material facts were stated in the judgment of the Subordinate Judge made on the present application which was as follows:—

"It appears that in the previous execution proceeding, an order was passed by my predecessor in office on 1st May 1890, calling on the decree-holder, to deposit talabana for the proclamation of sale within a week. No date was fixed for taking up the case. It appears that the decree-holder failed to deposit the talabana called for within the time given by the Court, and that the case was not taken up till 4th July 1890, on which date the execution case was dismissed for the failure of the decree-holder to deposit talabana. On 9th August 1890 the present application was filed and it is objected to on the judgment debtor's side, that the execution cannot proceed on this application, inasmuch as the dismissal of the previous execution case being under s. 158 of the Code of Civil Procedure, this fresh application cannot be entertained, nor can there be a revival of the former proceeding, nor had the decree-holder proceeded actually to revive it; and even if the present application be considered to be a revival, it is barred, having been filed more then 30 days after the order of dismissal. I fully

---

* Appeal from order No. 307 of 1890, against the order of Baboo Amrita Lal Paul, Subordinate Judge of Patna, dated the 22nd of November 1890.

(1) 10 B. 62. (2) 12 A. 392.

agree with the judgment-debtor's pleader that when time is granted to the decree-holder to deposit talabana, and he fails to do it, and the Court dismisses the case on the ground of that failure, the dismissal is under s. 158 of the Code. But in the present case there is this distinction, that the Court did not comply wholly with the provisions of s. 158. That section empowers the Court to decide the case forthwith. In the present case, instead of deciding it forthwith as the law prescribes, it was not decided till about two months after, and without fixing any date for hearing, and without, as it appears, giving notice to the parties that it would be taken up on the 4th July; and from aught that can be gleaned from the order-sheet, the order of my [464] predecessor in office was passed in the absence of the decree-holder. Under such circumstances I am of opinion that the case comes under no other section but s. 98, and s. 99 gives the decree-holder power to institute a fresh proceeding for enforcing the decree. I am not induced to hold with the learned pleader of the judgment-debtor that the failure of the decree-holder should be considered as an abandonment of the case on his part, and that, therefore, no permission having been taken, no fresh proceeding can be instituted under s. 373 of the Code. There was no application for withdrawal or abandonment on the decree-holder's part, and therefore the case cannot come under the provisions of s. 373."

The Subordinate Judge therefore allowed the execution to proceed.

From this decision the judgment-debtor appealed to the High Court.

Mr. *Garth* and Moulvi *Serajul Islam*, for the appellant.

Baboo *Saligram Singh*, for the respondents.

The arguments and cases cited are sufficiently stated in the judgment of the Court (PRINSEP and BANERJEE, JJ.), which was as follows:—

JUDGMENT.

A decree was passed for a sum of money under a mortgage, which was made absolute under s. 88 of the Transfer of Property Act on 11th March 1890, but no further order for sale was made under s. 86 of the Act. On the 23rd March application for execution was made by sale of the mortgaged property, and an order was passed on 1st May for putting in affidavits and for the deposit of the necessary fees within one week. This was not done, nor did the case come on for hearing in due course after expiry of the term so fixed or on any other day appointed for that purpose, but it apparently was taken up on 4th July, and the application was dismissed. A fresh application for execution was made on 9th August, and objections taken by the judgment-debtor were overruled.

The debtor now appeals, contending that execution cannot proceed.

[465] It is first objected by Mr. Garth, for the appellant judgment-debtor, that this application is informal and cannot be acted upon, inasmuch as it does not expressly state in what manner the decree is to be executed, and we are referred to the recent decision of a Full Bench of this Court in the case of *Asgar Ali* v. *Troilokhya Nath Ghose* (1). We find, however, that though the application for execution before us is not complete in itself so as to show in what manner execution is to be taken out, still it is capable of being acted upon, for it refers to the former application in which the mortgaged properties were set out, and it prays that the decree may be executed by sale of those properties. We think,

(1) 17 C. 631.

1891 APRIL 14. — APPELLATE CIVIL. — 18 C. 462.

therefore, that this objection at most is regarding only a technical irregularity, in form rather than in substance, and that the Court was competent to proceed, taking the former application which is on the record of the suit as part of the application then before it, so as to indicate how the decree should be executed.

It is next objected that execution is barred in consequence of the dismissal of the former application to execute without leave to make a fresh application, and in support of this the case of *Radha Churn* v. *Man Singh* (1), decided by a Full Bench of the Allahabad High Court, is cited. The practice there laid down is certainly not what has been in force in the Courts of this Province, which has been that described in the judgment of a Full Bench of this Court in the case of *Eshan Chunder Bose* v. *Pran Nath Nag* (2). The Code of 1882 and the Law of Limitation of 1877 have made no alteration in the law to affect that practice, although the view of one of the learned Judges in that case in unmistakable terms strongly advocated an alteration in the law so as to introduce the practice now prescribed by the High Court at Allahabad. It was not indeed expressly laid down in that case that the rule regarding the effect of the abandonment or withdrawal of a suit without leave to institute a fresh suit does not apply to an application for execution of a decree, but it was held that the permission of the Court to a second application to execute the same decree was unnecessary, which is practically the same in its result; and this has been the practice of our Courts in such matters. We **[466]** observe that the High Court of Bombay in two cases—*Tara Chand Megraj* v. *Kashi Nath Trimbak* (3) and *Shankar Bisto Nadgir* v. *Narsingh Rao Ram Chandra* (4)—has prescribed a similar procedure, overruling the previous case of *Pirjade* v. *Pirjade* (5) to the contrary, and in the former of these cases it was expressly held that ss. 373 and 374 do not apply to applications for execution. In this view it seems unnecessary for us to state our reasons at length for declining to follow the opinion of the Full Bench of the Allahabad Court beyond stating that in numerous instances the Code itself, as well as the terms of the Limitation Act, show that the procedure of the Code in regard to suits cannot be strictly applied to matters of execution, and in no instance is this more evident than with regard to ss. 373 and 374.

On general grounds, therefore, we should not be disposed to hold that this application to execute was barred. But in the present instance there is another fatal objection. The order of the 4th of July was not passed after notice to the party concerned. The case was apparently taken up accidentally at some time convenient to the Court itself, which is not in accordance with the regular procedure of our Courts. The Code contemplates that on the adjournment of a suit or other proceeding a day shall be fixed for its hearing. No order therefore passed on any other day, except in the presence of the parties and without objection raised, can be binding on them. We cannot agree with the learned counsel that because the decree-holder did not comply with the order of the Court of the 1st May to file the necessary affidavits and deposit the necessary fees within one week his application stood dismissed, because if the case had been regularly brought on, it is not improbable that some cause might have been shown for an extension of that time, and the order was not peremptory in its

(1) 12 A. 392. (2) 14 B.L.R. 143=22 W.R. 512. (3) 10 B. 62.
(4) 11 B. 467. (5) 6 B. 681.

terms. The order passed on 4th July without any notice to the decree-holder, and in his absence, seems to us to be open to serious objection, and should not, in any view of the matter, be regarded as precluding him from further proceedings.

We accordingly dismiss this appeal with costs.

[467] We should remind the Subordinate Judge that in cases under s. 88, Transfer of Property Act, he should be careful to draw up the order strictly in accordance with the law.

J. V. W. *Appeal dismissed.*

---

18 C. 467.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

CHOWDHRY RAGHU NATH SARUN SINGH AND OTHERS (*Plaintiffs*) v. DHODHA ROY AND OTHERS (*Defendants*).*
[29th April, 1891.]

Bengal Tenancy Act (*VIII of* 1885), s. 40, *cl.* 5—*Order commuting* bhowli *rent to* nagdi *rent—Omission to state time when order is to take effect.*

The provisions of cl. 5, s. 40 of the Bengal Tenancy Act, are imperative, and should be strictly complied with. Where, therefore, an order under that clause omitted to state the time from which it was to take effect, it was held to be inoperative.

THIS was a suit for the recovery of Rs. 725-13, being both *bhowli* and *nagdi* rent for the years 1293 to 1295 (1886—1888). It was alleged that the defendants held 36 bighas 3 cottahs and 10½ dhurs, bearing an annual jama of Rs. 96-13-3, under a *nagdi* contract, and 6 bighas 13 cottahs under a *bhowli* contract, giving the plaintiffs, their landlords, half the actual produce of such lands.

The further material facts were stated as follows in the judgment of the Subordinate Judge :—

"The only important question for determination in this appeal is whether the zemindar plaintiffs are entitled to *bhowli* rent or to the money rent fixed by the Collector under s. 40 of the Bengal Tenancy Act. The facts are that the defendant applied to the Collector under the provisions of the aforesaid section to convert his rent in kind to money rent; and the Collector by an order in writing, dated 17th April 1886, fixed the money rent at Rs. 3 per bigha. The plaintiff appealed to the Commissioner, who, by his order, dated 25th September 1886, remanded the case to the **[468]** Collector for the trial of certain questions. The Collector, by his order, dated 4th July 1887, did not alter his previous order, and the Commissioner on appeal confirmed the Collector's order on 13th June 1889. The Munsif has held that, as the appeal to the Commissioner was not decided when he pronounced his judgment, the defendant was liable to pay *bhowli* rent. This suit was brought long after the second decision of the Collector. That decision should be acted upon unless upset on appeal. As a matter of fact the said decision has since been upheld on appeal by the

---

* Appeal from Appellate Decree, No. 381 of 1890, against the decree of Baboo Rakhal Chunder Bose, Subordinate Judge of Shahabad, dated the 16th of January 1890, reversing the decree of Baboo Rajani Kant Mukerjee, Munsif of Arrah, dated the 11th of May 1889.

1891 APRIL 29. — APPELLATE CIVIL: — 18 C. 467.

Commissioner. Hence the plaintiff is only entitled to money rent and not to *bhowli* rent. It is contended that as according to sub-s. 5 of s. 40 of the Bengal Tenancy Act a time should be fixed by the Collector from which his order is to take effect, and as no such time was fixed by the said Collector, the plaintiff is entitled to *bhowli* rent so long as the said mistake remains uncorrected. But I see by the order of the Collector, dated 4th January 1890, that the order is to take effect from the date on which the said order was passed, that is to say, it would apply to any rent which fell due after the date of such order. The first order of the Collector was passed on 17th April 1886, corresponding to the 28th Choit 1293. The rent of 1293 fell due after its expiration; hence the commuted recovery rent would be due from 1293."

From this decision the plaintiffs appealed to the High Court.

Mr. *C. Gregory*, for the appellants.

Baboo *Neel Madhub Bose*, for the respondents.

JUDGMENT.

The judgment of the Court (TREVELYAN and BANERJEE, JJ.) was delivered by—

BANERJEE, J.—This appeal arises out of a suit for arrears of rent. The plaintiffs claimed the rent as due under the *bhowli* system. The point urged in defence, which it is necessary for us to consider now, was that, by an order under s. 40 of the Bengal Tenancy Act, the *bhowli* rent had been commuted into a money rent.

The Munsif held that this defence could not be entertained, as the order under s. 40 set up by the defendants did not state the time from which it was to take effect, and accordingly he gave the plaintiffs a decree upon the footing that the rent was still *bhowli*.

[469] On appeal by one of the defendants, the Subordinate Judge reversed that decision, holding that the order under s. 40 must be taken to operate from the date thereof.

In second appeal it is contended that this decision is wrong, and that the provisions of s. 40, cl. 5, are imperative, and should be strictly complied with before an order under that section can have any effect.

We think that this contention is sound. Clause 5 of s. 40 runs thus:—"The order shall be in writing, shall state the grounds on which it is made and the time from which it is to take effect, and shall be subject to appeal in like manner as if it were an order made in an ordinary revenue proceeding." The object of requiring the time from which the order is to take effect to be stated is to enable the parties distinctly to know from what date the new arrangement is to come into operation. It ought not to be left in uncertainty, and, in the absence of any date being fixed in the order, the order must be taken to be practically inoperative, or, at any rate, to remain in suspense until it is amended by the specification of the time of its operation. It may be that the omission in this case to specify the time was altogether inadvertent, but we think it was the business of the parties, in order to avail themselves of the effect of the order, to have the time specified. We think, therefore, that the decision of the lower appellate Court on this point is erroneous and should be reversed, and the case should be sent back to that Court for determination of the other points that may arise in the appeal before it. The costs will abide the result.

J. V. W. *Appeal allowed.*

18 C. 469.

1891
APRIL 23.

APPEL-
LATE
CIVIL.

18 C. 469.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Trevelyan.

BEHARY LAL PUNDIT (*Judgment-debtor*) v. KEDAR NATH MULLICK AND OTHERS (*Decree-holders*).* [23rd April, 1891.]

Appeal—Civil Procedure Code (Act XIV of 1882), *ss.* 2, 244, *cl.* (*c*)—*Order—Decree.*

An order merely determining a point of law, arising incidentally or otherwise in the course of a proceeding for determining the rights of parties **[470]** seeking relief, is not a decree within the meaning of s. 2 of the Civil Procedure Code and is not appealable.

Where the judgment-creditor, after satisfaction entered upon a compromise, applied for execution, on the ground of the compromise having been obtained from him by fraud, and the Court below, being of opinion that the remedy of the judgment-creditor was by a proceeding in execution, and not by a regular suit, ordered the case to be tried on its merits:

Held, that no appeal lay from such an order.

[**F.**, 36 C. 422=9 C.L.J. 251=2 Ind. Cas. 338; **Rel.**, 15 Ind. Cas. 573 (574); **Appl.**, 14 C.L.J. 35=16 C.W.N. 124=10 Ind. Cas. 371; **Dissappr.**, 21 Ind. Cas. 938 (942)=18 C.L.J. 264 (267); **R.**, 34 A. 530 (532)=10 A.L.J. 56=15 Ind. Cas. 50; 24 C. 725 (739) (**F.B.**); 31 C. 179 (180); 13 C.L.J. 90 (100)=15 C.W.N. 848=9 Ind. Cas. 183; 14 C.L.J. 489 (496)=12 Ind. Cas. 745 (749); 8 C.W.N. 257 (261); 13 Ind. Cas. 186.]

THIS appeal arose out of an application by the decree-holders, Kedar Nath Mullick and others, for execution of a Privy Council decree obtained by them against the judgment-debtor, Behary Lal Pundit. On the 30th of March 1886, the decree in question was compromised, and on the 7th of April following, the compromise being certified to the Court, the proceedings in execution of the decree were struck off, and satisfaction entered. On the 15th of May 1890, the decree-holders applied to the Subordinate Judge for execution of the Privy Council decree, on the ground that the compromise was brought about by fraud. The petition of compromise recited, *inter alia*, an assignment of certain debts due to the judgment-debtor by third parties in favour of the present decree-holders, and the said assignment was made towards the partial discharge of the decree. It was urged that as a matter of fact those debts did not really exist, and that the assignment thereof was an act of fraud on the part of the judgment-debtor, by reason of which the decree-holders were entitled to execute the decree to the extent fraud was practised upon them.

The judgment-debtor objected to execution, and urged that by reason of the Court's final order declaring the decree as completely satisfied, execution was barred, and the decree-holders' only remedy was by a regular suit; and that the decree having been transmitted to the Court of the Subordinate Judge by another Court, and satisfaction having been certified to that Court, the Subordinate Judge had no jurisdiction to review the proceedings.

The Subordinate Judge overruled both these objections and ordered that the case be tried on its merits.

The judgment-debtor appealed to the High Court.

Dr. *Rashbehari Ghose* and Baboo *Asutosh Mookerjee*, for the appellant.

Dr. *Troylokhyanath Mitter*, for the respondents.

---

* Appeal from order No. 257 of 1890, against the order of Baboo Bolloram Mullick, Subordinate Judge of Cuttack, dated the 18th of August 1890.

1891 April 23. — Appellate Civil. — 18 C. 469.

[471] The appeal coming on for hearing, Trevelyan, J., doubted if an appeal lay from the order passed by the Subordinate Judge.

Dr. *Rashbehari Ghose* contended that an appeal would lie from an order deciding that the decree-holders' remedy was by a regular suit. An appeal, therefore, would also lie when the order goes against the judgment-debtor —See observations of Jessel, M. R., in *Shubrook* v. *Tufnell*(1). See also *Trowell* v. *Shenton* (2), *International Financial Society* v. *City of Moscow Gas Company* (3), *Collins* v. *The Vestry of Paddington* (4), *Ram Kirpal* v. *Rup Kuari* (5), *Jogessur Sahai* v. *Muracho Kooer* (6), *Rahimbhoy Habibbhoy* v. *Turner* (7). The appeal lies under s. 244, read with s. 2 of the Civil Procedure Code,—*Luchmeeput Singh* v. *Sitanath Doss* (8), *Ishwargar* v. *Chudasama Manabhai* (9), *Musajee Abdulla* v. *Damodardas* (10), *Steel* v. *Ichchamoyi Chowdhrain* (11).

Dr. *Troylokyanath Mitter*, for the respondents, was not called upon.

JUDGMENT.

The judgment of the Court (TOTTENHAM and TREVELYAN, JJ.) was delivered by

TREVELYAN, J.—This is an appeal from what has been described as an order of the Subordinate Judge of Cuttack.

There was an application for execution of a decree of the Privy Council. This decree, it seems, was compromised in March 1886. The judgment-crditor, alleging that the compromise had been obtained by fraud, now seeks to execute the decree as if no compromise had been effected. The learned Subordinate Judge first of all considered whether the proper remedy was by suit or by a proceeding in execution of the decree, and he came to the conclusion that the remedy was not by suit but by a proceeding in execution. He then ordered that the case be tried on its merits. This is the so-called order from which the present appeal is brought. It is an order in one sense and not in another.

Now it is unnecessary for us, in the view we take, to express any opinion whether this was a right conclusion or not; for we [472] do not think that any appeal lies in this case. It is true that the objection that no appeal lies was not taken in the way an objection of this kind is usually taken, namely, as a preliminary objection by the pleader for the respondents. The objection was suggested by one of us on the learned pleader for the appellant telling us what the facts were. It is, however, none the less a matter which we should consider.

The question whether or not an appeal lies in this case really depends to a great extent, if not entirely, upon the wording of the Civil Procedure Code. An appeal lies against a decree; and in s. 2 "decree" is defined as an order, amongst other things, determining any question mentioned or referred to in s. 244; and following that we have the definition of "order" as the formal expression of any decision of a Civil Court which is not a decree as above defined. That definition of "order" apparently cannot be used for the purpose of defining the word "order" in the previous part of the section, because it expressly excludes everything in the previous part of the section. It does not, we think, include an order merely determining a point of law arising incidentally or otherwise in the course of a proceeding for determining the rights of parties

(1) L.R. 9 Q.B.D. 621. (2) L.R. 8 Ch. D. 318. (3) L.R. 7 Ch. D. 241.
(4) L.R. 5 Q.B.D. 368. (5) 6 A. 269. (6) 1 C.L.R. 354.
(7) 15 B. 155. (8) 8 C. 477. (9) 12 B. 30.
(10) 12 B. 279. (11) 13 C. 111.

1891 APRIL 23.

APPELLATE CIVIL.

18 C. 469.

seeking relief. The result of any other interpretation would be, as pointed out in the course of the argument, that there would be a separate appeal from every order made in respect of any objection raised in connection with an application; and, if the Judge chose, for the sake of convenience, to determine each objection separately, we might have a series of appeals, that is, an appeal in respect of each objection on which a separate order had been made. It seems to us that we ought to repudiate a construction of that kind, unless we are forced by any Act to accept it; for it does not seem to us at all likely that the Legislature would multiply appeals by allowing an appeal from every order passed in the course of an application. We think that the only appealable order is an order refusing an application or granting relief. An order arising out of a point of law which is argued in the course of a proceeding is not appealable. It may be a very good ground for attack when the occasion arises for attacking the final order; but to allow an appeal of this kind would be very disastrous to litigants, and we could not allow it [473] unless we were forced to do so by the Legislature or by any clear conclusions of authority. The English authorities cited are authorities referring to other statutes, and the only authority approaching it, which is a decision of Mr. Justice Markby (1), is one against it.

That being so, we think that no appeal lies in this case, and we dismiss the appeal with costs.

A. F M. A. R. *Appeal dismissed.*

---

18 C. 473.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

LEDLIE *v.* LEDLIE.* [23rd April, 1891.]

Divorce—Practice—Custody of child, application for—Notice of application—Act IV of 1869, *s.* 42.

A petition for judicial separation by a wife contained a statement in the body thereof to the effect that the petitioner was desirous of having the custody of a child born of the marriage, but contained no prayer to that effect. The respondent appeared and filed an answer to the petition, in which he expressly noticed that portion of the petition. Pending the hearing of the petition, an application was made by the petitioner for the custody of the child *pendente lite*, which was opposed by the respondent and refused After decree made for judicial separation, the respondent not appearing at the hearing, an application was made by the petitioner, under the provisions of s. 42 of the Act, for the custody of the child. No notice of such application was given to the respondent.

Held, that it was the more correct procedure, having regard to the provisions of s. 42, not to include a prayer for the custody in the original petition, and that following the decision in *Horne* v. *Horne* (2) and *Wilkinson* v. *Wilkinson* (3), it was unnecessary under the circumstances to give further notice of the application to the respondent.

Held further on the merits that the petitioner was entitled to the order asked for.

[R., 18 C.W.N. 484=22 Ind. Cas. 424=15 Cr.L J. 72.]

THIS was an application under s. 42 of the Indian Divorce Act (IV of 1869) by Alicia Ellen Ledlie, praying for the custody [474] of her son

* Motion in Original Civil Suit No. 4 of 1890.

(1) *Jogessur Sahai* v. *Maracho Kooer*, 1 C.L.R. 354.

(2) 30 L. J. P. & M. 200.

(3) 30 L. J. P. & M. 200, note.

1891 APRIL 23. — ORIGINAL CIVIL. — 18 C. 473.

Arthur Ledlie, a boy of the age of nine years. The petitioner had on the 14th April obtained a decree for judicial separation from her husband, Henry St. Clair Ledlie.

The petitioner and the respondent were married on the 12th July 1880 at Agra, and the sole surviving issue of the marriage was a son, Arthur Ledlie, who was born on the 16th July 1881. The parties lived together till 1883, when, the respondent being unable to support the petitioner, she with his consent went with their child to live with her mother. Subsequently she obtained employment and supported herself and her child till March 1890, when she returned to live with the respondent, whose protection she left on the 1st July 1890 in consequence of his gross cruelty towards her. On the 28th August 1890 the petitioner filed her petition for a judicial separation, and on the 9th September 1890 she filed a further petition praying for an order that the child might be delivered into her custody or placed under the protection of the Court *pendente lite*, and for access.

Upon the hearing of the *interim* application, both parties having appeared and filed affidavits, it was rejected upon it appearing that the child had been placed with respondent's parents at Allahabad, and that they were maintaining and educating him.

At the hearing of the suit the respondent did not appear, and the alleged gross cruelty having been found to be fully proved, the Court (Mr. Justice Wilson), on the 14th April 1891, gave a decree for judicial separation with costs, in accordance with the prayer of the petition.

The petitioner now applied under s. 42 of the Divorce Act, for the custody of the child, setting out the above facts and alleging that she had repeatedly been refused access to the child; that the respondent was unfit to have the custody, and that his parents were not possessed of sufficient means to educate the child properly; and further alleging that she was desirous of maintaining and educating him, and was well able to do so from her own earnings, and had in fact done so from 1886 to 1890 without any assistance from the respondent. She further stated that it would not be just to leave the custody of the child with his father, judicial separation having been decreed by reason of his gross cruelty and misconduct, and that unless she obtained the [475] custody of the child she would virtually be deprived, being the innocent party, of the solace and comfort of her child's society.

No notice of this application was served upon the respondent. A prayer for the custody of the child was not included in the original petition for judicial separation, though the fact that the petitioner desired to have the custody appeared from the body of the petition itself.

Mr. *Caspersz*, for the petitioner.—In this case the wife, being the innocent party, is entitled to the custody as of right upon the principles laid down in *Macleod* v. *Macleod* (1) in which the English cases of *Chetwynd* v. *Chetwynd* (2), *Hyde* v. *Hyde* (3), *Duggan* v. *Duggan* (4), *Suggate* v. *Suggate* (5), *Boynton* v. *Boynton* (6), and *Marsh* v. *Marsh* (7), are cited and followed by Mr. Justice Phear. In that case an order for custody was made at the time the decree was passed; but s. 42 of the Divorce Act expressly directs that such an order is to be made upon a separate petition. Section 50 provides that notice is to be given to the opposite party unless dispensed with by the Court. It has been held in *Horne*

(1) 6 B. L. R. 318. (2) L.R. 1 P. & D. 39. (3) 29 L.J.P. & M. 150.
(4) 29 L.J.P. & M. 159. (5) 1 S. & T. 492. (6) 2 S. & T. 275.
(7) 1 S. & T. 312.

v. *Horne* (1) and *Wilkinson* v. *Wilkinson* (2) that where the original petition contains a prayer for the custody, an order may be made without further notice. Here the respondent has already had sufficient notice of this application, the original petition for judicial separation setting out clearly that the petitioner desired to have the custody, and that portion of the petition is referred to in paragraph 26 of the respondent's answer. It was unnecessary to insert a prayer for the custody in that petition, as no order could be passed except upon a separate petition under s. 42. Reading the original petition in the light of the subsequent interlocutory application, in which the respondent appeared, it is clear that he has had sufficient notice. Should the Court, however, think notice is necessary, I would ask for a rule and for an order for substituted service **[476]** thereof as we have endeavoured unsuccessfully to give the respondent notice of this application.

The judgment of the Court (WILSON, J.) was as follows :—

JUDGMENT.

Where the petitioner in a suit for judicial separation desires an order as to the custody of the children of the marriage, it is clear, I think, that s. 42 of the Indian Divorce Act contemplates that, after the decree has been made, the intervention of the Court shall be sought by petition. Generally speaking, the Court will not act *ex parte*, but the petition must be served, or in some sufficient form notice must be given in order to show the respondent what the Court is to be asked to do. On the other hand, it has been held in England that, if that notice has been given in an earlier stage of the case, then notice of the petition itself need not be given. In the case of *Horne* v. *Horne* (1) a decree *nisi* for dissolution of marriage had been made, and, at the time of applying to have the decree *nisi* made absolute, counsel for the petitioner asked the Court whether notice ought to be given to the respondent of an intended application to the Court with respect to settled property, and added that a copy of the petition for dissolution of the marriage, which prayed for such an order, had been served on the respondent, but he had not entered an appearance. On that the Judge Ordinary said, " as a copy of the petition praying for an order as to the settled property was served on the respondent, and he has not entered an appearance, I think no notice of the application need be given. If the petition had not contained such a prayer, notice to the respondent would have been necessary." In a note to the same case is cited the case of *Wilkinson* v. *Wilkinson*, which is to this effect :—" Where the respondent was served with a petition for dissolution of marriage containing a prayer for the custody of children, but did not appear on making the decree absolute, the Court gave the custody of the children to the petitioner, though no notice of the application had been given to the respondent."

In the present case the original petition for judicial separation did not actually contain a formal prayer for the custody of the child; but it did what I think was more correct as being in accordance **[477]** with s. 42. The petition warned the respondent that this application would be made; for what it says in paragraph 28 is this :—" That your petitioner is desirous by reason of the matters hereinbefore stated to be enabled to live apart from her husband and to have the custody of her child." This is, I think, a sufficient warning that she intended to

(1) 30 L.J.P. & M. 200.

(2) 30 L.J.P. & M. 200, note.

1891 APRIL 23. — ORIGINAL CIVIL. — 18 C. 473.

apply at the proper time for the custody of the child. And that being so, I think, under the authority of the English cases, notice is not necessary of this application. This is strengthened by the fact that the respondent in his answer deals with paragraph 28, and is also strengthened by the application for *ad interim* custody of the child, in which she said :—" Your petitioner, therefore, humbly prays your Lordship for an order that the respondent do deliver the said child into her custody, or for an order that the said child be placed under the protection of this Honourable Court *pendente lite* in the custody of a guardian to be appointed by this Honourable Court, and that your petitioner be allowed full and free access to the said child." The result is that I think the petitioner need not give any further notice. On the merits she is clearly entitled to the custody of the child. The costs of this application will be costs in the cause.

H. T. H. *Application granted.*

Attorneys for the petitioner : Messrs. *Orr & Robertson.*

---

18 C. 477.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

HURI DASS KUNDU (*Defendant*) *v.* J. C. MACGREGOR, RECEIVER, HIGH COURT, AND RECEIVER TO THE ESTATE OF RAJ CHANDER DAS (*Plaintiff*).* [8th May, 1891.]

Receiver, powers of—Right to sue without permission of Court—Suit for ejectment—Monthly tenant holding over after expiry of notice to quit.

The order appointing a receiver gave him power "to let and set the immoveable property or any part thereof as he shall think fit, and to take and use all such lawful and equitable means and remedies for recovering [478] realizing and obtaining payment of the rents, issues and profits of the said immoveable property, and of the outstandings debts and claims, by action suit or otherwise, as shall be expedient." *Held* under the terms of such order, the receiver had power to sue to eject, without obtaining permission of the Court, a monthly tenant whose tenancy was determinable by a notice to quit, which had been duly served. *Drobomoyi Gupta* v. *Davis* (1) distinguished.

[R., 34 C. 304=5 C.L.J. 270.]

IN this case the plaintiff was the Receiver of the High Court, and receiver to the estate of Raj Chunder Das of Jaunbazar, Calcutta. The order of appointment of the plaintiff as receiver of the said estate gave him power "to let and set the said immoveable property or any part thereof as he shall think fit, and to take and use all such lawful and equitable means and remedies for recovering, realizing and obtaining payment of the said rents, issues and profits of the said immoveable property, and of the outstandings debts snd claims, by action suit or otherwise as shall be expedient, and for that purpose to use the names of the plaintiffs and of the defendants who are to be indemnified out of the said estate." The defendant was a monthly tenant of a godown in Bhowanipur in the 24-Pergunnahs belonging to the said estate at a rent of Rs. 4-8 a month.

---

* Appeal from Appellate Decree No. 724 of 1890, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 15th of May 1890, reversing the decree of Baboo Girindra Mohun Chuckerbutty, Munsif of Alipore, dated the 15th of January 1890.

(1) 14 C. 323.

The godown being required for purposes of the estate, a notice to quit was served on the defendant, giving him a month in which to vacate the godown; but as he had not given up possession on the expiration of that period a suit was brought against him for ejectment, and for damages for his remaining in occupation after the expiration of the notice to quit.

1891 MAY 8. — APPELLATE CIVIL. — 18 C. 477.

The main defence was that the receiver could not maintain the suit without the permission of the High Court, which he had not obtained. There was also an objection to the sufficiency of the notice to quit, but this was decided against the defendant.

The only issue material to this report was "whether the plaintiff receiver has authority to bring and maintain this suit?" The Munsif found this issue against the plaintiff, and therefore made a decree dismissing the suit.

The Judge on appeal reversed this decision as follows:—

"Admittedly the defendant is a monthly tenant. He says that he has held the godown from the time of his grandfather, but he does not and cannot show any permanent right, and his [479] rent is payable monthly. Now I understand it to be the English law as laid down in Kerr on Receivers. that the power given to a receiver to let and set authorizes him to determine the leases of temporary tenants. I also understand from the decision in the case of *Drobomoyi Gupta* v. *Davis* (1) that the High Court did not dissent from Mr. Evans' exposition of the law on this subject, and I think by implication they admitted that a receiver can issue notices to quit on temporary tenants. The form of appointment of a receiver, which was till lately at least in use in the High Court, is apparently in English form, and should be construed according to English precedents. These show that a receiver can determine temporary leases. Now if a receiver can issue a notice to quit, can he not sue thereon? The Munsif holds that he cannot, and he draws a distinction between the power to put an end to a tenancy by a notice, and the power to sue for ejectment. But I think that the power to determine a tenancy carries with it the power to use the ordinary legal remedies in case the notice is not complied with. I therefore find that the receiver can bring the suit."

The Judge therefore gave the plaintiff a decree, from which the defendant appealed to the High Court.

Baboo *Bhobani Churn Dutt*, for the appellant.

Mr. *W. Jackson* and Baboo *Akhoy Coomar Banerjee*, for the respondent.

The following cases and authorities were referred to:—

Drobomoyi Gupta v. *Davis* (1), *Miller* v. *Ram Runjun Chuckerbutty* (2), *Doe* v. *Read* (3), *Crosbie* v. *Barry* (4), *Wilkinson* v. *Colley* (5), *Jones* v. *Phipps* (6), *Mansfield* v. *Hamilton* (7), *Anon* (8), *Swaby* v. *Dickon* (9), *Re Montgomery* (10), *Bristowe* v. *Needham* (11), *Wynne* v. *Lord Newborough* (12), *Ward* v. *Swift* (13), and Kerr on Receivers, 2nd ed., pp. 151, 152.

[480] The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

---

(1) 14 C. 323. (2) 10 C. 1014. (3) 12 East, 61.
(4) Jon. & C. 106. (5) 5 Burr. 2697. (6) L.R. 3 Q.B. 572.
(7) 2 Sch. & Lef. 30. (8) 6 Ves. 287. (9) 5 Sim. 629.
(10) 1 Moll. 419. (11) 2 Ph. 190.
(12) 3 Browne's C. C. 87 = 1 Ves. Jun. 164. (13) 6 Hare, 312.

1891
MAY 8.

APPELLATE CIVIL.

18 C. 477.

JUDGMENT.

This is a suit for ejectment brought by a receiver appointed on the original side of this Court against the defendant whose tenancy is found to have been terminated by a notice to quit.

The only question raised for our decision—and this point was raised in both the lower Courts—is whether the suit has been brought by the receiver under proper authority. We have been referred to the case of *Drobomoyi Gupta* v. *Davis* (1) as a precedent for holding that this same receiver was found incompetent, without permission of the Court, to sue for the ejectment of a tenant under the terms of his appointment. We are not disposed to disagree with the rule laid down in that judgment, but we think that it is inapplicable to the present case. This was a suit for the determination of a tenancy of a permanent character. In the present case it has been found that the interest of the tenant was merely temporary and determinable by a notice to quit, which has been served. These two cases, therefore, are not indentical. We have also been referred to a long series of cases decided in the Courts in England, quoted in Kerr on Receivers, pp. 151 and 152. We observe that in all those cases the power of the receiver was questioned before the Court by which he was appointed. In only two of those cases was the objection raised by the party against whom the receiver was proceeding. In all the other cases the decision of the question only affected the receiver's right to charge his costs in the action against the estate. In the two cases to which reference has been made, *Wynne* v. *Lord Newborough* (2), and in a later proceeding between the same parties (3), where the objection was raised by the parties against whom the receiver was proceeding, it was held that such person had no valid interest to object, and their applications were refused. Having regard to the terms of the order appointing the receiver, we think that they are sufficient to confer on him the power to bring a suit to eject a tenant having only a temporary interest, such as a monthly tenant in the case before us whose tenancy has been determined. [481] We have been referred to the case of *Miller* v. *Ram Runjun Chuckerbutty* (4), and although we may say that we do not altogether agree in the general terms of that decision, we find that it is not in point, as it affects the right of a party to proceed against a receiver without permission of the Court appointing him. We accordingly dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*

---

(1) 14 C. 323.
(2) 3 Browne's C C. 87.
(3) 1 Ves. Jun. 164.
(4) 10 C. 1014.

18 C. 481.

1891
MAY 28.
APPELLATE CIVIL.
18 C. 481.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Beverley.

KABILASO KOER (*Plaintiff*) *v.* RAGHU NATH SAKAN SINGH AND OTHERS (*Defendants*).* [28th May, 1891.]

Bengal Tenancy Act (VIII of 1885), *s.* 174—*Jurisdiction—Civil Procedure Code (Act XIV of* 1882), *s.* 11—*Sale for arrears of rent—Deposit in Court.*

No suit is maintainable to set aside a sale under the provisions of s. 174 of the Bengal Tenancy Act.

The right under the section to have a sale set aside is not an abstract right which can be enforced by suit against any particular person, but is a right to call upon a Judge to set aside a sale, and, on his refusal, to proceed in revision.

[F., 11 C.P.L.R. 33 (34); R., 26 M. 492 (493); 15 C.L.J. 89=16 C.W.N. 736 (740=13 Ind. Cas. 365 (368); 5 N.L.R. 121.]

SUIT to set aside a sale held under the Bengal Tenancy Act.

One Chowdhry Tribeni Pershad Singh having obtained a rent decree against one Kabilaso Koer, in execution of such decree caused the holding of the judgment-debtor to be sold. At such sale, which was held on the 15th March 1888, Raghu Nath Saran Singh and Sabhlaik Singh became the purchasers of the holding. Within 30 days from the date of such sale, Kabilaso Koer, on the 3rd April 1888, applied to the Munsif in whose Court the sale had been held to have the sale set aside under the provisions of s. 174 of the Bengal Tenancy Act; but instead of depositing in Court the amount recoverable under the decree with costs, and [482] a sum equal to 5 per cent. on the purchase-money, she paid the decretal amount out of Court to the decree-holder, and on the 9th April 1888 deposited in Court a sum equal to 5 per cent. on the purchase money. The decree-holder certified to the Court that his decree had been satisfied. The Munsif dismissed the application and confirmed the sale, holding that the provisions of s. 174 had not been complied with, inasmuch as the decretal amount and costs had not been deposited in Court. Kabilaso Koer thereupon brought a suit to set aside this sale against the decree-holder, the purchasers, and one Bhirug Singh (who she alleged had, in collusion with the purchasers, fraudulently paid over to the decree-holder the decretal amount and the sum due to the purchasers as damages, instead of paying the same into Court in accordance with the provisions of s. 174 of the Rent Act).

The defendants in their several written statements submitted that no regular suit would lie for the purpose of setting aside the sale, and denied the fraud alleged.

The Munsif held that s. 174 of the Rent Act did not expressly prohibit a regular suit being brought; and that under s. 11 of the Code of Civil Procedure the suit was maintainable, and concluded his judgment as follows:—Considering the novelty of the provisions of s. 174 of the Tenancy Act, the status of the petitioner, a purda female, and the mistake that has been committed by a third party, *viz.*, the decree-holder, in not

* Appeal from Appellate Decree No. 402 of 1890, against the decree of Baboo Dwarka Nath Mitter, Subordinate Judge of Shahabad, dated the 31st of December 1889, reversing the decree of Baboo Nagendro Nath Roy, Munsif of Arrah, dated the 15th of April 1889.

1891 MAY 28. — APPELLATE CIVIL. — 18 C. 481.

depositing the amount paid to him by the petitioner for such purpose which has been alleged to be fraud, I hold that the relief prayed should be granted to the petitioner."

The defendants appealed. The District Judge held that even conceding, for the sake of argument, there to be no express provision in the Bengal Tenancy Act similar to that contained in s. 312 of the Code preventing a regular suit, it did not follow that s. 174 should be construed less strictly in a regular suit than in an execution case, and that relief which could be granted only under the provisions of s. 174, and which the Munsif could not grant in the miscellaneous department, because the provision of the section had not been complied with, could be granted in a regular suit. He further held that, having regard to the terms and objects of s. 174, the Legislature meant proceedings thereunder [483] to be final, and not subject to be re-opened in a regular suit; he therefore reversed the judgment of the Munsif.

The petitioner appealed to the High Court.

Baboo *Abinash Chunder Banerjee*, for the appellant.—Proceedings under s. 174 are not final, and such a suit as this is maintainable; further, the provisions of s. 174 were sufficiently complied with.

Baboo *Devendra Nath Sen* (with him Baboo *Taruck Nath Palit*), for the respondent, contended that the suit would not lie; that to enable a judgment-debtor to claim the benefit of s. 174, he must strictly comply with the provisions of the section— *Rahim Buksh* v. *Nundo Lal Gossami* (1); the section had not been complied with; and even if such suit would lie, it would lie only subject to the provisions of s. 174 having been complied with.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

PETHERAM, C. J.—This is a suit brought by the plaintiff against the defendant to set aside a sale on the ground that she is entitled to have it set aside under the provisions of s. 174 of the Bengal Tenancy Act, she having made the necessary deposit within the meaning of that section.

The Subordinate Judge dismissed the suit on two grounds, and we think that he was right in both. He, first of all, has considered that such a suit would not lie, and in that view we think he was right. Section 174 provides a particular means by which sales can be got rid of after they have been concluded and by which the purchaser at the sale can be compensated for loss, but it must be got rid of by order of the Court, which made the sale. There is no doubt that if all the provisions of the law have been complied with, and the Court which made the sale refuses to set it aside, that order can be brought up to this Court in revision, but that is a different thing from saying that an independent suit will lie for that purpose, and we agree with the Subordinate Judge in thinking that such a suit will not lie. The right to have a sale set aside is not an abstract right which can be enforced by action against one person alone, but it is a right to call upon the Judge to set aside a sale, and if he does not do it, to bring his failure to do so to the [484] notice of the Court, and therefore we think that upon that ground the Subordinate Judge was right, and the appeal upon that ground fails.

The Subordinate Judge also thinks that the provisions of s. 174 have not been sufficiently complied with so as to entitle the plaintiff to this relief

(1) 14 C. 321.

in whatever form it is sought for. In that also we agree with him; s. 174 provides that before a sale is set aside, the whole of the debt and the expenses and the damage which the purchaser has sustained shall be deposited in Court: the debt for payment to the decree-holder, the damage for payment to the purchaser. In this case the only thing which has been deposited in Court is the damage which is payable to the purchaser. The amount of the debt has not been deposited; but some person comes who says that he is the decree-holder, and admits that he has received the money. We think that that is not a compliance with the Act. We think that before a claim can be made for the protection of s. 174, the Court must have the money deposited in the Court itself, so that the Court may know, of its own knowledge, that the provisions of the section have been complied with, and may not be driven to rely upon the evidence of other persons who may or may not be interested in the matter.

1891 MAY 28. — APPELLATE CIVIL. — 18 C. 481.

For both reasons then we think that the Subordinate Judge was right in the view he took of this case, and that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

---

18 C. 484 (F.B.).

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson and Mr. Justice Ghose.

QUEEN-EMPRESS v. NAYAMUDDIN AND OTHERS.*
[19th May, 1891.]

Penal Code, s. 300, cl. 5, and ss. 149 and 307—Murder, attempt to commit—Rioting armed with deadly weapons—Pre-arranged fight.

In a case in which it was found that all the accused were guilty of rioting armed with deadly weapons, that the fight was premeditated and [485] prearranged, a regular pitched battle or trial of strength between the two parties concerned in the riot, and that one of the accused in the course of the riot, and in prosecution of the common object of the assembly, killed or attempted to kill a man under such circumstances that his act amounted to an attempt to murder, the question arose whether that act could be said to bear a less grave character by reason of exception 5 to s. 300 of the Indian Penal Code.

Per Curiam, *held*, that upon such finding the case did not fall within the exception.

Per PIGOT, J. (PETHERAM, C.J., and MACPHERSON, J., concurring).—The 5th exception to s. 300 should receive a strict and not a liberal construction; and in applying the exception it should be considered with reference to the act consented to or authorized, and next with reference to the person or persons authorized, and as to each of those some degree of particularity at least should appear upon the facts proved before the exception can be said to apply. *Shamshere Khan* v. *Empress* (1) and *Queen* v. *Kukier Mather* (2) dissented from so far as they decide that from such a finding as the above consent to take the risk of death is inferred.

Per O'KINEALY, J.—Before exception 5 can be applied, it must be found that the person killed, with a full knowledge of the facts, determined to suffer death, or take the risk of death; and that this determination continued up to, and existed at, the moment of his death. *Queen* v. *Kukier Mather* (2) observed on.

---

* Full Bench Reference on Criminal Appeal No. 773 of 1890, against the order of ~~the Sessions Judge of Furridpur,~~ dated the 6th September 1890.

(1) 6 C. 154. (2) Unreported.

1891
MAY 19.
FULL
BENCH.
18 C. 484
(F.B.).

Per GHOSE, J.—No general rule of law can be laid down in determining, in cases of this description, whether the person killed or wounded suffered death or took the risk of death with his own consent; it being a question of fact, and not of law, to be decided upon the circumstances of each case as it arises. *Shamshere Khan* v. *Empress* (1) and *Queen* v. *Kukier Mather* (2) observed on, and the propositions of law laid down therein concurred with.

[R., 11 Cr.L.J. 345=5 Ind. Cas. 988=5 L.B.R. 160.]

REFERENCE to a Full Bench made by PRINSEP and WILSON, JJ. The referring order was as follows:—

"In this case the appellants, three in number, have been convicted of an attempt to murder under s. 307 of the Indian Penal Code, read, in the case of two of them, with s. 149. It has been found—and we see no reason to question the findings—that they were all guilty of rioting armed with deadly weapons, and that one of the accused, Nayamuddin, in the course of the riot and in prosecution of the common object of the assembly, killed or attempted to kill a man under such circumstances that [486] his act amounted to an attempt to murder, unless that act bears a less grave character by reason of exception 5 to s. 300 of the Indian Penal Code. That exception says—'Culpable homicide is not murder when the person whose death is caused, being above the age of 18 years, suffers death or takes the risk of death with his own consent.'

"In this case it is found, and we accept the finding: 'The third version of the occurrence is that of certain witnesses for the prosecution, and it is to the effect that the fight was premeditated and pre-arranged, a regular pitched battle or trial of strength between the Gujnaypur party and the Laukhola men on accused's side. It cannot, I think, be at all reasonably doubted that this third account of what took place is the true one.'

"We think it a question of some difficulty whether this finding brings the offence of the appellants within the 5th exception to s. 300, Indian Penal Code. And the decisions of *Empress* v. *Rohimuddin* (3) and *Shamshere Khan* v. *The Empress* (1) appear to be directly in conflict upon the point.

"If the exception does not apply to the case, the conviction and sentences appear to be right. If it does apply, the conviction should have been under s. 308, Indian Penal Code, and the sentences such as are sanctioned by that section.

"We desire to refer to a Full Bench the question whether, on the finding above cited, the case falls within the 5th exception to s. 300, Indian Penal Code."

Mr. *P. L. Roy* (with him Babu *Baikunt Nath Das*), for the appellants.

The Officiating Deputy Legal Remembrancer (Mr. *Leith*), for the Crown.

Mr. *P. L. Roy*.—With reference to exception 5 of s. 300, I would draw attention to the first report on the Penal Code by the Indian Law Commissioners, see the reprint of the Indial Penal Code as originally framed in 1837, by Higginbottam and Company, p. 256, cl. 282, where the Commissioners deal with "Voluntary culpable homicide by consent," which offence they say "ought not [487] to be punished so severely as murder." In the draft Code just printed, a duel was given as an illustration of this offence; the Commissioners, however, considered that cl. 298 as it stood included the case of a person killed in a duel as one who "suffers or takes the risk of death by his own choice. The illustration was thereupon

(1) 6 C. 154. (2) Unreported. (3) 5 C. 31.

dropped out. It is probable that the authors of the Code were led to distinguish this form of voluntary culpable homicide, by the consideration of the case of *suttee*; and they had to consider whether they would rank this case as murder, as falling within the definition thereof, or reduce it by a special exception to a lower grade of culpable homicide; following the existing law as to *suttee*, they concluded that it ought not to be treated as murder; and they had then to frame an exceptive definition, and the question would naturally arise whether the terms of the definition should be limited specially to *suttee*, or be made general enough to comprehend other cases depending upon the same principle The result was cl. 298, the terms of which are general, including all cases in which "the person whose death is caused was above twelve years of age, and suffers death or takes the risk of death by his own choice." The words of cl. 298 have since been slightly altered, and are embodied in the present s. 300, exception 5. Therefore we see the exception is a general one, and includes all cases depending on the same principle as *suttee*. Next as to whether the present case is one resting on that principle, the case law on this point is conflicting, that of *Empress* v. *Rohimuddin* (1) is against me; on the other hand, the case of *Shamshere Khan* v. *Empress* (2) is in my favour, in which White, J., observes on the case of the *Empress* v. *Rohimuddin*. The unreported case of the *Queen* v. *Kukier Mather* is also in my favour. In the present case before the Court the men went out armed against armed adversaries, and must have been aware that they ran the risk of death; and having voluntarily put themselves in that position, they must be taken to have consented to incur the risk. With regard to this exception, Mr. Mayne (ed. 1890), p. 288, says:—"It certainly seems to me that the exception was directly intended to abrogate the rule of English law that a combatant in a fair duel who kills [488] his opponent is guilty of murder. If so, the rule must equally apply, however numerous the combatants may be, provided they have voluntarily sought the contest with a knowledge that its results may probably be fatal." This view appears to be approved by Mr. Stokes, p. 209, vol. I, Anglo-Indian Codes.

The Officiating Deputy Legal Remembrancer (Mr. *Leith*), for the Crown:—The construction to be placed on the words in the exception "takes the risk of death with his own consent," should be, consents to take the risk of death ensuing as the result of a definite act to be performed by a definite person, that is, permits, after deliberation, a certain person to do a certain act which may result in death. The moment a person engages in a hazardous enterprise which may involve the loss of his life, he does not take the risk of death with his own consent, within the meaning of exception 5, so as to afford any person an opportunity of destroying him while engaged in such enterprise without being liable for murder. The idea of consent involves the idea of deliberation and a decision arrived at thereafter. To permit a thing to be done is very different from consenting to a thing done.

The Court (PETHERAM, C. J., PIGOT, O'KINEALY, MACPHERSON, and GHOSE, JJ.) delivered the following

OPINIONS.

PIGOT, J.—I am of opinion that the question referred to us should be answered in the negative. I think that, upon the finding cited in the

(1) 5 C. 31. (2) 6 C. 154.

1891 MAY 19. — FULL BENCH. — 18 C. 484 (F.B.).

reference, the case does not fall within the 5th exception to s. 300 of the Penal Code.

The learned Judges referring the case say :—

"It has been found—and we see no reason to question the findings —that they were all guilty of rioting armed with deadly weapons, and that one of the accused, Nayamuddin, in the course of the riot and in prosecution of the common object of the assembly, killed or attempted to kill a man under such circumstances that his act amounted to an attempt to murder unless that act bears a less grave character by reason of exception 5 to s. 300 of the Penal Code."

And also :—

"In this case it is found, and we accept the finding: 'The third version of the occurrence is that of certain witnesses for the prosecution, and it is to the effect that the fight was premeditated and **[489]** pre-arranged, a regular pitched battle or trial of strength between the Ghujnaipur party and the Laukhola men on accused's side. It cannot, I think, be at all reasonably doubted that this third account of what took place is the true one.'"

It is not found as a fact that the deceased did suffer death, or take the risk of death, with his own consent. If the case comes within the 5th exception, it can only do so, because the second finding abovementioned, read in connection with the other, leads by necessary inference to the conclusion that the deceased did within the meaning of the exception consent to suffer death or to take the risk of it, at the hands of any person who might be a member of the hostile party.

I own that as I read the cases of *Shamshere Khan* v. *Empress* (1) and of *Queen* v. *Kukier Mather* (2) there referred to, I think they do decide, that from such a finding as this, such a consent is to be inferred: and I feel bound respectfully to dissent from them if, and so far as, they do so decide.

It is not easy to construe the 5th exception: the wholly anomalous rule which it lays down is expressed but in few words, unaided by definitions; but I think it is not going too far to say that it should receive a strict and not a liberal construction; I mean that it should only be applied to cases which quite clearly fall within it.

I think the exception should be considered in applying it, first, with reference to the act consented to or authorised, and next with reference to the person or persons authorised. And I think that as to each of these, some degree of particularity at least should appear upon the facts proved, before the exception can be said to apply. I cannot read it as referring to anything short of suffering the infliction of death, or running the risk of having death inflicted, under some definite circumstances not merely of time, but of mode of inflicting it, specifically consented to, as for instance in the case of *suttee* or of duelling, which were, no doubt, chiefly in the minds of the framers of the Code.

Nor can I understand that it contemplates a consent to the acts of persons not known or ascertained at the time of the consent **[490]** being given. I do not doubt, that the consent may be inferred from circumstances and does not absolutely need to be established by actual proof of express consent.

In *Shamshere Khan* v. *Empress* (1) it is said—"A man, who, by concert with his adversary, goes out armed with a deadly weapon to fight that adversary, who is also armed with a deadly weapon, must be aware that

(1) 6 C. 154 (158). (2) Unreported.

he runs the risk of losing his life ; and as he voluntarily puts himself in that position, he must be taken to consent to incur the risk." In such a case the circumstances do show a distinct act of the mind of each combatant with respect to the other and *in concert with him* of willingness to encounter and suffer such known and anticipated acts of violence from that other as he cannot defend himself from. I am not sure that to include such a case within the exception is not rather to strain the terms of it, but I am not prepared to hold that here the exception would not apply.

But I think there is a distinction between such a case and that referred to in the following passage, at p. 158 of the report of *Shamshere Khan* v. *Empress* of the members of two riotous assemblies who "agree to fight together," and of whom some on each side or, to the knowledge of all the members, armed with deadly weapons. I do not think that from such a mere agreement to fight, such a consent as is contemplated by the section can be imputed to each member of each mob, to suffer death or take the risk of death at the hands of any one of the armed members of the other mob, by means of whichever of such deadly weapons, used in whatever way that person may please, and be able, to inflict it.

Whether or not the exception would apply if fight were so carefully arranged beforehand, that the express consent of the members of each party to take the risk of death in the fight at the hands of the opposite party could be established, need not be here discussed. The present is not such a case, nor was either *Shamshere Khan* v. *Empress* (1) or *Queen* v. *Kukier Mather* (2) such a case.

But I should myself find great difficulty in holding that a general consent to take the risk of the lethal acts of each and all **[491]** of the members of the opposing mob, could be such a consent as is contemplated by the exception, or that such a case would come within it at all. I confess that, unless compelled by very clear words, I should hesitate to give such a construction to this exception as should involve the proposition that the Legislature intended by it to confer a species of privilege upon the murderous acts of riotous assemblies, provided the members of them should add to their offence the further quality of deliberate premeditation in the commission of it.

PETHERAM, C. J.—I agree with the judgment which has just been read.

MACPHERSON, J.—I entirely agree with the judgment which has just been delivered by Mr. JUSTICE PIGOT.

O'KINEALY, J.—In this case the accused, five in number, were convicted of offences under ss. 148, 304, 325, 302 and 149 of the Indian Penal Code, by the Officiating Sessions Judge of Furridpur. He held that the fight in connection with which the prisoners have been convicted was premeditated and pre-arranged—a regular pitched battle or trial of strength between the Gujnaipur party and the men on the accused's side—and both sides were armed with spears and *lathies*.

On this statement of facts, the learned Judges who heard the appeal have referred to us the question, whether this finding brings the offence of the appellants within exception 5, s. 300 of the Indian Penal Code, and reference has been made to the cases of the *Queen-Empress* v. *Rohimuddin* (3) and *Shamshere Khan* v. *The Empress* (1) as directly in conflict upon the meaning to be attached to that exception.

---

(1) 6 C. 154 (158). (2) Unreported. (3) 5 C. 31,

1891 MAY 19. — FULL BENCH. — 18 C. 484 (F.B.).

Assuming that I am in a position to give a judicial decision upon the question now before us, of which I am not at all certain, I am of opinion that the finding of the Court below is not sufficient to bring the case of the prisoners within the exception. The exception states that "culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own [492] consent." Consent under the Code is not valid if obtained by either misrepresentation or concealment, and implies not only a knowledge of the risk but a judgment in regard to it, a deliberate free act of the mind. In other words, before this section can be applied, it must be found that the person killed, with a full knowledge of the facts, determined to suffer death or take the risk of death, and this determination continued up to, and existed at, the moment of his death. It appears to me difficult to assert that when two parties armed with *lathies* and spears go out to fight, the members of each party consent to suffer death; nor can it, I think, be predicated, as a general rule that they consent to take the risk of death.

In s. 87 of the Indian Penal Code it is stated that "nothing which is not intended to cause death or grievous hurt and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm." Appended to this section there is the following illustration:—"A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence."

This section and illustration show what amount of evidence the Legislature considered sufficient to prove that a person injured had "consented to suffer the injury incurred." Applying that illustration to a few cases, I think we may arrive at something like a definite idea of what the Legislature intended by similar words in s. 300, exception 5. If two men went out armed with rifles and fired at each other from a distance of 10 yards, and one of them was shot, then looking at the nature of the weapons and the short distance which separated them, I think, looking at the illustration to s. 87, that a Jury would be entitled to hold that they took the risk of suffering death. But as the existence of the consent at the moment the deceased received [493] the fatal shot would be necessary in order that the accused should obtain the benefit of the exception, he could not succeed if the evidence pointed the other way. Thus, if the deceased declined to continue the fight, or ran away, or showed in any other open manner a desire to avoid his previous consent, the accused could not successfully appeal to this exception. On the other hand, if they were armed only with ordinary walking sticks, I think it would be extremely difficult for a Jury to hold that the parties had fully before them the idea that they were running any risk of death, or ever consented to suffer death. Between these two extremes there are numerous cases different in degree, in which it would be extremely difficult to state what was the mental attitude of the person whose death was caused when he was killed. If, as I have said before, the parties were armed with guns and were placed near each other, a Jury might well find that they had

undertaken the risk of death. If, on the other hand, there was only one or two guns amongst a great number of people, there would be much less room for the conclusion that the deceased considered there was any risk of death or consented to take it. So far as I can see, the nature of the weapons with which the parties were armed in this case is only one out of many facts from which the consent of the deceased should be inferred: and I myself would not come to the conclusion that any individual of either of the two parties consented to take the risk of death, when the evidence in support of that conclusion is simply that some of the men on both sides were armed with *lathies* and spears. No doubt in the case of *Queen* v. *Kukier Mather* (1), White, J., in delivering the judgment of the Court, said: "A man, who by concert with his adversary, goes out armed with a deadly weapon to fight an adversary, who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life, and as he voluntarily puts himself in that position, he must be taken to consent to incur that risk. If this reasoning is correct as regards a pair of combatants fighting by premeditation, it equally applies to the members of two riotous assemblies who agree to fight together, out of whom some on each side are to the knowledge of all the members armed with deadly weapons.''

[494] I do not understand the Judges in that case to decide that as a matter of law, such consent must be presumed in every case of rioting with deadly weapons, but rather that in that particular case the evidence warranted the conclusion. If I did understand them so to hold, I should be compelled to dissent. To my mind there is no presumption of law at all. The matter, as I think is pointed out by the illustration to s. 87, is one of fact to be decided on evidence given at the trial.

GHOSE, J.—The question we are called upon to decide is whether upon the finding cited in the reference, the case falls within the 5th exception to s. 300, Indian Penal Code. That finding is as follows :—

"The third version of the occurrence is that of certain witnesses for the prosecution, and it is to the effect that the fight was premeditated and pre-arranged, a regular pitched battle or trial of strength between the Gujnaipur party and the Laukhola men of accused's side. It cannot, I think, be at all reasonably doubted that this third account of what took place is the true one."

I do not think that these facts are sufficient to show that Summiruddin, who was either killed or wounded, suffered death or took the risk of death with his own consent.

I observe that the Sessions Judge also finds that the rioters on *both* sides were armed with deadly weapons ; but it is not found, whether only a few or a large number of the rioters on the side opposed to Summiruddin were armed with such weapons, nor has it been found that the man took a part in the battle with a full knowledge of the risk he was incurring, and that he continued to fight and did not attempt to retire until he was disabled. Upon the facts found, and confining myself to those facts, I am unable to say what was the attitude of Summiruddin's mind at the time when he entered into the conflict, and whether that attitude continued till he received the fatal blow.

I do not think that any general rule of law can be laid down in a case like this; for it is, I take it, a question of fact, and not of law, to be decided upon the circumstances of each case.

---

(1) Unreported.

1891 MAY 19. — FULL BENCH. — 18 C. 484 (F.B.).

There is an obvious distinction between suffering death and taking the risk of death with one's own consent; and that being so, different considerations would in many instances arise, according [495] as the particular case comes under the first or second head of the 5th exception to s. 300.

In the case of a person who is said to have suffered death with his own consent, some definite circumstances both as to time and the mode of inflicting death, consented to—as in the case of a *suttee*—should, no doubt, as has been observed by Pigot, J., be proved. But I am disposed to think that this rule cannot always apply in the same way in the other case.

In the case of a person entering into a duel with another person, both being armed, neither of the combatants specially consents to being killed: each of them hopes to come out victorious, but knows fully well at the same time that he incurs the risk of being killed—so in other cases of the kind, where two persons in concert with each other deliberately fight with deadly weapons.

In such cases, I think, it can hardly be questioned that the exception would apply. If so, I do not see why, when the fight is between a person and two or more persons, or between two or more persons on either side, it cannot apply. There is nothing in the exception itself to indicate such a distinction.

Take this case: Two men, on each side, are determined and agree to fight each other until some one of them is killed or wounded. They use different weapons; the two on one side use a gun and a club, respectively, and the other side a sword and spear. The fight is begun, and nothing is shown indicating that any one of the combatants resiled from that determination and agreement; and in this fight one of them is killed. Here there was no consent given by the deceased to any particular person killing or wounding him, or as to the particular weapon that might be used for the purpose. Instances of this kind might be multiplied to show that a band of persons varying in number, and armed with different kinds of weapons, may fight another band of persons similarly situate, both bands agreeing to fight each other until one is killed. In these cases, the person killing, the person to be killed, the mode and the instrument by which death might be inflicted, would be uncertain; and yet, each one of the combatants might expressly consent to suffer death, or take the risk of death. Can it be said that in these cases the exception does not apply? In a case where there is no *express* consent, the difficulty [496] of bringing the offence within the exception is indeed great; but there may be facts and circumstances proved, which necessarily lead to an inference of consent, and from which the Jury may find that the deceased took the risk of death with his own consent.

I do not understand that Mr. Justice White in the two cases of *Shamshere Khan* v. *Empress* (1) and *Queen* v. *Kukier Mather* (2) meant to lay down any other proposition of law than two: *first*, that the 5th exception to s. 300 of the Indian Penal Code should not be taken to be confined to the case where two men by concert fight each other with deadly weapons; but that it may also apply in the case of two bands of men entering into a premeditated fight in concert with each other with deadly weapons: and *second*, that the 5th exception stands upon different grounds from the 4th exception. And so far as these two propositions

(1) 6 C. 154.

(2) Unreported.

are concerned, I agree with him. I do not think that the said learned Judge meant to lay down as he could not lay down, any general rule applicable to all cases of the kind; when in each case, the question must be determined upon evidence whether the deceased took the risk of death with his own consent; and this must necessarily depend upon the particular facts proved. And as I read his judgments, the conclusion that he arrived at was upon the facts proved in each of the two cases before him.

1891 MAY 19. — FULL BENCH. — 18 C. 484 (F.B.).

T. A. P.

---

18 C. 496.

CIVIL RULE.

Before Mr. Justice Tottenham and Mr. Justice Trevelyan.

BAGAL CHUNDER MUKERJEE (*One of the judgment-debtors, Objector*) *v.* RAMESHUR MUNDUL (*Decree-holder*) AND ANOTHER (*Auction-Purchaser*), AND ANOTHER (*Judgment-debtor*).* [14th May, 1891.]

Sale in execution of decree—Setting aside of sale—Irregularity—Civil Procedure Code (Act XIV of 1882), *ss.* 290, 291—*Appeal—Civil Procedure Code Amendment Act of* 1888.

Where a sale in execution of decree was adjourned on the application of one of two judgment-debtors, who waived the issue of a fresh proclamation **[497]** of sale, and the interests of both were sold,—*Held*, on the application of the other judgment-debtor to set aside the sale, that the omission to issue a fresh proclamation of sale, under s. 291 of the Civil Procedure Code, amounted only to an irregularity, and did not vitiate the sale.

Held further, that the District Judge had jurisdiction to hear the appeal from an order passed after the 1st of July, 1888, under the Civil Procedure Code Amendment Act of 1888, although the execution proceedings were commenced before that date.

Rameshur Singh v. *Sheodin Singh* (1) and *Satish Chunder Rai Chowdhuri* v. *Thomas* (2) followed in principle.

[F., 96 P.L.R. 1902.]

THIS was an application by one Bagal Chunder Mukerjee, one of the judgment-debtors, under s. 311 of the Civil Procedure Code, to set aside a sale in execution of decree.

One Rameshur Mundul in execution of his decree attached mouzah Joalbhanga and caused a proclamation of sale to be issued. The sale was fixed for the 18th day of June 1888. On that date the other judgment-debtor, Sukhoda Sunderi, applied for postponement of the sale to the 2nd day of July 1888. On the 2nd day of July 1888, the property was sold to one Mohesh Chunder Bhuttacharji, without any fresh proclamation of sale. On the 18th day of July 1888, the petitioner, Bagal Chunder Mukerjee, applied to the first Court to set aside the sale. That Court, on the 22nd day of February 1890, dismissed the petition.

He then appealed to the District Judge, who, on the 23rd day of December 1890, dismissed the appeal, confirming the order of the first

---

* Civil Rule No. 303 of 1891 against the decree of R.F. Rampini, Esq., Judge of Burdwan, dated 23rd of December 1890, affirming the order of Baboo Kalidhan Chatterjee, Munsif of Ranigunge, dated the 22nd of February 1890.

(1) 12 A. 510. (2) 11 C. 658.

1891 MAY. 14.

CIVIL RULE.

18 C. 496.

Court. The District Judge held that the omission to issue a fresh proclamation amounted only to an irregularity, and that the petitioner did not sustain any substantial injury by reason of such irregularity.

Thereupon the petitioner, on the 19th day of February 1891, obtained from Norris and Beverley, JJ., a rule calling upon the opposite party to show cause why the said sale should not be set aside, on the ground that the execution proceedings, in the course of which the sale was held, having been commenced before the 1st day of July 1888, the District Judge had no jurisdiction to hear the appeal, and that the sale having been postponed for more than seven days, and no fresh proclamation having been published, the sale was void.

[498] On the rule coming on for argument,

Dr. *Trailokya Nath Mitter* and Baboo *Nalin Ranjan Chatterji*, appeared for the petitioner.

Baboo *Srinath Das* and Baboo *Boikant Nath Das*, appeared for the opposite party.

Dr. *Trailokya Nath Mitter*, in support of the rule, contended that the language of s. 291 of the Civil Procedure Code was peremptory, and therefore the omission to publish a fresh proclamation of sale vitiated the sale. Section 290 of the Civil Procedure Code must also be followed when under s. 291 an adjournment has been allowed, unless both the judgment-debtors waive the issue of a fresh proclamation. *Bakshi Nand Kishore* v. *Malak Chand* (1), *Sadhu Saran Singh* v. *Panchdeo Lal* (2).

Baboo *Srinath Das* in showing cause against the rule contended that after the adjournment of the sale under s. 291 of the Civil Procedure Code, no fresh proclamation was necessary. Illegality consisted in doing a thing which was prohibited by law, but omission to do something prescribed by law was only an irregularity. The sale was good—*Rameshur Singh* v. *Sheodin Singh* (3), *Satish Chunder Rai Chowdhuri* v. *Thomas* (4), *Nana Kumar Roy* v. *Golam Dey* (5).

The judgment of the Court (TOTTENHAM and TREVELYAN, JJ.) was as follows :—

JUDGMENT.

This is a rule obtained by one of two judgment-debtors to show cause why a sale held in execution of a decree against him should not be set aside, as being null and void for default in the issue of a fresh proclamation under s. 291 of the Code of Civil Procedure, upon an adjourment being granted at the instance of the other judgment-debtor, who had waived any fresh proclamation.

The present petitioner was no party to the petition for adjournment.

The Courts below held, that the omission to issue a fresh proclamation amounted only to an irregularity, and that no substantial injury had thereby been caused to the petitioner.

Another ground, urged for setting aside the decree of the lower appellate Court, is that that Court had no jurisdiction to hear the **[499]** appeal, inasmuch as the execution proceedings were commenced before the 1st of July 1888, and when an appeal from the Munsif's order confirming the sale would lie to the High Court and not the District Judge.

It is not contended that there was any irregularity or defect in the original sale proclamation. And so far as the proclamation that was

(1) 7 A. 289. (2) 14 C. 1. (3) 12 A. 510.
(4) 11 C. 658. (5) 18 C. 422.

1891 MAY 14. — CIVIL RULE. — 18 C. 496.

published is concerned, there has been no transgression of the provisions of s. 290.

It has been argued by the vakeel for the petitioner, that s. 290 must be equally followed when under s. 291 an adjournment has been allowed, unless all the judgment-debtors waive the issue of a fresh proclamation. But we think it clear that this is not so.

For supposing that under s. 291 a sale has been, in the discretion of the Court, and not upon application, adjourned for 15 days, and a fresh proclamation has to be published, it would be impossible to hold, that under s. 290 it would be illegal to hold such adjourned sale, until after the expiration of at least thirty days from the date of the fixing up of the fresh proclamation in the Court of the Judge.

The High Court at Allahabad has held in *Rameshur Singh* v. *Sheodin Singh* (1), that whereas the doing of a thing by the Court which is prohibited by law is an illegality, which renders the thing done null and void, the omission to do something which is prescribed may be only an irregularity. And in a case very similar to the one before us, this Court has held in *Satish Chunder Rai Chowdhuri* v. *Thomas* (2), that the omission to publish a fresh proclamation was only an irregularity. We see no reason for dissenting from this opinion: and we find that the cases cited on behalf of the petitioner are not on all fours with this one.

As regards the objection taken to the jurisdiction of the District Judge, to hear the appeal, it was not seriously pressed before us; and we are not disposed to attach any weight to it. The amendment of the Procedure Code did not repeal the previous law, but merely altered the forum of appeal in such cases, and we think the District Judge had jurisdiction.

The rule must be discharged with costs.

A. F. M. A. R. *Rule discharged.*

---

18 C. 500.

[500] APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

BHOOPENDRO NARAIN DUTT AND OTHERS (*Judgment-debtors*) *v.* BARODA PROSAD ROY CHOWDHRY (*Decree-holder*).*
[15th May, 1891.]

Court of Wards Act (Bengal Act IX of 1879), *ss.* 20, 51 *to* 55 —"*Suit*"—*Application for execution by Collector on behalf of ward, when Manager of Ward's Estate has been appointed.*

The word "suit" as used in ss. 51 to 55 of Bengal Act IX of 1879, is not limited to what is usually called a "regular suit," but covers miscellaneous proceedings in a suit, such as an application for execution of a decree in which the ward for the first time seeks to have the carriage of litigation instituted by his predecessor in title.

When it appeared that a manager of a minor's property had been appointed by the Court of Wards under the provisions of s. 20 of Bengal Act IX of 1879, and during the absence of such manager on leave an application was made on behalf of the minor by the Collector of the district for execution of a decree.

---

* Appeal from order No. 42 of 1891 against the order of Baboo Radha Krishna Sen, Subordinate Judge of the 24-Pergunnahs, dated the 18th of August 1890.

(1) 12 A. 510. (2) 11 C. 658.

1891
MAY 15.

APPELLATE CIVIL.

18 C. 500.

Held that the office of manager did not become vacant because the manager obtained leave, and that if it were not vacant, s. 51 of the Act did not enable the Collector to appear on behalf of the minor.

[Rel., 27 C. 242 = 4 C.W.N. 405; Appr., 3 N.L.R. 146 (153); R., 36 B. 360 (365) = 14 Bom.L.R. 325 (330) = 15 Ind.Cas. 512; 144 P.R. 1908; 2 S.L.R. 82; D., 23 C. 374 (386).]

THIS was an appeal from an order passed by the Subordinate Judge of the 24-Pergunnahs, allowing the execution of a decree dated the 20th and 21st December 1883. The suit in which the decree was passed was originally instituted by one Haro Prosad Roy Chowdhry. Pending the suit Haro Prosad Roy Chowdhry died, and thereafter his mother Radhika Chowdhrani claimed to succeed to his estate under a will, and having obtained probate thereof, got her name substituted on the record of the suit as plaintiff, and obtained a decree against the defendants, who were the appellants in the present application. Subsequent to the decree the will was set aside as a forgery, and the estate thereafter passed to Baroda Prosad Roy Chowdhry, the son of Haro Prosad, who was a minor, and whose estate was taken charge [501] of by the Court of Wards. Thereafter a manager of the estate of the minor was appointed by the Court of Wards, and an application was made by the minor through such manager in the Court of the First Subordinate Judge of the 24-Pergunnahs to which Court the decree had been sent for execution, to have the minor's name substituted as plaintiff, and for execution of the decree. That application was allowed, and an order was passed on the 14th August 1889, directing the sale of the judgment-debtors' property. Against that order the judgment-debtors appealed to the High Court, which set it aside on the ground that the application should have been made to the Court which passed the decree, and not to the Court to which it had been sent for execution.

The application, out of which the present appeal arose, was made on the 18th June 1890 to the Court of the Second Subordinate Judge of Alipore by the minor represented by the Collector of the 24-Pergunnahs, and the petitioner asked to have the minor's name substituted on the record, and to have the decree executed. Notice of the application was given to the judgment-debtors, who appeared and opposed it on several grounds, the main grounds being that the right to execute the decree was barred by limitation, and that the application itself was informal, inasmuch as it was made by the Collector and not by the manager appointed by the Court of Wards, who was alone competent to represent the minor in such matters under the provisions of Bengal Act IX of 1879 (Court of Wards Act). These objections were overruled by the lower Court, and an order was passed on the 18th August 1890, allowing the substitution asked for and directing execution to issue. Against that order the judgment-debtors preferred this appeal upon various grounds, and amongst them the two grounds alluded to above which had been urged in the Court below.

Mr. *Evans*, Baboo *Taruck Nath Palit*, and Baboo *Sharoda Churn Mitter*, for the appellants.

The Advocate-General (Sir *Charles Paul*) and Baboo *Ram Churn Mitter*, for the respondent.

The appeal came on to be heard on the 30th April and the 1st May. The nature of the arguments advanced at the hearing [502] sufficiently appears for the purpose of this report from the judgment of the Court (O'KINEALY and AMEER ALI, JJ.), which was delivered on the 15th May, and was as follows:—

1891
MAY 15.

APPELLATE CIVIL.

18 C. 500.

JUDGMENT.

This appeal arises out of an application for the execution of a decree passed by the Subordinate Judge of the 24-Pergunnahs on the 18th August 1890.

Haro Prosad Roy Chowdhry obtained a decree against the appellant and others. He died, and his mother, claiming under a will, took out probate and got her name registered under s. 232 of the Civil Procedure Code, as the representative of Haro Prosad. Subsequently, the will was set aside, and the estate then passed to Baroda Prosad Roy Chowdhry, the son of Haro Prosad, and who is now a minor under the Court of Wards. The minor, through the manager under the Court of Wards, applied to have his name entered in the execution proceedings, and to have the proceedings revived in the Court of the First Subordinate Judge of Alipore. That application was allowed, but on appeal to this Court it was rejected on the ground that the application should have been made to the Court which passed the decree, and not to the Court to which the decree had been sent for execution. After that, an application was made to the Court of the Second Subordinate Judge of Alipore by the Collector of the 24-Pergunnahs on behalf of the minor on the 18th June 1890, to have his name registered and execution to issue. Notice was served on the judgment-debtor, and the judgment-debtor, who is the appellant before us, appeared and raised several objections. The chief among them were that the application was barred by lapse of time; and, not having been made by the manager of the Ward's estate, but by the Collector of the district, who had no power to make any application on behalf of the minor as long as the manager existed, it should be dismissed. These answers were not considered sufficient by the Subordinate Judge, and he allowed execution to issue.

The judgment-debtor, dissatisfied with this order, has appealed to this Court, and has raised the same defence before us as was raised by him in the Court below.

We think that so far as the question of limitation is concerned, the appellant ought not to succeed. Admittedly, if the [503] decree-holder is entitled to the benefit of s. 14 of the Limitation Act, and allowance is made for the time during which he prosecuted the former application, the present application is not barred. We agree with the Subordinate Judge in considering that he is entitled to the deduction claimed. The application was dismissed in this Court on the ground that it was made to a Court which had no jurisdiction to receive it. We do not acquiesce in the argument of the learned Counsel for the appellant that the litigation in that case could not have been carried on in good faith. Looking at the judgment of the First Court, and the circumstances surrounding that litigation, we think it could, and we concur with the Subordinate Judge in allowing the respondent the benefit of that deduction.

But in regard to the question whether the Collector was justified in making the application, we regret that we differ from the Subordinate Judge. Under Bengal Act IX of 1879, the Board of Revenue is the Court of Wards. By s. 20, it can appoint one or two managers of the property of a ward, who is quite a different officer from the guardian of the person of a ward. Sections 39 and 40 enumerate the duties and powers of managers; and so far as general management is concerned, when no manager has been appointed the Collector of the district in which the greater part of the property is situated can manage the property. By

1891 MAY 15. — APPELLATE CIVIL. — 18 C. 500

s. 51, in every suit brought by or against any ward, he must be described as a ward of Court; and the manager of such ward's property, or, if there is no manager, the Collector of the district in which the greater part of such property is situated, or any other Collector whom the Court of Wards may appoint in that behalf, shall be named as next friend or guardian for the suit, and shall in such suit represent such ward. This is the general mode of describing the persons who can appear for a ward.

Under s. 52 power is given to the Court of Wards by an order to nominate or substitute any other person to be next friend or guardian for any such suit; and if the order be one for substitution, the Civil Court, on the presentation to it of a copy of such order, is bound to carry out the order of the Court of Wards.

Section 55 declares that "no suit shall be brought on behalf of any ward, unless the same be authorized by some order of the Court."

[504] Looking at all these sections, it seems to us that the Legislature has declared that only a manager, or a Collector, or some special person appointed by the Court of Wards can file original suits on behalf of a ward, and represent the ward throughout the whole of the litigation.

It has been argued before us by the counsel for the respondent that the word "suit" in that part, *i.e.*, Part VII of Bengal Act IX of 1879, must mean what is usually called a "regular suit," and cannot refer to proceedings of the nature now before us, in which the ward seeks to have his name substituted for that of his mother, and the decree obtained by his father executed. We regret that we are unable to accept this argument. The word "suit" in this Act has not the narrow significance attached to the word "action" in English law; and as Sir Barnes Peacock pointed out in a Full Bench decision of this Court (1) it embraces all contentious proceedings of an ordinary civil kind, whether they arise in a suit or miscellaneous proceedings. That, too, was the opinion of a Division Bench of this Court in the case of *Shurut Soonduree Debi* v. *The Collector of Mymensingh* (2), where it was decided that the Court of Wards has full control over miscellaneous proceedings in execution of decree. Nor can we find anything in the nature of the Act itself which militates against this conclusion. It is an Act passed placing the property of wards and wards' litigation exclusively in the power of the Court of Wards (and there are reasons which make it desirable for the Court of Wards, and the Court of Wards alone, to have the initiation of litigation under its control), and applies as much to miscellaneous proceedings initiated on behalf of a ward as to regular suits. We think therefore that the word "suit" in this Act covers an application of the nature now before us in which the ward for the first time seeks to have the carriage of the litigation.

The next point argued is that the application has not been made by the manager, and that as this informality was objected to at the beginning of the suit, the application should have been dismissed. The manager under the Court of Wards is appointed **[505]** by the Court of Wards under powers given to it by statute. The Court, no doubt, has complete control over such matters, but its duty is set forth in the Act, and its position seems to be that of a public officer appointed under statute. In this case a manager was appointed; but it is said that previous to the application being presented he had taken leave, and that the

(1) *Hurro Chunder Roy Chowdhry* v. *Scoradhonee Debia*, B.L.R., Sup. Vol. 988 (990).

(2) 7 W. R. 221.

Collector of the 24-Pergunnahs was the proper person to make the application. We think that the office of manager did not become vacant because the manager obtained leave; and if it is not vacant, s. 51 of the Wards' Act does not enable the Collector to appear on behalf of a minor. The Court of the Subordinate Judge of the 24-Pergunnahs had jurisdiction over the subject-matter of the litigation, and although the application may not have been properly initiated, still it might well be that if a proper application had been made after the death of the manager, who, we are told, died before the Subordinate Judge gave judgment in this case, much of the existing difficulty in the case would not have been experienced. When the manager died, what happened when he died, we are unable to say. Indeed, in this and in many other points we have been unable to obtain any information from the papers. Moreover, it may well be, for aught we know, that the Collector was appointed by virtue of the Rules issued by the Board of Revenue to Commissioners of Sub-divisions under s. 52 of the Act as a special person to carry on this litigation. But in truth, no evidence was taken in the Court below, and there is nothing before us on which we would be justified in coming to any determination.

We, therefore, direct that the records be returned to the Subordinate Judge of the 24-Pergunnahs in order that he may hear evidence and determine: *first*, when the manager took leave; *secondly*, on his taking leave, what, if any, arrangements were made for the management of the property and for the carrying on of litigation; *thirdly*, if any such arrangement was made, was it made under the order of the Court of Wards, and if not, by whom; *fourthly*, when did the manager die; and *fifthly*, after his death what arrangements were made for the management of the property and the carrying on of the litigation of the ward, and by whom.

[506] The Judge will submit to this Court his finding on the issues above indicated, together with the evidence recorded on those issues, within a month from the date of the receipt by him of the record, and will, at the same time, return the record.

The case will remain on the file of this Court.

H. T. H. *Case remanded.*

---

18 C. 506.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

DIN DOYAL SINGH (*one of the Defendants*) v. GOPAL SARUN NARAIN SINGH, MINOR, THROUGH HIS NEXT FRIEND, MR. A. OGILVY, MANAGER UNDER THE COURT OF WARDS (*Plaintiff*).*
[19th May, 1891.]

Limitation Act, 1877, *art.* 116—*Registered Instalment Bond, Suit on—Contract in writing registered.*

Article 116 of the Limitation Act is applicable to a suit on a registered instalment bond, notwithstanding the express provisions of art. 74. That article (116)

---

* Appeal from Appellate Decree, No. 654 of 1890, against the decree of J. Crawfurd, Esq., Judge of Gaya, dated the 5th of February 1890, modifying the decree of Baboo Abinash Chunder Mitter, Subordinate Judge of Gaya, dated the 2nd of April 1889.

1891 MAY 19. — APPELLATE CIVIL. — 18 C. 506.

is intended to apply to all contracts in writing registered, whether there is or is not an express provision in the Limitation Act for similar contracts not registered.

[R., 16 Bom. L. R. 20 (25).]

THIS was a suit to recover Rs. 3,965 for principal and interest due on a registered instalment bond, dated 15th Bysack 1283, Fasli (23rd April 1876), by which it was stipulated that, on failure to pay any instalment, the whole amount was to become due. Default was made in payment of the instalment due on 1st Magh 1289 (5th January 1882), and the cause of action was stated in the plaint to have arisen on that date. The suit was instituted on the 18th May 1888 (22nd Bysack 1295).

The only defence material to this report was that the suit was barred by limitation, and an issue raised as to this was decided by both the lower Courts in favour of the plaintiff. The defendant appealed to the High Court, and the only question material was whether the period of three years under s. 74 of the Limitation Act, or the period of six years under art. 116, applied to the suit.

[507] Baboo *Saligram Singh*, for the appellant.

Baboo *Hem Chunder Banerjee* and Baboo *Ram Churn Mitter*, for the respondent.

The judgment of the Court (TREVELYAN and BANERJEE, JJ.) was as follows :—

JUDGMENT.

The question before us is whether the term of limitation for a suit upon a registered instalment bond is six years or three years.

The decision of that question would depend upon the determination of the question whether art. 116, sch. II of the Limitation Act, governs an instalment bond. It is argued that it does not, because art. 74 in express terms makes provision for an instalment bond.

We think that art. 116 is intended to apply to all contracts in writing registered, whether there is or is not an express provision in the Limitation Act for similar contracts not registered, and this view seems confirmed by the distinction between the terms of this article and of art. 115, in which the words "not herein specially provided for" occur. In this view we think that the provisions of art. 116 govern this case, and that this appeal must, therefore, be dismissed with costs.

J. V. W. *Appeal dismissed.*

18 C. 507.

1891 MAY 19.

APPELLATE CIVIL.

18 C. 507.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

SURESH CHUNDER BANERJEE, MINOR, BY HIS GUARDIAN AND EXECUTOR NOGENDRA CHUNDER BANERJEE AND ANOTHER (*Defendants, Nos.* 2 *and* 3) *v.* AMBICA CHURN MOOKERJEE AND OTHERS (*Plaintiffs*).* [19th May, 1891.]

Appellate Court, Power of—Power to refer to arbitration a case on appeal—Civil Procedure Code, 1882, *s.* 582.

Under s. 582 of the Civil Procedure Code, an Appellate Court has power to refer a case before it to arbitration, if the parties wish it to be referred.

[508] *In re the petition of Sangaralingam Pillai* (1) and *Bhugwan Das Marwari* v. *Nund Lal Sen* (2) followed.

THE facts of this case are sufficiently stated in the judgment of the High Court.

Baboo *Harendra Nath Mookerjee*, for the appellants.

Baboo *Hari Mohun Chuckerbutty*, for the respondent.

JUDGMENT.

The judgment of the Court (TREVELYAN and BANERJEE, JJ.) was delivered by

BANERJEE, J.—It appears from the record that this case was referred to arbitration in the lower appellate Court, and a certain time was fixed within which the arbitrators were required to submit their award. The next order that we find on the order sheet is that "a decree be drawn up in terms of compromise by the pleaders;" and it appears from a note at the foot of the decree that the pleader of one of the parties objected to sign the decree on the ground that he had no authority from his client to compromise the appeal. We further find on the record an award signed by the arbitrators; but we do not find any petition of compromise put in by the parties after that. The award, however, bears on the back of it the following order :—" Decree in terms of the compromise as agreed to by both parties." The decree that is drawn up is in terms of the award submitted by the arbitrators; but the order " that the decree be drawn up in terms of the compromise " was passed without giving the parties any opportunity to raise any objection to the award.

It appears to us clear, therefore, that though the case was originally referred to arbitration, yet, when the award reached the Court, it was regarded not as an award, but as a compromise by the parties ; and a decree was ordered to be drawn up upon the footing of its being a compromise.

Against this decree and decision the defendants have preferred this second appeal ; and it is contended on their behalf, *first*, that the decree is bad, because the Appellate Court has no power to refer a case to arbitration; and, *secondly*, that the decree is further bad, as it is based on an award without giving the parties **[509]** any opportunity to object to it; and it is pointed out in the course of the argument that there

* Appeal from Appellate Decree, No. 656 of 1890, against the decree of F. F. Handley, Esq., Judge of Nuddea, dated the 28th of February 1890, reversing the decree of Baboo Bepin Chunder Roy, Munsif of Ranaghat, dated the 30th of April 1889.

(1) 3 M. 78. (2) 12 C. 173.

1891 MAY 19. — APPELLATE CIVIL. — 18 C. 507.

were other irregularities, such as the submission of the award long after the time allowed by the order appointing the arbitrators, without there being any extension of time obtained from Court.

In support of the *first* objection, the learned Vakil for the appellant refers to the decision of this Court in the case of *Juggessur Dey* v. *Kritartha Moyee Dossee* (1); but we do not think that that decision applies to this case. The question whether the Appellate Court can refer a case to arbitration depends upon the provisions of s. 582 of the present Code of Civil Procedure, which is different from the provisions of s. 37 of Act XXIII of 1861, which was the law in force when that case was decided. Under the old law it was provided that "the Appellate Court shall have the same powers as the Courts of first instance;" under the present Code it is enacted that "the Appellate Court shall have, in appeals, the same powers, and shall perform the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction." If the reference to arbitration on the application of parties is not a power to be exercised by the Court, it is a duty imposed upon the Court, and under the provisions of s. 582 of the Code of Civil Procedure, we think that the Appellate Court can refer a case to arbitration if the parties to the appeal pray for such reference. This view is in accordance with the decision of the Madras High Court in the case of *Sangaralingum Pillai* (2), and also with the opinion of this Court in the case of *Bhugwan Das Marwari* v. *Nund Lal Sen* (3).

But the second objection is, we think, valid, as there was really no compromise in the case, and what has been treated as a compromise was, in fact, an award submitted by the arbitrators appointed in the case. It is necessary, therefore, that the formalities prescribed by the Act for awards should be strictly complied with. The appellants were therefore entitled to have an opportunity of objecting to the award if they thought fit; and the learned Judge below ought to have disposed of their objection before he could order the decree to be drawn up in terms of the award.

[510] The case must therefore go back to the lower appellate Court in order that the appellants may have such an opportunity. When the record goes back to the Judge, he shall fix a day for the hearing of the case not less than ten days from the arrival of the record in his Court; so that the parties may have an opportunity of raising any objection to the award that they may think fit; and the learned Judge will then dispose of the objections, provided they are filed within ten days from the date of the arrival of the record.

The costs will abide the result.

J. V. W. *Case remanded.*

---

(1) 12 B.L.R. 261 = 26 W.R. 210. (2) 3 M. 78. (3) 12 C. 173.

1891 JUNE 8.

APPELLATE CIVIL.

18 C. 510.

18 C. 510.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

RAJENDRA NARAIN BAGCHI (*Plaintiff*) v. WATSON & CO. (*Defendants*).* [8th June, 1891.]

Transfer of Property Act (IV of 1882), s. 135—Transfer of actionable claim.

The first paragraph of s. 135 of the Transfer of Property Act has no application to a case in which the debtors deny the existence of the claim altogether, and where the purchaser of the claim has to obtain judgment affirming the claim before any satisfaction is made or tendered.

Clause (*d*) of that section is not limited to cases where the judgment of a Court affirming the claim has been delivered, or where the claim is made clear by evidence *before* the sale of the claim.

Girish Chandra v. *Kasiswari Debi* (1), *Khosdeb Biswas* v. *Satis Mondul* (2) and *Subbammal* v. *Venkatarama* (3), followed. *Jani Begum* v. *Jahangir Khan* (4) dissented from.

[Appr., 21 C. 568 (F.B.); 4 C.L.J. 334 (336); Cons., 23 C. 713 (717).]

ONE Sriram Chowdhry was the owner of certain maurasi and putni taluqs, and the defendants were ijaradars under him of those mehals by virtue of a lease dating from 1288 (1881). On the death of Sriram Chowdhry, his widow, Hari Dasi Debi, on behalf of her minor sons, executed a kobala, dated 25th Choitro 1296 (6th April 1890), in favour of the plaintiff for the arrears of [511] rent due from the defendants to her for the years 1292 to 1294 (1885 to 1887) inclusive. The plaintiffs brought this suit for those arrears, amounting to Rs. 2,873.

The defence was that the plaintiff, being a member of a joint Hindu family, was incompetent to sue alone; that the kobala was fraudulent and collusive and executed by Hari Dasi to defraud the defendants of a large sum of money due to them from her; that the kobala was without consideration; that, with the view of avoiding the provisions of s. 135 of the Transfer of Property Act, the plaintiff had falsely stated the amount of the consideration for the kobala; that an abatement of the ijara rent was allowed them by Sriram Chowdhry; and that the rent which was due after such abatement had been paid by them, and there was therefore nothing due to Hari Dasi or to the plaintiff.

The Subordinate Judge decided that the plaintiff was entitled to sue alone; that the kobala was made in good faith and for good consideration; and that there was no abatement of rent allowed. He therefore gave the plaintiff a decree for the amount claimed.

The Judge on appeal held that, even assuming the kobala was *bona fide* and executed for good consideration, the plaintiff could not sue alone; but that it was not a *bona fide* transaction for good consideration. He therefore reversed the decision of the Subordinate Judge and dismissed the suit.

From this decision the plaintiff appealed to the High Court.

Baboo *Rash Behari Ghose* and Baboo *Saroda Churn Mitter*, for the appellant.

---

* Appeal from Appellate Decree, No. 1103 of 1890, against the decree of W.H. Page, Esq., Judge of Moorshedabad, dated the 9th of June 1890, reversing the decree of Baboo Raj Chandra Sannyal, Subordinate Judge of Moorshedabad, dated the 20th of December 1889.

(1) 13 C. 145. (2) 15 C. 436. (3) 10 M. 289. (4) 9 A. 476.

1891
JUNE 8.

APPELLATE CIVIL.

18 C. 510.

Mr. *Evans* and Baboo *Jogesh Chunder Roy*, for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This was a suit by the plaintiff-appellant to recover a certain sum of money which is said to have been due from the defendants to the minor sons of one Sriram Chowdhry on account of *ijara* rent, and which the plaintiff claims under a transfer from the guardian of the minors. The defendants denied the plaintiff's right to sue alone, and they also denied the existence of the debt, and the reality and *bona fides* of the transfer to the plaintiff, and urged [512] that the payment of consideration for the transfer was fasely stated in order to escape the provisions of s. 135 of the Transfer of Property Act, and that the plaintiff was in no case entitled to recover more than the price he may have actually paid with interest and expenses of the sale.

The first Court disallowed all the objections of the defendants and gave plaintiff a decree for the entire claim. On appeal the District Judge has reversed that decision and dismissed the claim, holding that, even if the transfer to the plaintiff be taken to have been for consideration, such consideration not being shown to have been the plaintiff's self-acquired money, plaintiff who is a member of a joint Hindu family, was not entitled to maintain this suit alone, and further that in reality the transfer was not *bona fide* for consideration.

In second appeal it is contended, on behalf of the plaintiff, that the decision of the District Judge is wrong, because the transfer to the plaintiff having been notified by the transferor to the defendants, the debtors, and having been further admitted by her in her deposition as a witness, the defendants were bound, under s. 133 of the Transfer of Property Act, to give effect to the transfer, and it was not competent to them to question the plaintiff's right to sue for the debt either on the ground of his having other co-sharers interested with him in the claim, which was the subject-matter of the transfer, or on the ground of the transfer not being *bona fide* for consideration.

With reference to the former of these two grounds of objection to which the lower appellate Court has given effect, it is sufficient to say that though, as a general rule, no one can enforce a claim by suit if he is not beneficially interested in the subject-matter thereof, that rule is subject to exceptions, and that the case of the ostensible transferee of a debt, after the transfer is notified to the debtor, is an instance of such an exception by reason of the provisions of s. 133 of the Transfer of Property Act. The reason for that provision of the law is obviously this, that every debtor is bound to pay his debt to his creditor or to any other person to whom the creditor directs him to pay it. It was argued for the respondents that if the debtor is aware that some person other than the party to whom the creditor directs him to [513] pay his debt is by reason of a prior or simultaneous transfer from the creditor justly entitled to recover, it would be allowing the debtor and creditor to commit a gross fraud if the person named by the latter is held entitled to enforce his claim. But the answer to this is that it is always in the power of a prior assignee or a co-assignee to protect himself by insisting upon a notice in his favour from the assignor to the debtor at the time of the transfer to him.

The second objection of the debtors which has been allowed by the learned Judge below to prevail seems to us to be equally untenable. The creditor having admitted the transfer and given notice of it to the debtors, it was no business of theirs to enquire whether the transfer was *bona fide* for consideration. Here it was urged for the respondents that an enquiry into the amount of the consideration was necessary in order to enable the debtors to avail themselves of the provisions of s. 135 of the Transfer of Property Act, and to obtain their discharge by paying to the purchaser the price paid with interest and incidental expenses. If the first paragraph of s. 135 be applicable to this case, no doubt an enquiry into the amount of consideration would be necessary. But we do not think that the first paragraph of s. 135 has any application to a case like the present in which the debtors deny the existence of the debt altogether, and the purchaser of the debt has to obtain judgment affirming the claim before any satisfaction is made or tendered. Clause (*d*) of the section, by providing that nothing in the first paragraph of the section applies where the judgment of a Court has been, or is about to be, delivered affirming the claim, makes the matter clear. This view is in accordance with the decision of this Court in the cases of *Girish Chandra* v. *Kasiswari Debi* (1) and *Khosdeb Biswas* v. *Satis Mondul* (2), and of the Madras High Court in *Subbammal* v. *Venkatarama* (3). The Allahabad High Court has, it is true, taken a different view in the case of *Jani Begum* v. *Jahangir Khan* (4), and the learned counsel for the respondent strongly relied upon that case and the reasons therein given, and contended that the first paragraph of s. 135 applied to this case, and that [514] cl. (*d*) refers to cases where the sale takes place after judgment has been delivered affirming the claim or after it is made clear by evidence and is ready for judgment. But after careful consideration of his argument, we see no reason to question the correctness of the decisions of this Court.

1891
JUNE 8.
—
APPELLATE
CIVIL.
—
18 C. 510.

The language of cl. (*d*) fully bears out our view. It would, we think, be wrong to limit the clause to cases where the judgment of a Court affirming the claim has been delivered, or where the case is made clear by evidence before the sale of the claim, since, if that had been the intention, it would have been expressed by adopting the same grammatical structure in this clause as in the three preceding clauses, and by using words such as these:—" Where it is made after the judgment of a competent Court, &c." Nor is there anything unreasonable in this view, though it may not secure the discouraging of speculative purchases, the main object of the section, to the same extent that the opposite view does. There is good reason for compelling a speculative purchaser of an actionable claim to be satisfied if he gets from the party liable the price paid with interest and incidental expenses before the claim is made certain by suit; but the reason does not hold equally good after he has got his claim affirmed by suit in Court. It would be discouraging speculative purchasers sufficiently if they are told that it is in the power of those against whom claims are purchased to obtain discharge by paying them the price paid with interest and expenses, but it would be something more than discouraging such purchases and would indeed practically amount to prohibiting them if purchasers were told that they may recover nothing if they fail to establish the claims purchased, but they shall in no case get a pice more than the amount

(1) 13 C. 145. (2) 15 C. 436. (3) 10 M. 289. (4) 9 A. 476.

1891 JUNE 8. — APPELLATE CIVIL. — 18 C. 510.

they have actually paid as price and expenses with interest. It was argued for the respondents that, if the above view is correct, it will be in the power of the purchaser by falsely overstating the price to prevent the debtor from getting the benefit of the section. We do not think that this would follow. Where the debtor without denying the claim offers to pay the purchaser the price paid by him with interest and expenses of the sale and merely disputes the amounts of these items, there, if the purchaser has to obtain judgment of the Court determining such [515] amounts, it would not be a judgment affirming the claim, and so the case would not come under the exception in cl. (*d*) of s. 135, and the first paragraph of the section would apply. But that is not the case here.

We think, therefore, that the two grounds upon which the Court of appeal below has dismissed the suit are both wrong in law, and the judgment appealed against must be reversed; and as the other questions raised in the case have not been disposed of by the lower appellate Court, the case must be remanded to that Court for their determination. Costs will abide the result.

J. V. W. *Appeal allowed and case remanded.*

---

18 C. 515.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

RADHA KISHEN LALL (*Judgment-debtor*) *v.* RADHA PERSHAD SING (*Decree-holder*).* [24th April, 1891.]

Limitation—Execution of decree—Civil Procedure Code (Act XIV of 1882), ss. 43, 373, 374, 465—*Separate applications to execute reliefs of a different character.*

The Code of Civil Procedure does not prevent a person from making separate and successive applications for execution of a decree, giving reliefs of different characters in respect to each such relief.

Sections 43, 373 and 374 do not apply to proceedings for execution of decree.

Radha Charan v. *Man Singh* (1) dissented from.

Wajihan v. *Biswanath Pershad* (2) followed.

[F., 19 A. 90 (100) (F.B.) = A.W.N. (1893) 57; 18 C. 635; R., 11 C.L.J. 83 = 14 C.W.N. 465 (469) = 4 Ind. Cas. 408.]

IN this case the decree-holder obtained a decree against the judgment-debtor, requiring the latter to remove his hut, which stood on the land decreed. The decree also contained an order for the delivery of the disputed land, and further awarded costs to the decree-holder. Out of the three reliefs thus granted, the decree-holder first applied for execution for costs only, and full satisfaction of this part of the decree was certified to the Court.

Subsequently the decree-holder applied for execution of the other reliefs granted by the decree. In the first Court this application [516] for execution was opposed by the judgment-debtor on the ground that it was a *res judicata*, and that the reliefs were not included in the first application for execution. It was also contended that the application was

* Appeal from Order, No. 17 of 1891, against the order of J. G. Charles, Esq., Judge of Shahabad, dated the 1st of September 1890, affirming the order of Baboo Promotho Nath Chatterjee, Munsif of Buxar, dated the 23rd of May 1890.

(1) 12 A. 392. (2) 18 C. 462.

barred by ss. 43 and 373 of the Code of Civil Procedure. That Court overruled these objections and allowed execution to proceed. The judgment-debtor appealed to the District Judge of Shahabad.

The District Judge dismissed the appeal, and the material portion of his judgment was as follows :—

"No doubt the Privy Council has held that the principle of *res judicata* applies to execution proceedings, but in my humble opinion it does not follow by any means that all legal restrictions, which the Legislature has seen fit to impose upon the institution of suits, should be considered equally applicable to the execution of decrees. Such legal barriers are in one sense matters of procedure, and find a place in the Civil Procedure Code, but in my opinion it is not desirable that they should all be extended to the execution of decrees. The execution of decrees has been separately dealt with by the Code, and if, in addition to the special restrictions of the Code, decree-holders are relegated in other matters to the position of ordinary plaintiffs, it seems to me that undesirable and unnecessary obstacles will be thrown in their way, and the execution of the decrees of the Civil Courts will be surrounded with ever increasing difficulties. The learned Chief Justice of the Bombay High Court has held in *Tara Chand Megraj* v. *Kashinath Trimbak* (1), that s. 374 of the Civil Procedure Code does not apply to applications for execution, and as the rulings applicable are conflicting, while the practice in Bengal is not, I believe, to apply ss. 373 and 43 of the Civil Procedure Code to execution proceedings, I decline to follow the recent rulings of the Allahabad High Court (2) until they are approved by the Calcutta High Court; and I hold. therefore, that the barriers provided by ss. 373 and 43 of the Civil Procedure Code are not applicable to the proceedings in execution."

From this order the judgment-debtor appealed to the High Court.

[517] Baboo *Taraknath Palit*, for the appellant.

Baboo *Hem Chunder Banerjee*, Baboo *Umakali Mookerjee* and Baboo *Jogender Chunder Ghose*, for the respondent.

The following cases were referred to in the course of the arguments :—

Bandey Karim v. *Romesh Chunder Bundopadhya* (3), *Protab Chunder Doss* v. *Peary Chowdhrain* (4), *Suraj Prosad* v. *Sita Ram* (5), *Fakirullah* v. *Thakur Prosad* (6), *Pirjade* v. *Pirjade* (7), *Tara Chand Megraj* v. *Kashinath Trimbak* (1), *Ramanadan Chetti* v. *Periatambi Shervai* (8) and *Radha Charan* v. *Man Singh* (9).

The judgment of the Court (MACPHERSON and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

The decree-holder, the respondent in this appeal, had obtained a decree for possession of a plot of land, for the removal of a hut which stood thereon, and for costs. He first took out execution for costs, and on the amount being realized, the case was struck off on the 5th of June 1889 as disposed of. On the 17th March 1890, he applied to execute the decree for possession and for the removal of the hut, and was met by the objection that the decree could not be executed in parts; that the order of the 5th of June had disposed of the whole case, and that under the provisions of s. 43 of the Civil Procedure Code, read with s. 647, a further application for execution could not be entertained. The Munsif and the

(1) 10 B. 62. (2) 10 A. 71 and 12 A. 179. (3) 9 C. 65.
(4) 8 C. 174. (5) 10 A. 71. (6) 12 A. 179.
(7) 6 B. 681. (8) 6 M. 250. (9) 12 A. 392.

1891 APRIL 24. — APPELLATE CIVIL. — 18 C. 515.

District Judge on appeal overruled the objections, and it is now contended that they were wrong in doing so, having regard to the provisions of ss. 43 and 373 of the Code.

In our opinion s. 43 does not apply to proceedings in execution of a decree, and when a decree gives reliefs of a different character, such as a decree for possession and a decree for costs, we see nothing in the Code of Procedure which prevents separate and successive applications for execution as regards each of them. In some cases separate applications to different Courts would be necessary. If the judgment-debtor resided out of the jurisdiction and had no assets within it, the decree for costs would necessarily be executed in the district in which the assets were, although the [518] decree for possession would be executed by the Court which passed the decree. In the absence of any provision in the Code directing that the application must be, when possible, to execute the entire decree, however various the reliefs granted may be, we must hold that the second application in the present case is not barred on the ground that the decree-holder did not in his first application apply to execute the whole decree. The order of the Court, striking the case off as disposed of, obviously had reference only to the particular application before it.

As regards the provisions of s. 373 of the Code in connection with which it was argued that, as the first application was struck off without any permission to make a fresh one for the unexecuted portion of the decree, a fresh application could not be entertained, our attention has been called to a decision of a Division Bench of this Court in *Wajihan* v. *Biswanath Pershad* (1), in which it was held, differing from the Allahabad High Court (2), that ss. 373 and 374 did not apply to execution proceedings. We agree with the learned Judges who decided that case, and we think that the grounds for holding that ss. 373 and 374 do not apply, are applicable to s. 43 also. The appeal is dismissed with costs.

A. F. M. A. R. *Appeal dismissed.*

---

18 C. 518.

CRIMINAL MOTION.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

CHATTER LAL AND OTHERS (*Petitioners*) *v.* THACOOR PERSHAD (*Opposite party*).* [11th June, 1891.]

Penal Code (Act XLV of 1860), *s.* 186—*Public Servant—Ameen appointed under Bengal Tenancy Act (VIII of* 1885), *s.* 69—*Bengal Tenancy Act, s.* 89.

A person nominated by the Collector under s. 69 of the Bengal Tenancy Act, for the purpose of making a division of crops between the [519] landlord and the tenant, is not a public servant within the meaning of s. 186 of the Penal Code.

[D., 26 C. 158 (159).]

ON the application of certain ryots of mouzah Narainpore, made under s. 69 of the Bengal Tenancy Act, one Thacoor Pershad was appointed

---

* Criminal Motion, No. 232 of 1891, against the order of G. Geidt, Esq., Sessions Judge of Bhagulpore, dated the 15th of May 1891, affirming the order passed by H. Basu, Esq., Deputy Magistrate of Jamui, dated the 6th of May 1891.

(1) 18 C. 462. (2) *Radha Charan* v. *Man Singh*, 12 A. 392.

an ameen by the Deputy Collector of Jamui to make a division of certain crops. Thacoor Pershad held no official position of any kind whatever: he, however, proceeded to the spot, and the usual notices having been served, certain resident ryots (the accused) came forward and claimed the crops as belonging to them and obstructed the ameen; the ameen thereupon submitted a report to the subdivisional officer, stating that he had been obstructed in his duty: and the subdivisional officer thereupon passed the following order:—"Tell him to come away, prosecute the men and fix an early date." The accused were, under this order, prosecuted before the subdivisional officer, who sentenced them under s. 186 of the Penal Code to rigorous imprisonment for one month.

1891 JUNE 11.

CRIMINAL MOTION.

18 C. 518.

The accused moved the High Court to have their sentences set aside.

Moulvie *Serajal Islam* (with him Moulvie *Mahomed Ishfaq*), for the accused, contended that the subdivisional officer having instituted the proceedings ought not to have himself tried the case; that there was no complaint such as is contemplated by the Code before that officer, and no examination of the complainant under s. 200 of the Code; that the ameen was not a public servant, and that therefore the conviction under s. 186 of the Penal Code was bad.

No one appeared on the other side.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

ORDER.

The only real question in this case is whether a person nominated by a Collector under s. 69 of the Bengal Tenancy Act for the purpose of making a division of crops between the landlord and the tenant is a public servant within the meaning of the Penal Code. We think that he is not. He does not fulfil any of the characteristics of a public servant as defined by the law. His mere office is to go down on the nomination of the Collector and [520] appraise and make a division of the crops as between two private persons who are to pay him for his services. Under these circumstances we think that this conviction should not be sustained, and this rule should be made absolute to set it aside.

T. A. P. *Conviction set aside.*

---

18 C. 520.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ameer Ali.

GOSSAIN DALMAR PURI (*Plaintiff*) v. BEPIN BEHARY MITTER AND ANOTHER (*Defendants*).* [24th April, 1891.]

Limitation Act (XV of 1887), sch. ii, art. 144—Symbolical possession.

The plaintiff Gossain Dalmar Puri's predecessor in title, one Gossain Lachmi Narain Puri, acquired the share of 2 annas and 8 pies in certain mouzahs by purchase at a sale held in execution of his own decree against one Het Narain Singh, and in September 1874 obtained symbolical possession.

In December 1874, Het Narain Singh and his co-sharers granted a perpetual lease to one Gokulanund, reserving a nominal rent. Subsequently Gossain Lachmi Narain Puri brought a suit for possession of the 2 annas and 8 pies share

---

* Appeal from Appellate Decree, No. 1814 of 1889, against the decree of J. Crawford, Esq., Judge of Gya, dated the 10th of August 1889, reversing the decree of Baboo Amrita Lal Pal, Subordinate Judge of Gya, dated the 13th of December 1888.

1891 APRIL 24.

APPELLATE CIVIL.

18 C. 520.

against Het Narain Singh, and his co-sharers, and after the death of Gossain Lachmi Narain Puri, Gossain Dalmar Puri obtained a decree. In March 1882, Gossain Dalmar Puri obtained symbolical possession in execution of that decree.

On the 29th January 1887, Bepin Behary Mitter purchased at a sale in execution of a decree against Gokulanund, the right of the latter as lessee, and obtained, through the Court, symbolical possession of the same.

Gossain Dalmar Puri then instituted this suit to recover possession of the said 2 annas and 8 pies share against Bepin Behary Mitter and Gokulanund in December 1887, that is, 13 years after the grant of the lease by Het Narain Singh and his co-sharers to Gokulanund. The defence set up was limitation.

Held, that the suit was barred by limitation.

Held also, that when the lease purports to be a perpetual lease without reversion to the grantors, and no rights reserved to them, but only a [521] nominal rent, symbolical possession as against the grantors would not be effective against the lessee, and thus save the bar in limitation.

Bejoy Chunder Banerjee v. *Kally Prosonno Mookerjee* (1) referred to.

[R., 16 B. 722; 19 B. 620; 25 B. 275; 25 M. 507 (514) = 12 M.L.T. 119; 6 C.L.J. 472.]

In this case one Gossain Lachmi Narain Puri, the predecessor in title of the plaintiff Gossain Dalmar Puri, in execution of his own decree, on the 15th of November 1873, purchased the share of the judgment-debtor, one Het Narain Singh, in mouzah Rampore Balwa and other mouzahs. Gossain Lachmi Narain Puri then obtained a sale certificate on the 26th of July 1874, and on the 30th of September of the same year obtained, through the Court, symbolical possession.

Subsequently he instituted a suit, alleging that he was dispossessed, against Het Narain Singh and his co-sharers for the recovery of possession of his aforesaid share. On the 31st of March 1881, after the death of Gossain Lachmi Narain Puri, his disciple and successor, the plaintiff Gossain Dalmar Puri, obtained a decree for the 2 annas and 8 pies share which had belonged to Het Narain Singh, and on the 15th of March 1882 obtained, through the Court, symbolical possession.

In the meantime, that is to say on the 4th of December 1874, Het Narain Singh and his co-sharers had given a permanent lease to one Gokulanand. In execution of a decree against Gokulanand, his leasehold interest was sold to one Bepin Behary Mitter, who on the 29th of January 1887 took delivery of possession of the same.

This suit was brought by the plaintiff, on the 7th of December 1887, against Bepin Behary Mitter and Gokulanand to recover possession with mesne profits of the 2 annas and 8 pies share in the aforesaid mouzahs. The main defence was that the plaintiff's suit was barred by limitation.

The first Court was of opinion that Gokulanand's possession was not adverse to the plaintiff. That Court further held that the symbolical possession obtained by the plaintiff of the disputed share of 2 annas and 8 pies, on the 15th of March 1882, was possession not only as against Het Narain Singh and his co-sharers, but as against Gokulanand also, who claimed through them, and that such delivery of possession saved this suit from limitation even [522] if Gokulanand's possession was adverse. He, therefore, decreed the plaintiff's suit.

The lower appellate Court differed from the conclusion arrived at by the first Court, and held that Gokulanand's possession was adverse to the plaintiff's rights; and that inasmuch as the defendants "set up their own title to a leasehold right adversely to the plaintiff's right to immediate

(1) 4 C. 327.

possession, and they have maintained their possession for all these years, and in spite of the symbolical possession taken under the previous suit," the suit was barred under art. 144 of the second schedule to the Limitation Act.

The plaintiff preferred a special appeal to the High Court.

Mr. *Woodroffe*, Baboo *Karuna Sindhu Mukerji*, and Baboo *Jogender Chunder Ghose*, for the appellant.

Mr. *Evans* and Baboo *Atul Krishna Ghose*, for the respondents.

Baboo *Kāruna Sindhu Mookerji*, for the appellant.—The respondent, Bepin Behary Mitter, who purchased the interest of Gokulanand, was bound by the decree against the lessor, Het Narain Singh, and the symbolical possession obtained under it on the 13th of March 1882. Symbolical possession cannot give a fresh starting point against third persons only, *viz*, persons claiming an equal right with the appellant—*Juggobundhu Mukerjee* v. *Ram Chunder Bysak* (1), *Juggobundu Mitter* v. *Purnanund Gossami* (2). The decree against the lessor could not be wholly infructuous. The appellant's title against the lessor was not barred according to the Full Bench decisions. His possession was through his lessee. If the suit was barred against the lessee, it would be barred against the lessor also. Further, unless it was found that the respondents held the lease with the knowledge of the appellant for more than twelve years, the appellant's suit could not be held to be barred by limitation—*Petamber Baboo* v. *Nilmony Singh Deo* (3), *Ram Chunder Singh* v. *Madho Kumari* (4), *Tekaetnee Goura Coomaree* v. *Saroo Coomaree* (5).

[523] Mr. *Evans*, for the respondents.—The symbolical possession taken by the appellant in September 1874 extinguished the title and possession of Het Narain Singh in the disputed mouzahs. The right and possession of Het Narain Singh being extinguished, the respondent No. 2 entered into possession, alleging a grant from Het Narain Singh and his co-sharers. This possession was adverse to the appellant—*Bejoy Chunder Banerji* v. *Kally Prosonno Mookerjee* (6). Adverse possession is defined to be possession by a person holding on his own behalf, or on behalf of some person other than the true owner, the true owner having a right to immediate possession. Hence the respondent No. 2 and his representatives in title, not having been sued within twelve years, were in the position of third parties holding adversely. The symbolical possession, therefore, obtained by the appellant on the 15th of March 1882, against Het Narain Singh and his co-sharers, gave no fresh start as contended for by the appellant—*Juggobundhu Mitter* v. *Purnanund Gossami* (2). The case of *Ram Chunder Sing* v. *Madho Kumari* (4) does not apply to the present case. It has been held that where the right of a tenant depended upon trespass, and was not recognised by the true owner of the land, the tenant was at liberty to plead adverse possession—*Dinomoni Dabea* v. *Doorgapersad Mozoomdar* (7); and the same rule has been followed by the Bombay Court in *Maidin Saiba* v. *Nagapa* (8). The appellant not having sued the respondents within twelve years from the date of the origin of his title, his remedy was barred by limitation.

Babu *Karuna Sindhu Mukerji* replied.

---

(1) 5 C. 584 = 5 C.L.R. 548. (2) 16 C. 530. (3) 3 C. 793.
(4) 12 C. 484. (5) 19 W.R. 253. (6) 4 C. 327.
(7) 12 B. L. R. 274 = 21 W. R. 70. (8) 7 B. 96.

1891 APRIL 24. — APPELLATE CIVIL. — 18 C. 520.

JUDGMENT.

The judgment of the Court (TOTTENHAM and AMEER ALI, JJ.) was delivered by

TOTTENHAM, J. (AMEER ALI, J., concurring).—In this case the lower appellate Court has differed from the first Court in holding that the suit is barred by limitation, and we have to decide whether the District Judge was right or wrong.

[524] The suit was brought to eject the defendants from a 2 as. 8 gs. share of a certain mouzah, and to obtain from them *mesne* profits in respect thereof. Plaintiff's predecessor in title acquired the share in question of the whole mouzah Rampore Balwa, of which the mouzah now in question is a "dakhili," by purchase at a sale held in execution of his own decree against his debtor, Het Narain Singh, and obtained formal possession through the Court on the 30th of September 1874.

In December 1874, Het Narain Singh, together with all his co-sharers in the mouzah, granted a perpetual mouroosi ticca of their "dakhili" to the defendant No. 2, reserving the almost nominal rent of Rs. 25 per annum.

Subsequently the plaintiff's predecessor brought a suit against all the maliks, including Het Narain, whose right had been sold to him, on the allegation that they had dispossessed him; and after his death the plaintiff recovered a decree for the 2as. 8 gs. share which had been Het Narain's on the 31st of March 1881. In March 1882 he obtained formal possession in execution of that decree.

On the 29th of January 1887, defendant No. 1 having purchased at a sale, in execution of a decree against defendant No. 2, the right of the latter as ticcadar, obtained formal possession of the same through the Court.

Plaintiff complains that he was then dispossessed of the 2 as. 8 gs. share belonging to him; and he instituted this suit to recover it in December 1887—13 years after the grant of the ticca by Het Narain to the defendant No. 2.

The first Court was of opinion that the ticcadar's possession was not adverse to the plaintiff; and that he does not claim any right adverse to the plaintiff. That Court further held that the formal possession obtained by the plaintiff of the share now in dispute in 1882 was possession not only as against the defendants in that suit, but as against the ticcadar also who claims through one of those defendants, and that such delivery of possession saves this suit from limitation, even if the ticcadar's possession was adverse.

The appellate Court, on the contrary, held that the ticcadar's possession was adverse to the plaintiff's right and that it had been [525] held "all these years," and therefore was sufficient to bar this suit under art. 144 of the schedule to the Limitation Act.

My opinion is that the District Judge's decision is correct; and that although the ticcadar originally acquired no right whatever to that share of the mouzah which had, before the sale in 1874, belonged to Het Narain Singh, yet his possession immediately became adverse to the plaintiff; and that the latter cannot as against the ticcadar take any benefit from the formal possession obtained in execution of the decree of March 1881 to which the ticcadar was no party. The plaintiff himself has repudiated any relation of landlord and tenant as between himself and the defendant, and by his suit declares the possession of the latter to

1891 APRIL 24. — APPELLATE CIVIL. — 18 C. 520.

be adverse to his rights; and if that possession had been enforced for more than 12 years before this suit was brought, I do not see how the plaintiff can get rid of the bar of limitation. It might be more easy to do so if the ticcadar in question was a mere lessee of Het Narain Singh, and if there purported to exist any reversionary right in the latter. It might in such case be argued that the symbolical possession obtained by the plaintiff as against Het Narain in 1882 was equally effective as against one setting up to be his tenant or his ijaradar, and in possession on his account. But here the ticca purports to be a perpetual estate, with no reversion to the grantors, and no right reserved to them but the nominal rent of Rs. 25 per annum amongst them all. The Full Bench decisions *Juggobundhu Mukerji* v. *Ram Chunder Bysack* (1) and *Juggobundhu Mitter* v. *Purnanund Gossami* (2) cited for the appellant do not, in my opinion, govern the present case, in which, as I think, the defendant has been in adverse possession for more than 12 years before suit, and not on behalf of the party against whom the plaintiff obtained a decree in 1881 and got symbolical possession in execution of that decree. In the case of *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (3) this Court pointed out the distinction as regards a plea of limitation between a person holding as tenant for a term under a party in wrongful possession, and one holding as owner **[526]** and not as lessee on the term of paying a fixed sum annually to the former owner, although what he pays is called *rent*. And that distinction is one which I think must tell in favour of the defendant in the present suit.

The Privy Council decision cited for the appellant—*Ram Chunder Singh* v. *Madho Kumari* (4) and *Tekaetnee Goura Coomaree* v. *Saroo Coomaree* (5)—do not seem to me to be applicable to this case. Those cases only show that a tenant cannot plead limitation in a contest with his landlord in respect of an adverse right as a perpetual tenure-holder except from the date when the landlord has had notice of such adverse claim. And this ruling does not further the plaintiff's case before us. I am of opinion that the defendant is entitled to raise the plea of limitation, and that the lower appellate Court has properly found that the possession was always adverse to the plaintiff, and I would accordingly dismiss this appeal with costs.

A. F. M. A. R. *Appeal dismissed.*

(1) 5 C. 584 = 5 C. L. R. 548. (2) 16 C. 530. (3) 4 C. 327.
(4) 12 C. 484. (5) 19 W. R. 253.

1891
JUNE 11.

APPELLATE CIVIL.

18 C. 526.

18 C. 526.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

DAKHINA CHURN CHATTOPADHYA (*Defendant*) *v.* BILASH CHUNDER ROY (*Plaintiff*).* [11th June, 1891.]

Jurisdiction—Act VI of 1871, s. 18—*Sale in execution—Local limits of jurisdiction under Act VI of* 1871—*Practice—Form of action.*

Where a District Judge, under the authority vested in him by s. 18 of Act VI of 1871, has assigned to a Subordinate Judge the local limits of his particular jurisdiction, that officer can only exercise jurisdiction within such local limits.

Obhoy Churn Coondoo v. *Golam Ali* (1) and *Prem Chand Dey* v. *Mokhoda Debi* (2) followed.

[R., 19 A. 308 (309) = (1897) A. W. N. 71; 5 Ind. Cas. 798 = 13 O. C. 43; 163 P. L. R. 1901.]

THIS was a suit to set aside a sale held by the Second Subordinate Judge of Dacca on, amongst other grounds, the ground that the [527] property was not situate within his jurisdiction, but fell within that of the 1st Subordinate Judge.

The facts of the case, so far as they are necessary for this report, are as follows:—The plaintiff was the owner of certain property situated in Becharam's *deori* within the town of Dacca, and within the jurisdiction of the 1st Subordinate Judge of that district, he having become possessed of the property on the 29th March 1883 as the purchaser at an execution sale of the rights of his uncles Nobin Chandra, Bharat Chandra, and Atul Chandra Roy. Subsequently to this purchase one Shyama Sundari Debi obtained a decree against Nobin Chandra and his brothers in the Court of the 1st Subordinate Judge of Dacca, and applied for and obtained in that Court a transfer of this decree for execution to the Court of the 2nd Subordinate Judge of that district, on the ground "that the judgment-debtor had no property within the jurisdiction of this Court;" and at a sale held in execution of this decree the present defendant on the 15th September 1886 became the purchaser, and, under process issuing from the Court of the 2nd Subordinate Judge, took possession of the property. It appeared that on the 20th January 1883, there being two Subordinate Judges in the district of Dacca, the District Judge of Dacca, under the provisions of s. 18 of Act VI of 1871, assigned to each of these Subordinate Judges the local limits of their particular jurisdictions; assigning to the 1st Subordinate Judge the Sudder thannah and the thannah of Naraingunge, and to the 2nd Subordinate Judge the remainder of the district. In 1887, however, the whole of the town of Dacca was included within the Sudder thannah, and the jurisdiction of the two Subordinate Judges was re-affirmed on the 4th February 1887 by the District Judge in accordance with the robocari of the 20th January 1883. This assignment of jurisdiction was duly confirmed and sanctioned by a notification of the Government, dated the 6th February 1888, published in the *Calcutta Gazette* of the 29th February 1888.

---

* Appeal from Original Decree, No. 300 of 1889, against the decree of Baboo Beni Madhub Mitter, Subordinate Judge of Dacca, dated the 30th of August 1889.

(1) 7 C. 410. (2) 17 C. 699.

The defendant contended that the division of jurisdiction effected by the order of the District Judge was made for administrative purposes only, and that as both the Subordinate Judges had been appointed Subordinate Judges of the district of Dacca, both of them had jurisdiction to sell properties situate within that district.

1891 JUNE 11. — APPELLATE CIVIL. — 18 C. 526.

[528] The Subordinate Judge held that the Second Subordinate Judge of Dacca had not jurisdiction to sell the property, as it was situated within the jurisdiction of the First Subordinate Judge, and set aside the sale.

The defendant appealed to the High Court.

Baboo *Srinath Das* and Baboo *Bykanta Nath Das*, for the appellant.

Dr. *Troilokya Nath Mitter* and Baboo *Hari Mohun Chuckerbati*, for the respondent.

Baboo *Srinath Das*.—The division of jurisdiction was merely for administrative purposes—*Dinonath Sarma Sarkar* v. *Ram Chunder Bysack* (unreported), and on appeal *Ram Chunder Bysack* v. *Dinonath Sarma* (1), in which latter case the Privy Council say they wish to throw no doubt whatever upon the decision of the High Court by which it was held that the Principal Sudder Ameen had jurisdiction to issue execution.

Dr. *Troilokya Nath Mitter*.—The decision in the unreported case was under s. 3, Act X of 1844; but the Privy Council in 5 C. L. R. 470, do not decide the appeal on either that Act, or Act VI of 1871. The case of *Obhoy Churn Coondoo* v. *Golam Ali* (2) is in my favour as showing that the Second Subordinate Judge had no jurisdiction, as also the case of *Prem Chand Dey* v. *Mokhoda Debi* (3). The High Court would have no power to give jurisdiction to the Second Subordinate Judge over land situated in another sub-district—see *Kamini Sundari Chowdhrani* v. *Kali Prosunna Ghose* (4).

The following judgments were delivered by the Court :—

JUDGMENTS.

PETHERAM, C.J.—I think that the Subordinate Judge was right to set aside the sale, and that the appeal must be dismissed.

The point is concluded by the decisions in the case of *Obhoy Churn Coondoo* v. *Golam Ali* (2) and *Prem Chand Dey* v. *Mokhoda Debi* (3).

GHOSE, J.—The question raised in this appeal is whether a sale held by the Second Subordinate Judge of Dacca (Baboo Mutty Lall Sircar) on the 15th September 1886, in execution of a decree [529] passed by the First Subordinate Judge of the same district, was a bad sale for want of jurisdiction.

It appears that, in exercise of the powers vested in him by s. 18, Act VI of 1871, the District Judge of Dacca, on the 20th January 1883, defined the local limits of the jurisdiction of the First and Second Subordinate Judges of that place. And the Court below in this case finds—and there can be no doubt as to the correctness of that finding—that the property which was sold on the 15th September 1886 by the Second Subordinate Judge is, or at any rate was then, situate within the local jurisdiction of the First Subordinate Judge as defined by the District Judge.

A question was raised before us in the course of argument whether, supposing that the order of the District Judge of the 20th January 1883 applied to the Second Subordinate Judge, who then held office in Dacca,

(1) 5 C.L.R. 470. (2) 7 C. 410. (3) 17 C. 699. (4) 12 C. 225.

1891 JUNE 11. — APPELLATE CIVIL. — 18 C. 526.

it could apply to Baboo Mutty Lall Sircar, who was subsequently, in the year 1884, appointed as a Subordinate Judge of Dacca, and who would have, as such Subordinate Judge, jurisdiction over the whole of the district. But on looking at the correspondence which took place in the year 1884 between the then District Judge and the High Court on the subject, after Baboo Mutty Lall Sircar's appointment, and which correspondence we thought it necessary to send for, as also the letter of the District Judge, dated the 14th May current, it seems to be perfectly clear that Baboo Mutty Lall Sircar held the position of the Second Subordinate Judge, and as such exercised jurisdiction within the local limits assigned to the *Second* Subordinate Judge by the order of the District Judge of the 20th January 1883.

That the two Subordinate Judges of Dacca exercised jurisdiction over different local limits appears also from the fact that the decree-holder in this case, before he caused the sale of the property in dispute, petitioned to the *First* Subordinate Judge for a transfer of his decree to the Court of the *Second* Subordinate Judge, under ss. 223 and 224 of the Code of Civil Procedure, upon the ground that the judgment-debtor had no property "within the jurisdiction of this Court," *i.e.*, the Court of the *First* Subordinate Judge. **[530]** And having thus got the decree transferred, he applied to the *Second* Subordinate Judge, Baboo Mutty Lall Sircar, for sale of the property in question.

It seems, therefore, that the Second Subordinate Judge of Dacca had no local jurisdiction over this property, as laid down by the District Judge of Dacca in accordance with s. 18, Act VI of 1871.

But then it has been contended before us, upon the authority of the decision of the Judicial Committee in the case of *Ram Chunder Bysack* v. *Dinonath Surma Sircar* (1) and that of a Divisional Bench of this Court (Louis Jackson and Mc Donnell, JJ.) in the same case (unreported), that the division of jurisdiction effected by the order of the District Judge was made for administrative purposes only, and that it could not go beyond taking cognizance of original suits; and that, therefore, Baboo Mutty Lall Sircar having been appointed a Subordinate Judge of Dacca, could not be said to have no jurisdiction to sell the property in question.

The case of *Dinonath Sircar* was, as has been rightly observed by the Court below, a very different case from that which we have before us. There, the property sold was situate partly within the local limits of the Principal Sudder Ameen (now styled Subordinate Judge) at Dacca, and partly within that of the Principal Sudder Ameen at Furreedpore, as defined by an order of the District Judge under s. 3, Act IX of 1844 (both Dacca and Furreedpore being at the time within the jurisdiction of one and the same District Judge). And therefore each of these officers had the power to sell the property. The plaintiff claimed under a sale held by the Principal Sudder Ameen of Furreedpore in execution of a decree passed by that officer; but it was contended by the defendant, who had purchased the same property under a sale held by the Principal Sudder Ameen of Dacca, that the Subordinate Judge of Furreedpore had no jurisdiction to sell the property, and that the purchase under that sale was a *benami* purchase for the judgment-debtor. The High Court held, in the first place, that the said purchase was not *benami*, and they then

(1) 5 C.L.R. 470.

[531] dealt with the effect of s. 3, Act X of 1844, which was the law applicable to that case, as also of s. 18, Act VI of 1871, as regards the jurisdiction of two or more Principal Sudder Ameens appointed to any place. In dealing with this matter they expressed a view which no doubt supports the contention of the appellant in this case. But it will be observed that the judgment of the Judicial Committee in appeal against that decision turned upon the first-mentioned point, *viz.*, the point of *benami*. They held that the purchase under which the plaintiff claimed was a *benami* purchase for the judgment-debtor, and therefore he was not entitled to recover. They then observed as follows :—

"It is not necessary, therefore, to decide whether the Principal Sudder Ameen had jurisdiction to issue the execution under which the plaintiff's vendor purchased the estate, but their Lordships wish to be distinctly understood that they throw no doubt whatever upon the decision of the High Court by which it was held that the Principal Sudder Ameen had jurisdiction to issue the execution."

I do not understand the Judicial Committee as affirming all the remarks made by Jackson, J., as regards the effect of s. 3, Act X of 1844, as also that of s. 18, Act VI of 1871. As already observed, the law which the High Court had then to deal with was the former Act and not the latter Act, the language whereof, I may here observe, is somewhat different.

I do not think we are bound by any observations which were then made as regards the provisions of s. 18, Act VI of 1871. On the other hand, there is a more recent decision by another Divisional Bench of this Court (Pontifex and Field, JJ.) in the case of *Obhoy Churn Coondoo* v. *Golam Ali* (1) which is a distinct authority in support of the view taken by the Court below, that the Second Subordinate Judge of Dacca had no jurisdiction to sell this property. The question raised in that case was no doubt as to the jurisdiction of two Munsifs; but I think that the same reasoning as to two Munsifs holding office in the same munsiffi (as it was in that case) applies to two Subordinate Judges in the same district, whose territorial jurisdiction has been [532] defined under s. 18, Act VI of 1871. That section runs as follows :—

"The Local Government shall fix, and may from time to time vary, the local limits of the jurisdiction of any Civil Court under this Act : Provided that where more than one Subordinate Judge is appointed to any district, and where more than one Munsif is appointed to any munsiffi, the Judge of the District Court may assign to each such Subordinate Judge or Munsif the local limits of his particular jurisdiction within such district or munsiffi, as the case may be.

"The present local limits of the jurisdiction of every Civil Court (other than the High Court) shall be deemed to be fixed under this Act."

And it was held in *Obhoy Churn Coondoo* v. *Golam Ali* (1) that when a District Judge under s. 18 assigns local limits to Munsifs, the jurisdiction of each Munsif is confined to the particular limits assigned to him ; that there is nothing in s. 18 to limit its operation to the institution of regular suits, and that a Munsif has no jurisdiction to attach or sell property within the jurisdiction of another Munsif, as defined by the District Judge.

The construction of s. 18, Act VI of 1871, was apparently accepted as

(1) 7 C. 410.

1891 JUNE 11. — APPELLATE CIVIL. — 18 C. 526.

law until the year 1887, when the Legislature thought it necessary to alter that section in material respects (see Act XII of 1887, s. 13).

I think we ought to follow the case of *Obhoy Churn Coondoo* v. *Golam Ali* (1) and to hold that when the District Judge, under the authority vested in him by s. 18, Act VI of 1871, assigns to a Subordinate Judge the local limits of his particular jurisdiction, that officer exercises jurisdiction within and not outside (wholly) such local limits.

In this connection we may refer to some of the observations that were made by a Full Bench of this Court in this case of *Prem Chand Dey* v. *Mokhoda Debi* (2), and they were as follows:—" By s. 16 of the Code of Civil Procedure, suits for the **[533]** recovery of immoveable property, or for the determination of any other right or interest in immoveable property, must be instituted in the Court within the local limits of whose jurisdiction the property is situate. This shows that the object of the Code is to limit the territorial jurisdiction of the Courts in regard to the property that they are entitled to deal with." And later on—" So far as the Procedure Code is concerned, execution of a decree is only a continuation of the suit, and there appears no legitimate reason why a Court in the latter stage of the case should have greater powers than it possessed in its institution. But however that may be, a comparison of s. 223 with the last paragraph of s. 649 seems to us to indicate that territorial jurisdiction is a condition precedent to a Court executing a decree."

In this case, as already mentioned, the decree was passed by the first Subordinate Judge, and the property which the decree-holder caused to be sold was situate within the jurisdiction of that Court, as assigned to it by the District Judge; and it follows that the first Subordinate Judge, and not the Second Subordinate Judge, was authorized to execute the decree and sell the property in question. The transfer of the decree from the Court of the First Subordinate Judge to that of the Second Subordinate Judge was evidently obtained by a misrepresentation of facts, and this transfer would not give to the Second Subordinate Judge a jurisdiction which he did not otherwise possess.

Upon these grounds, I think that the Court below was right in holding that the sale held by the Second Subordinate Judge was void, and in decreeing the suit upon that ground, without going into the question of fraud in the matter of the sale raised by the plaintiff.

I may here observe that the proper form of action in such suits is not that the sale be set aside, but to have it declared that the sale is void and ineffectual, so as to pass any title to the auction-purchaser—and that is what the plaintiff in this case substantially asked for, although the prayer was also that the sale be set aside. The decree of the Subordinate Judge, however, is that the suit be decreed and the sale be set aside. That, I do not think, is **[534]** the proper decree to make; but, as no objection has been raised before us on this score, it is not necessary to say anything more on the subject, for the decree is substantially right.

The appeal will be dismissed with costs.

T. A .P. *Appeal dismissed.*

---

(1) 7 C. 410. (2) 17 C. 699 (703).

18 C. 534.

1891 JUNE 26. APPELLATE CIVIL. 18 C. 534.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

BAIJ NATH SINGH AND OTHERS (*Plaintiffs*) v. SUKHU MAHTON (*Defendant*).* [26th June, 1891.]

Evidence Act I of 1872, *ss.* 35, 74—*Public document—Reg. XII of* 1817, *s.* 16—*Rent, suit for.*

A "*Teis khana*" register prepared by a patwari under rules framed by the Board of Revenue under s. 16 of Reg. XII of 1817 is not a public document, nor is the patwari preparing the same a public servant.

[**Diss.**, 3 O.C. 205 (209); **R.**, 23 C. 366 (371); 18 Ind. Cas. 799=63 P.R. 1913=113 P.L.R. 1913=112 P.W.R. 1913; **D.**, 39 C. 995 (998)=18 Ind. Cas. 61.]

THESE appeals arose out of a number of rent suits, tried in two groups, by different officers, brought by the plaintiffs against a number of ryots of mouzah Miandarpur Kheronia in the district of Patna. The contested facts in these cases related to the rates of rent, the arrears of the holdings, the jamas, that is, the amounts of rent payable annually for the holdings, and the payments. The main facts in both groups of cases being virtually the same, it will be sufficient to deal with one only of these cases so far as such facts and the findings of the lower Courts are concerned.

Amongst the documentary evidence relied upon by the plaintiffs before the Munsif, was a certain *Teis khana Register* (so called from the number of columns in the statement or register) touching the question of rates, purporting to have been submitted by a deceased patwari during the time of the former proprietors. This register was one of a number of registers which patwaris are bound to keep in accordance with certain rules of the **[535]** Board of Revenue (1) drawn up under s. 16 of Reg XII of 1817. On the question of the admissibility and weight to be attached to this document the Munsif held that the statement was, strictly speaking, not a public document either under s. 74 of the Evidence Act or under Reg. XII of 1817, and that the statement in question had "no independent probative force," and on the whole case decided that the plaintiffs had failed to prove their allegation regarding the jamas, and that the defendants had failed to prove their allegation as to payment; and he accordingly gave the appellants decrees for the amounts due according to the jamas admitted by respondents, without deciding any question regarding the areas of the holdings and the rates of rent, which he thought were irrelevant.

The plaintiffs appealed to the Subordinate Judge, who upheld the Munsif's decision; but on the question of the admissibility of the *Teis khana* register, said—"A good deal was said as to the non-admissibility and admissibility of the 23 khana register as evidence against the ryots of their rates or jamas. The register appears to have been prepared by the *patwari* and submitted to the Collector in accordance with the rules framed

* Appeal from Appellate Decree, No. 1454 of 1889, against the decree of Baboo Girish Chunder Chowdhry, Subordinate Judge of Patna, dated the 27th of March 1889, modifying the decree of Baboo Hari Kristo Chaterji, Munsif of Patna, dated the 22nd of June 1888.

(1) Revenue Officers' Manual, Chapter XIV, page 37.

1891 JUNE 26. — APPELLATE CIVIL. — 18 C. 534.

by the Board of Revenue under s. 16 of Reg. XII of 1817, and may therefore be regarded as a register made by a person in performance of a duty specially enjoined by the law of the country in which such register is kept, even if it cannot be treated as a register kept by a public servant in the discharge of his duty. I think it is admissible under s. 35 of the Evidence Act, but it seems to me that its weight against the ryots is not much. These registers are prepared behind the back of the ryots, and the patwaris who prepare them are generally under the influence of the zemindars, from whom they receive their pay, although their status under the law is somewhat different from that of a servant of the zemindar."

Against this decision affirming that of the Munsif the (plaintiffs) appellants appealed to the High Court on, amongst other grounds, the ground that the lower Court had not adduced sufficient and satisfactory reasons for refusing to treat the 23 khana statements as furnishing materials on the question of rates.

[536] The Advocate-General (Sir *Charles Paul*), Mr. *R. E. Twidale* and Baboo *Lal Mohan Doss*, for the appellants.

Dr. *Rash Behary Ghose* and Baboo *Mohabeer Sahai*, for the respondents.

JUDGMENT,

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

PETHERAM, C. J.—These are two groups of second appeals. The first group begins with No. 1454 of 1889, and goes up to No. 1502 of 1889; the second group begins with No. 1438 of 1890, and goes up to No. 1470 of 1890, and includes another case, No. 1171 of 1890. They arise out of suits for rent brought in respect of land situated in an estate in the district of Patna. The first group were a number of cases instituted in the month of May 1887; the second group were a number of cases instituted in the month of May 1888. They are between the same parties, and in respect of the same lands, but the first set of cases was tried in the first instance by one Munsif, and in appeal heard by one Subordinate Judge; the second set of cases was tried by another Munsif, and the appeals from his judgment in those cases heard by another Subordinate Judge, and all these four officers have come to the same conclusion upon the facts.

As I said just now, these are suits for rent, and the only question which had to be tried was, what was the rate of rent which the defendants were to pay to the plaintiffs for the occupation of their holdings. The plaintiffs in all these cases gave a certain amount of evidence, and all four officers —both the two Munsifs who heard the suits in the first instance, and the two Subordinate Judges who heard the appeals—have absolutely disbelieved the plaintiffs' case. They have come to the conclusion that the case as presented on the part of the plaintiffs was untrue, that the evidence which was laid before them was of a fictitious kind, and that it was impossible to act upon it, and consequently they have come to the conclusion that the only decree they could give in favour of the plaintiffs was a decree for the amount of rent admitted by the defendant; and no doubt that is the position which the plaintiff, the landlord, must find himself in when he attempts to prove the rate of rent by evidence which cannot be relied upon; **[537]** he then necessarily occupies the position of claiming rent for a holding of which he has given no evidence that can be relied upon, and the consequence of that is, that the only thing the Court can do is to give him a decree for the rent admitted by the defendant. These being second

1891 JUNE 26.

APPELLATE CIVIL.

18 C. 534.

appeals, these findings of fact are binding upon this Court unless the first Court of appeal has committed some error in law in arriving at those findings which gives us jurisdiction to interfere.

The first point that has been raised—and that is with reference to all these cases—is, that the learned Munsifs and the learned Subordinate Judges have committed an error of law in not giving proper effect to certain registers known as the *Teis khana* registers.

It appears that both the Munsifs and the Subordinate Judges have held that these were public documents within the meaning of s. 35 of the Evidence Act, and were evidence, but they considered that, having regard to their nature, their value as evidence upon this point was very slight, and that it was impossible to act upon them if the rest of the plaintiffs' case were concocted.

As to that we think that the lower Courts are right. We think that even if these papers are evidence, they are not conclusive evidence, and as to their probative value, that was a matter for the Judges who had to try the question of fact; and both the Judges and the Munsifs thought that though they were evidence, their probative force, having regard to the mode in which the registers were kept, was slight, and therefore it was not safe to act upon them; and we cannot say they were wrong. But in saying this it must not be supposed that we think they are public documents at all under s. 35 of the Evidence Act. They are documents which are prepared in the zemindar's *serishta* by a person who is called the *patwari*, who is paid by the zemindar but approved by the Collector, and these registers are no doubt kept for the information of the Collector. The question is, does that make them public books or records kept by a public servant in the discharge of his official duty? So far as we can see, they are not official or public documents, and a *patwari* does not appear to us to be a public servant or to have any official duty. He is a person **[538]** who is a servant of the zemindar; his duties are performed in the *serishta* of the zemindar on information supplied by the zemindar and nobody else. It is true that the object of the books is to afford information to the Collector, but that does not make them binding as official records of the facts contained in them, so far as we can see. It appears to us that quite sufficient amount of importance was given to these documents, and it cannot be said that any error of law has been committed in not acting upon them.

The other point was, that in the first set of cases which were instituted in 1887, the Munsif declined to allow certain questions to be put to some of the witnesses, and the Subordinate Judge, in dealing with that objection, says he thinks that the questions ought to have been put, but does not think it necessary to remand the cases on that ground, because in his opinion, even if the answers had been what the appellant expected them to be, that would not have affected the merits of the case.

If the matter had stood there alone, no doubt a good deal might be said on behalf of the appellants to have the cases remanded in order to have those questions put to the witnesses; but, as I said just now, the same points that arose in those cases were tried over again in the other suits which were instituted in the year 1888. In these suits, those questions were put to the witnesses and answers obtained from them, but the answers did not affect the conclusions as to the facts which were arrived at both by the Munsif who heard these cases in the first instance or by the Subordinate Judge who heard them in appeal, they being different officers to those who heard the cases which were instituted in 1887.

1891 JUNE 26. — APPELLATE CIVIL. — 18 C. 534.

We think that these are nothing but questions of fact which have been decided in these cases by the first Court of appeal; that no error in law has been committed by that officer which has affected the decision of these questions of fact; and that all these appeals must be dismissed with costs.

T. A. P. *Appeal dismissed.*

---

18 C. 539.

[539] MATRIMONIAL JURISDICTION.

Before Mr. Justice Wilson.

HUNTER *v.* HUNTER.* [22nd June, 1891.]

Practice—Decree absolute, application for—Decree nisi, *non-service of—Notice of motion —Divorce.*

In an application to have a decree *nisi* made absolute where it appeared that the decree had been passed *ex parte*, after the original summons had been personally served on the respondent, and that owing to this, the petitioner being unable to discover the whereabouts of the respondent, who had left Calcutta immediately after the decree was passed, no copy of the decree had been served on him or notice of the application given him.

Held, that sufficient cause was shown for the decree being made absolute, notwithstanding it had not been served or notice of the application given, and order made accordingly.

THIS was an application on behalf of the petitioner to have the decree *nisi* which had been passed in this suit on the 18th December 1890 made absolute.

The original summons in the suit had been served personally on the respondent, but as no appearance was entered by him, the suit was heard *ex parte*, and the allegations of adultery and cruelty set out in the petition having been duly proved, the usual decree *nisi* was passed.

No copy of the decree was served on the respondent, nor had any notice been given to him of the present application, which was based on an affidavit of the petitioner sworn on the 19th June, and a certificate of the Registrar of the same date to the effect that no appearance had been entered by or on behalf of any person or persons, and that no affidavit in opposition to the decree *nisi* being made absolute had been filed in the suit.

In her affidavit the petitioner stated that she had not seen the respondent since the date of the decree, nor had she been able to ascertain where he had since been living; that a few days after the decree was passed, she was informed that he had left Calcutta two days after the decree for Vizianagram; that in the month of May she received information from Bombay that the [540] respondent was there, and that she then wrote to her informant to ascertain his address and received a reply saying that he had left Bombay; that since leaving for Vizianagram the respondent had not returned to Calcutta, and that she had enquired of friends of the respondent and of persons with whom he had business dealings in Calcutta if they could give her his address, but without success, and that she had been unable to get any information regarding his whereabouts, and that consequently she had been unable to have a copy of the decree served upon him or give him notice of this application.

---

* Original Civil Suit No. 5 of 1890.

1891
JUNE 22.
—
MATRIMONIAL JURISDICTION.
—
18 C. 539.

Mr. *T.A. Apcar* on behalf of the petitioner applied to have the decree made absolute, and submitted that under the circumstance he was entitled to the order asked for, notwithstanding that no copy of the decree had been served or notice of the motion given. He referred to the cases cited in Belchambers's Practice, pp. 419 and 420, to the decision of Trevelyan, J., in *Hoskins* v. *Hoskins* (1), and to Brown on Divorce, Appendix II, p. 534, Rule 80.

WILSON, J.—On the authorities I think you have shown sufficient cause for making the decree absolute, and it will be made absolute accordingly. Costs of this application will be costs in the cause.

H. T. H. *Order made.*

Attorney for petitioner: Baboo *O. C. Gangooly.*

---

18 C. 540 (P.C.) = 6 Sar. P.C.J. 16.

PRIVY COUNCIL.

PRESENT :

Lords Watson, Hobhouse and Morris and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

MAHABIR PERSHAD AND OTHERS (*Objectors, Appellants*) AND RADHA PERSHAD SINGH (*Petitioner, Respondent*) AND A CROSS-APPEAL.
[28th January and 21st February, 1891.]

Mesne profits—Evidence—Presumption of fact.

In determining the mesne profits upon alluvial land gained by accretion and decreed to the respondent, the amount of such profits depending upon **[541]** the quantity of land that had been under cultivation during a definite period, the Courts below found that, at the end of that time, an area of a certain number of bighas was cultivated land. There was no evidence, however, to show what had been the increase year by year of the area cultivated; and, on this question, the appellants objecting to the amount of the mesne profits assessed by the Court, could have produced evidence consisting of the papers usually kept in a zemindar's serishta, showing how gradual the increase had been. But these documents they withheld. *Held*, that, on the above facts, the Courts had properly presumed against them, that the entire area of all the bighas above mentioned had come under cultivation from the beginning of the period.

APPEAL and cross-appeal from a decree (3rd February 1885) of the High Court, varying an order (12th November 1881) of the Subordinate Judge of Shahabad.

The appellants were judgment-debtors under decrees adjudging to the respondent's father, and predecessor in estate, possession of 1,653 bighas of land gained from the Ganges in the Shahabad district, and also mesne profits. These were confirmed by the order of Her Majesty in Council of 29th June 1871, which remitted the decrees to the High Court for ascertainment of the amount of mesne profits. The appeals terminating in that order are reported as *Pahalwan Singh* v. *Maharaja Muhessur Bukhsh* and *Muhessur Bukhsh* v. *Meghburn Singh* (2). The present respondent and decree-holder, possession of the land having been obtained in 1871, filed his petition on the 19th February 1880, claiming the determination of the mesne profits. The proceedings thereupon taken,

(1) Unreported. (2) 9 B.L.R. 150.

1891 FEB. 21. — PRIVY COUNCIL. — 18 C. 540 (P.C.) = 6 Sar. P.C.J. 16.

as well as the previous litigation that had resulted in the order in Council of 29th June 1871, are stated in their Lordships' judgment.

The High Court (Romesh Chunder Mitter and Field, JJ.), after the appellants had taken objections which were disposed of both in the subordinate and in the appellate Courts, finally determined the amount of the mesne profits due at Rs. 1,06,013, in amendment of the amount of Rs. 1,83,058 awarded by the Subordinate Judge. After the appellants had filed their appeal from the order of the High Court, the respondent, by leave, filed his cross-appeal, alleging that the Subordinate Judge had rightly held him entitled to mesne profits on 1,079 bighas of land cultivated **[542]** from 1267 Fasli to 1280 (1865 to 1873) at Rs. 7 a bigha by the year.

Mr. *C. W. Arrathoon*, for the appellants, among other reasons for the over-estimation of the mesne profits, which he contended had occurred, submitted that the High Court should not have allowed, in reference to either of the decrees, a presumption in favour of the decree-holder to the effect that an area of 1,079 bighas had come under cultivation as far back as the Fasli year 1272 (1880). On this they had acted, but not with the support of the survey map.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne* for the respondent and cross-appellant, were not called upon.

JUDGMENT.

Their Lordships' judgment was afterwards, on February 21st, delivered by

SIR R. COUCH—The proceedings which are the subject of this appeal and cross-appeal were taken for the determination of the mesne profits of two tracts of land situated in mouzahs Kharha Tand, Pharhada Mahrowli, and Pranpore, pergunnah Bhojepore, for 12 years from 1269 to 1280 F. S. inclusive, under a decree of 1863, and for 14 years from 1267 to 1280 inclusive, under a decree of 1865. The two decrees were made by the High Court—one on the 21st July 1863 and the other on the 31st July 1865—in favour of the father of the respondent in the principal appeal, for possession of lands gained from the bed of the Ganges in the above mouzahs, and for mesne profits. The former of these decrees was, on an application for review, confirmed by the High Court on the 29th April 1864, and the latter was, on a like application, set aside on the 17th April 1866. On appeal to Her Majesty in Council in both cases judgment was given by the Board, which was confirmed by an Order in Council of the 26th June 1871, that the respondent's father, the plaintiff, was entitled to possession with mesne profits of so much alluvial land as lay to the north and west of the red line in the map annexed to Her Majesty's Order in Council, while the defendants, the present appellants, were entitled to the land situated on the south-east of the said line. Afterwards the respondent's father was, by an order of the Court of Shahabad, in execution of the decree of Her Majesty in Council, **[543]** put in possession of the lands decreed to him. Objections to the proceedings were from time to time taken by the defendants, and the final order was made on the 27th August 1877, and confirmed by the High Court on the 27th March 1878.

On the 17th February 1880 the respondent, who had succeeded as heir to his father, made an application for fixing the amount of the mesne profits, and the Court Amin having, by order of the Court, made a report on the subject, the appellants filed objections. They were eleven in number,

1891 FEB. 21. —— PRIVY COUNCIL. —— 18 C. 540 (P.C.) = 6 Sar. P.C.J. 16.

but the fourth is the material one. It is that the quantities of cultivated and uncultivated lands as estimated by the Amin are incorrect. The Subordinate Judge framed the following amongst other issues:—"Of the lands whereof mesne profits are claimed, how much is under cultivation and how much out of cultivation?" On that issue the Subordinate Judge held that 1,083 bighas 5 cottahs 15 dhoors of land were under cultivation from 1267 down to the year when possession was delivered to the decree-holder. As the periods for which mesne profits were awarded by the two decrees differed, it was necessary to determine what quantity of this land was covered by each decree. The Subordinate Judge compared the total amount of land, under cultivation and out of cultivation, of which the respondent had been put in possession under the two decrees, with the 1,083 bighas 5 biswas 15 dhoors which were proved to be under cultivation, and found that the land under cultivation covered by the decree of 1865 was 261 bighas 6 biswas. This being deducted from the amount covered by both decrees, left 821 bighas 19 biswas 15 dhoors for the decree of 1865. And he awarded mesne profits of 261 bighas 6 biswas for twelve years from 1269 to 1280 at Rs. 7 per bigha, and of 821 bighas 19 biswas 12 dhoors at Rs. 14 per bigha.

Both parties appealed to the High Court, which thought there should be a further inquiry as to what was the quantity of the cultivated land within the area decreed in the second suit, and remitted the case to the lower Court for that purpose. On the 24th March 1884 the Subordinate Judge—the successor of the Judge who made the former order—decided that 1,079 bighas were the area of the cultivated land in the first suit, and only 23 bighas 14 cottahs 8 dhoors the cultivated area in the second suit, **[544]** and awarded mesne profits for the whole at Rs. 7 per bigha annually. The result was that there was an increase of about 20 bighas at Rs. 7 per bigha, and a reduction in the defendants' favour of Rs. 7 per bigha on 821 bighas. With this finding the case was returned to the High Court for disposal. Both parties filed objections to the finding. With regard to the quantity of cultivated land up to 1271 inclusive, the High Court differed from it, and upon the strength of the survey map held that in the first suit there were 544 bighas 12 cottahs, from the year 1267 to 1271. This is as regards the land in the first suit in the defendant's favour. Then as regards the period 1272 to 1280, the High Court found that in 1281 the entire area of 1,079 bighas was under cultivation, and as it was in the power of the defendants by production of jumma-wasil-baki papers and other papers usually kept in the zemindar's serishta to show the gradual increase in the cultivated area from 1272 to 1280, and they had not given any evidence on this point, they could not complain if it was presumed against them that the entire 1,079 bighas came under cultivation from the beginning of 1272. The High Court therefore accepted the finding of the Subordinate Judge as regards the quantity of cultivated land in the first suit from 1272 to 1280. Their Lordships think this presumption is a proper one, and moreover, the findings of the two Courts being concurrent on a matter of fact, they ought not to be questioned.

The non-production of papers by the defendants applied also to the land in the second suit. The High Court on the evidence before them with regard to that held that from 1272 the quantity of cultivated land in this suit was 293 bighas 6 cottahs. Their Lordships have seen no reason to think that this is not a proper finding. Certainly no ground has been shown for saying that it is wrong. The defendants appear to have endeavoured throughout the proceedings to defeat the execution of the decree

1891
FEB. 21.

PRIVY
COUNCIL.
---
18 C. 540
(P.C.) =
6 Sar. P.C.J.
16.

for mesne profits by not producing evidence which they had power to produce. The decree of the High Court ought to have put an end to the protracted litigation.

Their Lordships regard the present appeal as an abuse of the right to appeal to Her Majesty in Council, and they will humbly advise Her Majesty to dismiss it, and to affirm the decree of the **[545]** High Court, which was made in accordance with the findings that have been stated. It became unnecessary for the respondent to proceed with his cross-appeal, and their Lordships will humbly advise Her Majesty that it should also be dismissed. It will be dismissed without costs, and the appellants in the principal appeal will pay the costs of that appeal, which are to be taxed and allowed as if there had been no cross-appeal.

Appeal and cross-appeal dismissed.

Solicitors for the appellants : Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent and cross-appellant : Messrs. *Burton, Yeates, Hart, and Burton.*

C. B.

---

18 C. 545 (P.C.) = 18 I.A. 144 = 6 Sar. P.C.J. 46 = Rafique & Jackson's P.C. No. 123.

PRIVY COUNCIL.

PRESENT :

Lords Watson and Morris, Sir R. Couch and Mr. Shand (Lord Shand).

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

WAJID KHAN (*Plaintiff*) *v.* EWAZ ALI KHAN (*Defendant*).
[5th May, 1891.]

Equity as to gifts to persons in a fiduciary relation—Burden of proving absence of undue influence – Gift attempted by widow.

An instrument executed by a widow, after setting apart the rental of villages, belonging to her as her patrimony, to defray the expenses of her and her deceased husband's tombs, gave to her managing agent, who was her sole adviser, the management of the endowment in perpetuity, with the residue, after the above expenditure should have been met, for himself ; so that a large surplus would have remained each year in his hands, and he would have been the person substantially interested. *Held*, that this transaction was within the well-recognised principle that every onus is thrown upon a person filling a fiduciary character towards another of showing conclusively that he has acted honestly, and *bona fide*, without influencing the donor, who has acted independently of him.

In a suit brought by the agent's representative to have the gift enforced against the widow's successor in the estate, this burden had not, in the opinion of the Courts below, with which their Lordships concurred, been sustained ; and it was *held* that the gift had been rightly set aside.

[R., 13 B. 578 (589) = 8 Bom.L.R. 525]

APPEAL from a decree (29th August 1887) of the Judicial Commissioner, affirming a decree (2nd October 1886) of the District Judge of Rai Bareli.

[546] The plaintiff-appellant sued for a declaration of his right under a registered instrument executed on 21st June 1865, by a widow, Sadha Bibi, the predecessor in estate of the defendant-respondent, a talukdar.

By this she had granted to the plaintiff's father, Dalmir Khan, the management of an endowment, consisting of the profits of twenty-nine villages amounting to Rs. 9,993 a year, part of the Mahona taluk, pargana Jogdispur, in the Sultanpur district. In 1871 this taluk was placed under the management of the Court of Wards in virtue of Act XXIV of 1870. Sadha Bibi died on 27th August 1873, and Dalmir Khan died in November 1877, leaving the plaintiff, his son. The defendant-respondent, who was the nephew of Sadha Bibi's late husband, was recognized as the successor to the taluk while it was still under official management, which ceased before this suit was brought. The instrument in question, termed in it ahdnama wasika, recited that the widow had no child, and that she desired to provide for the expenses of the tomb of her deceased husband and her own tomb. For this purpose it set apart, "by way of wasika, or endowment," the above property, and appointed Dalmir Khan to be hereditary manager of the endowment. The making of this deed and the competence of the widow to alienate were not disputed. But the defence was that the document had been obtained by the undue influence of Dalmir Khan, who was, at the time, in the fiduciary relation of manager of the widow's estate. It was also in evidence that afterwards, on the 18th February 1872, she presented a petition informing the Deputy Commissioner, Rai Bareli, that she had "revoked her will in favour of Dalmir Khan," and had dismissed him from her employment.

1891
MAY 5.

PRIVY
COUNCIL.

18 C. 545
(P.C.) =
18 I.A. 144 =
6 Sar. P.C.J.
46 =
Rafique &
Jackson's
P.C. No. 123.

The District Judge, holding that the document of 24th June 1865 was of a testamentary character, in which opinion the Judicial Commissioner afterwards concurred, found that Dalmir Khan was the widow's karinda, and in a position of active confidence and trust. The rule followed by Courts of Equity in such cases was "that he who bargains in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence." He referred to *Ashgar Ali* v. *Dilroos Banoo Begum* (1), and to the 111th section **[547]** of the Evidence Act, 1872. The deed of 21st June 1865 was not proved to have been obtained in good faith, and he, therefore, dismissed the suit with costs.

The Judicial Commissioner, in appeal, considered that the expenses of maintaining the tombs would have been wholly disproportioned to the income assigned for the purpose, and he affirmed the judgment of the lower Court.

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *G. E. A. Ross*, for the respondent.

For the appellant, it was argued that the endowment for the tombs should receive effect, and the present case was not precisely one of the application of the rule as to the presumption of undue influence. Without that presumption there was little to show that any such influence had been exercised, and, as the endowment had been validly constituted, the Muhammadan law required that to deprive one who was in the position of a Mutawali, there should be ground shown by proof of his misconduct. Reference was made to Macnaghten's Muhammadan Law, edition of 1869, p. 69, principle 5, in the chapter on Endowment.

[LORD WATSON said that the deed of 1865 was to be taken as a whole, and that if the presumption of undue influence arose, then it would relate, unless displaced by evidence, to all the objects of the instrument.]

Counsel for the respondent was not called upon.

(1) 3 C. 324.

1891
MAY 5.

PRIVY COUNCIL.

18 C. 545 (P.C.) = 18 I.A. 144 = 6 Sar. P.C.J. 46 = Rafique & Jackson's P.C. No. 123.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD MORRIS.—In this case a suit was filed by the appellant Wajid Khan, the son of one Dalmir Khan, seeking to have a declaration of right to possession of certain villages under a deed or will of the 21st June 1865, purporting to have been executed by Rani Sadha Bibi, the widow of Raja Ali Baksh, in favour of Dalmir Khan. The District Judge and the Judicial Commissioner of Oudh decided against the plaintiff; and both those Courts decided substantially on the same ground, that the document was executed under circumstances in which it could not be supported.

For the purpose of their Lordships' judgment it appears to them that it is not necessary to consider whether the document should be constructed as a deed of present conveyance or a will, because [548] in neither aspect can it be upheld. Dalmir Khan held a highly fiduciary position in regard to Rani Sadha Bibi, who was alleged to have executed it; she was a lady 65 years of age and comparatively illiterate, and she does not seem to have had any adviser or counsellor except Dalmir Khan, who appears to have had great influence over her, for one of the exhibits in the case is a will made by her in his favour in the year 1862, only some three years before the execution of the document which is in question in this case. He certainly filled such a position towards her as to render it incumbent upon him to show that he had made a proper use of the confidence reposed in him by her, and that the execution of the document, granted without any valuable consideration and from which he obtained important pecuniary benefit, was free from all attempt at undue influence. In the opinion of their Lordships the onus lay upon him to do so; because although the deed of 1865 at first provides that this lady sets apart 29 villages of her patrimony, producing a rental of Rs. 9,993 a year to defray the expenses of her tomb and that of her deceased husband, it goes on to say that Dalmir Khan, her managing agent, shall have the management of the endowment in perpetuity, generations after generations, and that under every circumstance he shall have full power for good or for evil. Dalmir Khan thus became the person substantially interested, because, looking at the facts of the case, it would appear that a comparatively small portion of this large fund could be annually allocated to the expenses of the tomb, and that a larger surplus would each year remain in his hands.

Under these circumstances Dalmir Khan is brought within all the well-recognized principles which have been already referred to in the discussion of this case by more than one of their Lordships, namely, that every onus is thrown upon a person who fills such a character as he did, of showing conclusively that the transaction was an honest one, and a *bona fide* one, as to which a woman in the position of this lady had had some independent advice, or some opportunity of knowing exactly what she was about, and in which she was not under the complete influence of her manager. Their Lordships are clearly of opinion that this instrument is one that cannot be sustained; that it is not a *bona fide* instrument; and that the onus which their Lordships consider lies upon Dalmir [549] Khan's representative has not been sustained, namely, that of showing that this was a proper transaction considering the relationship of the parties.

Then it is said that although Rani Sadha Bibi revoked this deed in 1872 by a registered petition, it was a deed *in præsenti* which could not

be revoked, at all events in so far as the endowment was in the nature of a dedication of her property to the expenses of her husband's and her own tomb, and that the petition itself recognised at that time the continuing existence and validity of the endowment. But if the instrument was bad in the beginning, at all events as regards the benefit which Dalmir Khan took under it, it is difficult to see how his representative is prejudiced by its revocation in 1872, which if valid puts an end to the instrument, and if invalid could not set up an instrument that was bad in itself. Their Lordships are clearly of opinion that the instrument was bad *ab initio* ; that it was improperly obtained by a person in a fiduciary character; and that even if there were no onus on Dalmir Khan's representative to prove the honesty of the transaction, all the facts of the case go to show that there was active undue influence.

1891 MAY 5. — PRIVY COUNCIL. — 18 C. 545 (P.C.) = 18 I.A. 144 = 6 Sar. P.C.J. 46 = Rafique & Jackson's P.C. No. 123.

Upon these grounds their Lordships will humbly advise Her Majesty that this appeal should be dismissed, and that the judgment of the Court below should be affirmed. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant : Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent : Messrs. *Barrow and Rogers.*

C. B.

---

18 C. 549.

CRIMINAL APPELLATE.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

LALCHAND (*Appellant*) *v.* QUEEN-EMPRESS (*Respondent*).*
[17th March, 1891.]

Confession—Criminal Procedure Code (Act X *of* 1882), *ss.* 164, 364 *and* 533—*Examination of accused—Defect in confession—Confession not recorded in language in which it is given, admissibility of.*

Where a confession given in Hindustani was taken before a Sub-divisional Magistrate, and was recorded by the Court Officer in Bengali, that being the **[550]** language of the Court, and where it appeared that the Magistrate himself was a Mahomedan and it was contended that he must be taken to have been able to record the confession in the language in which it was given, there being no evidence to the contrary, *held*, in the absence of such evidence the Court should presume that the proceedings of the Sub-divisional Magistrate were conducted in accordance with law, and that in the absence of anything to show that it was practicable for the officers of his Court to record the statement in Urdu, it could fairly be held that the Sub-divisional Magistrate found that was impracticable, and adopted the alternative allowed by law of having the confession recorded in the Court language.

Jai Narain Rai v. *The Queen-Empress* (1) doubted.

[R., 21 B. 495 (501) ; 23 B. 221 (225) ; 10 O.C. 112 (114).]

THE appellant in this case, Lalchand, was convicted by the Presidency Magistrate of the Northern Division of offences under ss. 380 and 411 of the Penal Code and sentenced to one year's rigorous imprisonment. The facts of the case were as follows :—

---

* Criminal appeal No. 165 of 1891, against the order of Syed Ameer Hossein, Presidency Magistrate of Calcutta, Northern Division, dated the 16th of February 1891.

(1) 17 C. 862.

1891 MARCH 17. — CRIMINAL APPELLATE. — 18 C. 549.

The complainant, Sookhraj Roy, a minor under the Court of Wards, who resided in Bhagulpur, came down to Calcutta in January 1890 and put up at the house of his father-in-law, Roy Dhunput Sing Bahadur. He was possessed of, amongst other property, a *surpech* set with diamonds, emeralds, rubies and pearls; a necklace of pearls and emeralds, and another of diamonds and emeralds. These were kept in a box in his room, and on one occasion he went out sight-seeing, leaving the key of the box in the room; Lalchand also being there. On his return he found the box open and the above mentioned ornaments and others gone. Nothing was discovered till November 1890, when some of the jewels and of the ornaments, said to be a portion of the stolen property, were seen by a witness in this case, who gave information. Thereupon a Sub-Inspector of the Calcutta Police, Preonath Mookerjee, was deputed to Azimgunge and Murshidabad, and he recovered some jewels, said to be portion of the stolen property. Thereafter Superintendent Robertson was sent up, and the appellant and a man named Meher Chand were arrested and taken before the Sub-divisional Magistrate, Moulvie Mahomed Nubbee, on the 20th November. On that occasion the appellant appeared to have made a statement to the Magistrate, which was recorded in English, but this did not amount to a confession. On the 22nd November both the accused were taken before the Sub-divisional Magistrate, and on that occasion **[551]** a further statement amounting to a confession was made by the appellant. This statement was made in Urdu, but was recorded by the Magistrate in English, the document itself showing that it purported to have been recorded under the provisions of s. 364 of the Code of Criminal Procedure. At the same time that the Magistrate put down the statement, the Court Officer also recorded it in Bengali. On being placed before the Presidency Magistrate both accused pleaded not guilty, and a number of witnesses were examined for the prosecution, and the jewels which had been found were produced and *spoken* to and identified. The Sub-divisional Magistrate, Moulvie Mahomed Nubbee, was also called as a witness for the purpose of rendering the statement recorded by him in English admissible in evidence, as the certificate required by s. 164 of the Code had not been attached to the document. From his evidence it appeared that he believed the statement to have been voluntarily made, and that he recorded it under ss. 164 and 364 of the Code; but it also appeared that very much more had been stated by the appellant than had been recorded. No evidence was given to show that he could not have recorded the statement in Urdu. Upon the evidence the statement recorded in English was admitted in evidence by the Presidency Magistrate, and it also appeared from the record that the statement as recorded in Bengali was also put in, but throughout the trial before the lower Court and up to the reply by counsel for the appellant before the High Court, the latter document was not referred to by any one as the confession of the accused, and the only document referred to or relied on by the prosecution or the Magistrate was the statement recorded in English by the Sub-divisional Officer himself. Before the Presidency Magistrate, counsel objected to the admissibility of this document, but the objection was overruled. The material portion of the judgment of the lower Court, so far as it affected the appellant, was as follows:—

"The defendants were arrested, and on the 20th November they were taken to the Sub-divisional Magistrate of Lal-bag in the Murshidabad district. On the 22nd November the first defendant made a statement to the Deputy Magistrate which amounts to a confession of his crime.

1891 MARCH 17. — APPELLATE CRIMINAL. — 18 C. 549.

The defendants plead not guilty. On the case for the prosecution being closed, they, through their counsel and pleader, informed the Court that they did not wish to examine any witness for the defence.

[552] The evidence adduced on behalf of the prosecution satisfactorily proves that the following articles recovered by the police belong to the complainant, and that they found portions of the stolen *surpech* and the two necklaces.

The evidence satisfactorily traces these articles to the first and second defendants. The Magistrate of Lal-bag (Moulvie Mahomed Nubbee) gives the following deposition as to what had happened in his Court on the 22nd November:—

'I next saw him (Lalchand) on the 22nd November. He was produced before me by Superintendent Robertson. He was accompanied by the second defendant, Meher Chand (identifies). 54 diamonds, 8 emeralds, a wire containing 4 pearls, one ruby, a gold catch, one gold pendant with emerald, one *peitch* set with 8 diamonds and one emerald were produced. I marked them (as Exhibit J). Defendant No. 1 said that they had been in his possession, and that he had made them over to defendant Meher Chand, his father-in-law, about 10 months ago. On my asking him where he had got them from, he said that he had got the things in a box from the Dhurrumsallah of Dhunput Baboo at Burtolla Gullee in Calcutta on the second storey of the house, and he said that the key of the box was lying a little way from the box. He further said that there were 7 pieces of diamonds, a pair of gold *tora*, and 300 small pearls. He said that he opened the box and took the articles from it, and that he had sold the 7 pieces of diamonds and 20 ruttees of diamonds to jewellers in Calcutta, whose names he did not know.'

While the Deputy Magistrate recorded the confession of the first defendant, he forgot to attach the certificate prescribed by s. 164, Criminal Procedure Code, to the statement. It was therefore necessary to examine him as a witness to prove the statement and to say whether the statement made by the defendant was a voluntary one.

Mr. Henderson, his counsel, contends that under the ruling of the High Court in *Jai Narain Rai* v. *The Queen-Empress* (1), the confession should not be admitted. But I think that there can be no question as to the admissibility of this confession under s. 26 of the Evidence Act under the Full Bench ruling in the case of *Empress* v. *Nilmadhub Mitter* (2).

Besides, in addition to the above confession, there is ample evidence on the record to bring the charges home to both the accused.

I therefore find the first defendant, Lalchand, guilty under ss. 380 and 411, Indian Penal Code, and sentence him to one year's rigorous imprisonment."

Against that conviction and sentence Lalchand appealed to the High Court, the main ground being that the confession as recorded by the Sub-divisional Magistrate had been improperly admitted in evidence; that it appeared from the evidence in the case that it **[553]** had not even been made voluntarily; and that, apart from it, there was no sufficient evidence upon which to base the conviction.

Mr. *Henderson* and Baboo *Dwarka Nath Chuckerbutty*, for the appellant.

Mr. *Phillips* (Standing Counsel), for the Crown.

---

(1) 17 C. 862. (2) 15 C. 595.

1891 MARCH 17. — APPELLATE CRIMINAL. — 18 C. 549.

Mr. *Henderson* (upon the question of the admissibility of the confession).— The case is precisely similar to that of *Jai Narain Rai* v. *The Queen-Empress* (1), and is distinguished from the case of *Queen-Empress* v. *Nilmadhub Mitter* (2), the decision in which was based on the ground that s. 164 did not apply to Calcutta where confessions need not be reduced into writing. Here the statement was made in Urdu and recorded in English by a person who knew Hindustani perfectly well, and it is not shown that the statement could not have been recorded in the language in which it was made. Although there was a certificate under s. 364, there was none under s. 164, and under the circumstances, and having regard to the decision in *Jai Narain Rai's* case, the defect is one which cannot be cured. Apart from the confession, there is no evidence to support the conviction.

Mr. *Phillips.*—It is not necessary that every word of what is uttered by an accused should be recorded by the Magistrate, and here the substance was taken down, which is sufficient. If *Jai Narain Rai's* case be rightly decided, I cannot contend that this confession is admissible in evidence, but I would submit that the Judges in that case were wrong in laying down the principle they did. Section 533 was intended to prevent the exclusion of confessions such as this, owing to mere slips by Magistrates, and it shows that the Magistrate is called not to prove the form of the document or to give the certificate, but to depose to the fact that the confession was one really made by the prisoners.

Mr. *Henderson* in reply.

During the reply *Beverley, J.*, pointed out that it would appear that the statement as recorded in Bengali, was the real statement, and that what was recorded by the Magistrate himself was only a memorandum; and in answer to that Mr. *Henderson* stated that throughout the case it had never been even suggested by the prosecution that this was so, and that the lower Court had **[554]** gone entirely on the statement as recorded by the Magistrate. He further contended that the memorandum referred to in s. 364 was only a note of the statement, and not the statement itself, as the Magistrate here appeared and purported to have recorded.

The judgment of the High Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

The appellant has been convicted by the Presidency Magistrate of the Northern Division of theft in a house, and of dishonestly receiving stolen property knowing it to be such, under ss. 308 and 411 of the Indian Penal Code. The property stolen consists of some ornaments and precious stones belonging to Sookhraj Roy, a boy, under the Court of Wards, of considerable means. These articles were deposited in a box in his house in Calcutta, and were left by him there when he went out sight-seeing. The appellant was at that time in his room, and some relation or dependent who was lying sick. This fact is mentioned because it shows that the appellant had an opportunity to commit the theft, if that offence is otherwise proved against him.

The evidence against the appellant consists in his having given information to the police, in consequence of which some of the precious stones, identified by two witnesses, were produced by a person who stated that he received them from the appellant. There is also evidence in a

(1) 17 C. 862. (2) 15 C. 595.

confession said to have been made by him to the Sub-divisional Magistrate of Lal-bag, in the district of Murshidabad, where he was arrested.

The Magistrate no doubt has principally relied upon this confession, which was recorded under s. 164 of the Criminal Procedure Code. That statement was recorded in Bengali, the language of the Court, and a memorandum as required by law was made by the Sub-divisional Magistrate himself in English. Because, however, the certificate required by s. 164 to the effect that the statement was voluntarily made, was not appended to that statement, the Sub-divisional Magistrate was summoned to give evidence so as to make the statement admissible in accordance with the provisions of s. 533 of the Code of Criminal Procedure. In the course of his examination the Sub-divisional Magistrate deposed that the statement was made by the prisoner in Hindustani. No notice was apparently taken of this, nor was he called upon to [555] explain why the statement was not recorded in that language, or whether it was impracticable to do so.

It is contended in appeal before us that as the confession was not recorded in the language in which it was made, it is inadmissible in law; that s. 533 cannot be applied so as to make it admissible; and that it does not appear to have been voluntarily made.

On this last point we may state that, so far as the evidence goes, the confession appears to have been voluntarily made, and there is nothing in our opinion in proof of the contrary. Hindustani, the language in which the appellant is said to have made that statement, is not the Court language of Murshidabad; and therefore ordinarily we take it that the ministerial officers of that Court would not be competent to record it in that language. We are, however, asked to conclude that because the Sub-divisional Magistrate was a Mahomedan gentleman, he must have sufficient acquaintance with Urdu to enable him to record a statement in that language. We are not prepared to make any such presumption. It appears to us that in the absence of any evidence to the contrary, we should presume that the proceedings of the Sub-divisional Magistrate were conducted in accordance with law; and that in the absence of anything to show that it was practicable for the officers of his Court to record the statement in Urdu, we can fairly hold that the Sub-divisional Magistrate found that this was impracticable, and adopted the alternative allowed by law, namely, to have it recorded in the Court language, that is, Bengali. We have been referred to the case of *Jai Narain Rai* v. *The Queen-Empress* (1) in which it seems to have been held that if a statement by an accused person, purporting to have been recorded under s. 164, is not recorded in the language in which it is made, and it is not shown that it was impracticable to record it in that language, the defect cannot be cured by s. 533 of the Code, and that oral evidence of such confession is inadmissible.

It is unnecessary for us in the present case to do more than say that, as at present advised, we are unable to agree in the view of the law which formed the grounds of that judgment. We do not, however, think it necessary to refer the matter to a Full Bench, because, for the reasons already stated, we think that this objection cannot in this case be sustained. We also think that the appeal [556] should be dismissed on other grounds. We think that the evidence proves that on information given by the prisoner to the police a portion of the stolen property, as proved by the complainant and another witness, was found. We have been asked to disbelieve this evidence, because from the nature of the articles they

(1) 17 C. 862.

1891 MARCH 17. — APPELLATE CRIMINAL. — 18 C. 549.

were not capable of easy identification. It is impossible for us sitting on appeal to give weight to such an objection. That evidence was believed by the Magistrate before whom it was given, and it was in no way shaken in cross-examination. We may further observe that the appellant has not attempted to prove that these articles belonged to him, or to explain how they came into his possession. No doubt the Magistrate in convicting the appellant relies principally on the confession made to the Sub-divisional Magistrate of Murshidabad, but he states in his judgment that in addition to that confession there is ample evidence on the record to bring the charges home to the accused. From this we conclude that he relies also on the evidence to which we have adverted. We therefore dismiss the appeal.

H. T. H. *Appeal dismissed.*

---

18 C. 556 (F.B.).

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson and Mr. Justice Ghose.

BAIJ NATH TEWARI (*Defendant*) *v.* SHEO SAHOY BHAGUT AND OTHERS (*Plaintiffs*).* [8th June, 1891.]

Registration—Act III of 1877, ss. 5, 6, 7, 21, 22, 28, 30, 31, 35, 49 *and* 60—*Description of property misleading—Registration of document referring to land not in the Sub-district of Registering Officer of a Sub-Registrar—Transfer of Property—Act IV of* 1882, *s.* 59.

Certain property was described in a mortgage bond as bearing towji No. 10, as paying a sudder jama of Rs. 719, and as lying within the [557] jurisdiction of thana Kotwali, sub-district Bhagulpore, Collectorate of Bhagulpur.

This description was so far erroneous, in that the property was in reality situated in thana Amarpur, sub-district Banka, and bore a sudder jama of Rs. 919-15. Banka was, however, within the are a of the district of Bhagulpur.

The mortgage bond was registered by the Sub-Registrar of Bhagulpur, who was, under s. 7 of the Registration Act, authorized, in addition to his own duties, to exercise and perform the duties and powers of the Registrar of Bhagulpur.

Held by *Pigot, O'Kinealy, Macpherson and Ghose JJ.*, that the provisions of s. 21 of the Act had not been complied with; that the description of the property was misleading and insufficient for the purposes of identification, and that therefore no registration of the document had been effected within the provisions of the Registration Act.

Held by *Petheram, C.J.*, that the description was sufficient to identify the property, and that the Sub-Registrar having been authorized to exercise the powers and duties of the Registrar of Bhagulpur, and the property being situate in sub-district Banka, the Sub-Registrar of which sub-district was subordinate to the Registrar of the district of Bhagulpur, the provisions of s. 28 of the Act being directory only, registration of the document was valid.

Semble per Pigot, J.—A document on which a certificate under s. 60 has been duly endorsed cannot be held to have been duly registered under s. 49 of Act III of 1877 if it appears that the officer who made the certificate should not under s. 28 have registered the document.

---

* Full Bench Reference on Special Appeal, No. 596 of 1890, against the decree of Baboo Gopal Chunder Bose, Officiating Subordinate Judge of Zilla Bhagulpur, dated the 26th of February 1890, reversing the decree of Baboo Gobind Deb Mukerji, Munsif of Banka, dated the 25th of May 1890.

[Diss., 1 C.L.J. 126 (132); F., 29 C. 654=6 C.W.N. 856; L.B.R. (1893—1900) 577; Appl., 1 N.L.R. 112 (114); R., 34 B. 202 (207)=11 Bom. L.R. 1321=4 Ind. Cas. 588; 18 M. 364 (367); 16 C.P.L.R. 141 (143); 15 Ind. Cas. 335; 24 M.L.J. 664 (676)=(1913) M.W.N. 525 (529)=14 M.L.T. 237; D., 25 M. 580 (582); 3 C.L.J. 165 (167); 6 C.W.N. 329; 14 C.W.N. 532=5 Ind. Cas. 127.]

1891 JUNE 8.

FULL BENCH.

18 C. 556 (F.B.).

IN this case, which was referred to a Full Bench by Mr. Justice Norris and Mr. Justice Beverley, it appeared that the plaintiffs were the mortgagees of certain property described in the mortgage bond as follows:—" A five anna four-pie share out of the sixteen annas of mouzah Basidpur, main and hamlet, bearing towji No. 10, and paying a sudder jama of Rs. 719, lying within the jurisdiction of thana Kotwali, sub-district Bhagulpur, Collectorate Bhagulpur." The mortgage bond had been registered by the Sub-Registrar of Bhagulpur, whose office had been amalgamated with that of the Registrar of Bhagulpur under s. 7 of Act III of 1877, and who was therefore authorized to exercise and perform the powers and duties of the Registrar of Bhagulpur in addition to his own powers and duties as Sub-Registrar of [558] Bhagulpur; the actual registration of the document having, however, taken place in the Sub-Registry of Bhagulpur by the Sub-Registrar.

The description of the mortgaged property was, however, so far erroneous in that it was situated in thana Amarpur, sub-district Banka, and bore a sudder jama of Rs. 919-15, and it was contended in this suit (which was one for the sale of the mortgaged property) by an intervenor, a person who claimed to have purchased the property by a registered deed executed subsequently to the date of the mortgaged bond, that the registration of the bond was on the above ground invalid, and that it therefore had no priority over his purchase.

The Munsif held the contention to be good, and while making a decree for the amount due upon the bond, held that it did not bind the mortgaged property.

On appeal the Subordinate Judge held that although, as a matter of fact, the bond was registered by the Sub-Registrar of Bhagulpur under s. 28 of the Act, still, as he might have registered it as Registrar under s. 30, the registration was good and the bond was effectual to bind the property mortgaged. On appeal by the defendant to the High Court, the Division Bench (Norris and Beverley, JJ.) referred the case to a Full Bench with the following remarks and question:—

" We think it is clear that the bond was registered by the Sub-Registrar of Bhagulpur not as Registrar, but as Sub-Registrar, and the circumstance that he might have registered it as Registrar is immaterial. As no portion of the property mortgaged is situate in the sub-district of Bhagulpur, the question arises whether the bond was registered in accordance with the provisions of the Act, so as to affect the property mortgaged, having reference to s. 49 of the Registration Act and s. 59 of the Transfer of Property Act.

" Section 60 of the Registration Act provides that the certificate of registration shall 'be admissible for the purpose of proving that the document has been duly registered in manner provided by the Act.' Section 87 provides that 'nothing done in good faith by any registering officer shall be deemed invalid merely by reason of any defect in his appointment or procedure.'

[559] " For the appellant in second appeal the case of *Beni Madhab Mitter* v. *Khatir Mondul* (1) (to which one of us was a party) is relied on.

(1) 14 C. 449.

1891 JUNE 8. — FULL BENCH. — 18 C. 556 (F.B.).

It is precisely on all fours with the present case. On the other side the following cases have been cited before us:—

Ram Coomar Sen v. *Khoda Newaz* (1).
Muhammad Ewaz v. *Birj Lal* (2).
Har Sahai v. *Chunni Kuar* (3).
Hardei v. *Ram Lal* (4).

"We think that these cases are in conflict with the case of *Beni Madhab Mitter* v. *Khatir Mondul* (5); and as we entertain doubts as to the correctness of that decision, we refer the following question for the decision of a Full Bench ;—

"Whether a document affecting immoveable property is registered in accordance with the provisions of the Indian Registration Act within the meaning of s. 49, when it bears a certificate of registration under s. 60, although under s. 28 the officer who made the certificate should not have registered the document.

"If this question is answered in the affirmative, the appeal will be dismissed ; if in the negative the decree of the lower appellate Court must be set aside and that of the first Court restored."

Baboo *Mohini Mohun Roy* and Baboo *Lal Mohun Das*, for the appellant.

Dr. *Rash Behari Ghose* and Baboo *Ram Churn Mitter*, for the respondents.

Baboo *Mohini Mohun Roy*.—The officer registering was both Registrar and Sub-Registrar. Registration was obtained by misrepresentation of facts ; but if the true facts had been stated, the registering officer might have registered as Registrar of the district of Bhagulpur, as Banka was within the district of Bhagulpur, but the registration was carried out by the registering officer as Sub-Registrar of Bhagulpur, and Banka was not in his sub-district. If he had registered as Registrar, he would have had to send on a copy to the Sub-Registrar. Sections 51, **[560]** 54 and 57 give the scheme of the Act, showing that books and indices are to be kept in each office and that fees may be charged for inspection ; in this case the people of Banka would be in ignorance of the land being mortgaged ; a registration such as this would open the way to fraud. Registration of a document should be with reference to the locality of the property to which the document refers ; the words of the Act are not to be read so as to defeat the object of the Act. See *Sheo Dayal* v. *Hari Ram* (6). The register is to be kept so as to afford information to the public of dealings with land within the district or sub-district. This is not done if there is no registration at Banka. The last case cited went up on appeal to the Privy Council—*Hari Ram* v. *Sheo Dayal Mall* (7). In that case the Court points out the intention of the Legislature in framing the provisions of the Act. What has happened in this case is not a defect in procedure only, which is covered by s. 87, but is a matter vitally affecting the scheme of the Act and defeating its object. The case of *Beni Madhab Mitter* v. *Khatir Mondal* (5) is in my favour. The Registrar could have had no jurisdiction unless he exercised his discretion under s. 30.

The case of *Ram Coomar Sen* v. *Khoda Newaz* (1) is against me, but it was considered and disregarded in *Beni Madhab Mitter* v. *Khatir Mondul* (5). The case of *Har Sahai* v. *Chunni Kuar* (3) is somewhat in point, but is a decision of another High Court, although approving of a decision of Mr. Justice Broughton.

---

(1) 7 C.L.R. 223. (2) 1 A. 465. (3) 4 A. 14. (4) 11 A. 319.
(5) 14 C. 449. (6) 7 A. 590. (7) 11 A. 136 (142).

1891
JUNE 8.
FULL BENCH.
18 C. 556 (F.B.).

Dr. *Rash Behari Ghose*, for the respondents:—Although as Sub-Registrar the officer was not competent to register, yet under s. 30 he could do so. [PETHERAM, C.J.—Does not his having signed as Sub-Registrar exclude the possibility of his having exercised his discretion under s. 30 ?] Under s. 60 the certificate is sufficient to render the document admissible in evidence, and all the provisions of ss. 34, 35, 58, and 59 were complied with. The meaning of the word "registered" in s. 49 is given in *Hardei* v. *Ram Lal*(1). There are frequent notifications altering the registration districts, and **[561]** innocent persons should not be affected by mistakes of a registering officer. The object of the Act is to create a system of public transfers of landed property. Registration is not notice. No construction should be put upon the Act enabling a party to vitiate proceedings by showing that there was a mistake. No evidence ought to be allowed to show that the land was outside the jurisdiction of the Sub-Registrar. There is no question of fraud in this case. The registering officer, under s. 60, means the officer to whom the document was presented. I rely on the judgment of Straight, J., at p. 324 in *Hardei* v. *Ram Lal* and the cases he refers to.

The case of *Sheo Sunker Sahoy* v. *Hardei Narain Sahu* (2) under the Registration Act of 1871 is in my favour, as no objection was taken before the Sub-Registrar, and also the case of *Har Sahai* v. *Chunni Kuar* (3). I also refer to *Rohimoonissa* v. *Abdoollah Khan* (4).

There is no foundation for the apprehension that the object of the Act will be defeated; fraud would vitiate the certificate in any event.

Baboo *Mohini Mohun Roy*, in reply, referred to *Hardei* v. *Ram Lal* (1) and to *Muhammad Ewaz* v. *Birj Lal* (5).

Opinions of the Court (PETHERAM, C.J., PIGOT, O'KINEALY, MACPHERSON, and GHOSE, JJ.) were as follows :—

OPINIONS.

PETHERAM, C.J.—The question referred to this Bench by the Division Bench is as follows :—"Whether a document affecting immoveable property is registered in accordance with the provisions of the Indian Registration Act within the meaning of s. 49, when it bears a certificate of registration under s. 60, although under s. 28 the officer who made the certificate should not have registered the document."

The entire system of registration is created by the Registration Act III of 1877, and no power to register any document, except that given by the Act, exists in any one; so that, unless the Act gives a Sub-Registrar power to register documents which **[562]** related to lands not situated within his sub-district, he has no such power, and if he goes through the form of registration, the Act is of no effect. The question then is, does the Act give him such power? If it does, I think that s. 28 should be read as directory only; if it does not, the question of the construction of that section does not arise. Section 4 of the Act directs that the Local Government shall form districts and sub-districts; s. 6 that it shall appoint Registrars and Sub-Registrars of such districts and sub-districts; s. 7 that it shall establish offices of the Registrars and Sub-Registrars in the districts and sub-districts; s. 28 that documents shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which the document relates is situate. Section 31 provides that in ordinary cases the registration shall

(1) 11 A. 319, (327). (2) 5 C.L.R. 194=6 C. 25. (3) 4 A. 14.
(4) 22 W.R. 319 (321). (5) 1 A. 465 (474).

1891 JUNE 8. — FULL BENCH. — 18 C. 556 (F.B.).

be made only at the office of the officer authorized to accept the document for registration. This section has not much bearing on the present question, as it appears from the last paragraph of it that the extraordinary occasions referred to are cases in which the persons desirous of presenting a document cannot attend at the office. Section 35 provides that when a document has been presented and certain proof has been given, the officer shall register it.

These are the whole of the sections under which the disticts and sub-districts are formed, the officers appointed and the offices established, and I cannot find that they anywhere constitute the office of a Sub-Registrar a general office for the registration of documents of the kind described in the Act. I think that the meaning of ss. 5, 6 and 7 is that each Sub-Registry Office is constituted for the registration of documents which are of the descriptions mentioned, and which relate to lands within the sub-district; that the office of a sub-district is not a Registry Office for the registration of any documents which do not relate to lands within the sub-district; and if any documents relating to lands wholly without the limits of a sub-registry, are registered in such sub-registry the registration is of no effect, because the documents have not been registered in an office established under the Act for the purpose of registering documents of the class to which they belong. The first case mentioned by the **[563]** referring Bench is that of *Muhammad Ewaz* v. *Birj Lal* (1). It is a decision of the Privy Council with reference to the provisions of Act VIII of 1871. Their Lordships held that under that Act a deed is not necessarily invalid by reason of a failure on the part of the registering officer to comply with the Registration Act. The office in which the deed was registered in that case was an office constituted for the registration of deeds of the class to which it belonged, and which related to property situated as that to which the deed in question related was situated.

The next case is that of *Sheo Sunker Sahoy* v. *Hurdei Narain Sahu*, reported in 5 C. L. R., 194; I.L.R., 6 Calc., 25. The judgment was given by Ainslie and Broughton, JJ., on June 18th, 1879. They decided that where a document, which purports to have been registered, is tendered in evidence, the Court cannot reject it for non-compliance with the Registration Law, but it can deal with other objections brought against it on their merits. In this case also the office in which the registration in fact took place was an office constituted under the Act for the registration of documents of the class to which the document in question belonged.

The next case is that of *Ram Coomar Sen* v. *Khoda Newaz* (2), decided on 11th August 1880, by Norris and Prinsep, JJ., in this Court. In that case, which was decided under the present Act, the property to which the deed related was situated in the sub-district of Brohumbora, and the deed was registered in the sub-district of Commilla. The learned Judges held, following, as they said, the case of *Sheo Sunker Sahoy* v. *Hurdei Narain Sahu* (3), that the Court had no power to go behind the certificate, and was bound to admit the registered deed as presented to it; they also referred to the remarks of the Privy Council in *Sah Mukhun Lall Panday* v. *Sah Koondan Lall* (4), but beyond this did not give any reasons for their opinion. The next case is that of *Har Sahai* v. *Chunni Kuar* (5). In that case, which was decided on 21st June 1881 by Straight and Duthoit, JJ., an

(1) 1 A. 465. (2) 7 C.L.R. 223. (3) 5 C.L.R. 194=6 C. 25.
(4) 15 B.L.R. 228. (5) 4 A. 14.

[564] instrument of mortgage on land which required to be registered was presented for registration to a Registrar within whose district no portion of the land was situate, and was registered by such Registrar. It was held, following, as the Judges say, the case of *Sheo Sunker Sahoy* v. *Hurdi Narain Sahu* (1), that the document could not be rejected for that reason. The next case is that of *Beni Madhab Mitter* v. *Khatir Mondal* (2), decided by Mitter and Beverley, JJ., on 7th March 1887. The judgment in that case is as follows:—" We think that the judgments of the lower Courts in this case are correct. Under s. 60 the certificate is adducible in evidence to prove that the document was duly registered by the particular officer whose signature it bears, but it has been shown that that officer had no jurisdiction to register it. That being so, the document was not duly registered within the provisions of the Registration Act. A decision was referred to in the course of the argument, *Ram Coomar Sen* v. *Khoda Newaz* (3), but we find that that decision is entirely based upon a Privy Council judgment, *Sah Mukhan Lal Panday* v. *Sah Koondan Lall* (4), and the Privy Council decision does not support the contention put forward in this case. There the document which was in question was registered by an officer who had jurisdiction to register it, but in this case the document has been registered by an officer who had no jurisdiction to register it. That being so, the observations of their Lordships of the Judicial Committee, upon which the decision proceeds, are not applicable to this case. We dismiss these appeals with costs." The only other case is that of *Hardei* v. *Ram Lal* (5), decided by a Full Bench of the Allahabad Court on 19th January 1889.

In that case the lower appellate Court had rejected as inadmissible in evidence, under s. 49, a deed of gift of immoveable property, upon which was endorsed a certificate under s. 60, on the ground that the person presenting it for registration and admitting execution was not justified to do so under ss. 32 and 35, holding that the registration was consequently void and the document not registered under s. 17. [565] The Judges of the High Court at Allahabad held that the lower appellate Court was wrong in so doing, and ought to have admitted and dealt with the document on the ground that the certificate under s. 60 was conclusive. It will be noticed that of these cases, three only deal with the question whether registration is of any effect, if it takes place in an office not constituted for the registration of documents relating to the property to which the deed registered relates. Of those three, two—one in this Court and one in the Allahabad Court—hold that such registration is effective, but in both cases the Judges base their decision on the case *Sheo Sunker Sahoy* v. *Hurdei Narain Sahu*, which case on examination does not appear to be an authority for the proposition. In the third the Judges took the other view, and an examination of the Act shows, I think, that their view is correct. I would reply to the question referred, that if the office in which the registration was effected was not an office constituted for the registration of documents relating to property in the area within which the property to which the document in question related is situated, no registration has been effected within the provisions of the Act.

In the present case, however, the question arises in a second appeal, and by the rules of this Court this Bench, in addition to answering the question referred, must dispose of the appeal, and for that purpose it is

(1) 5 C.L.R. 194. (2) 14 C. 449. (3) 7 C.L.R. 223.
(4) 15 B.L.R. 228. (5) 11 A. 319.

1891 JUNE 8. — FULL BENCH. — 18 C. 556 (F.B.).

necessary to consider other questions. It appears that the officer who registered this document was the Registrar of the district of Bhagulpur; that the office in which it was registered was the Registry Office for the district of Bhagulpur, and that the property to which the document related was situated within that district.

The office of Sub-Registrar of Bhagulpur has been amalgamated with that of Registrar of Bhagulpur under s. 7 of the Act, and the Sub-Registrar of Bhagulpur is authorized to exercise and perform the powers and duties of the Registrar of Bhagulpur, in addition to his own powers and duties as Sub-Registrar of Bhagulpur. By s. 30, cl. A, the Registrar of a district is empowered in his discretion to receive and register as Registrar any document which might be registered by any Sub-Registrar subordinate to him, and by s. 51 it is provided **[566]** that one set of books only shall be kept when the two offices have been amalgamated. As far, then, as anything the registering officer does is concerned, he acts in precisely the same way if he registers a document in his discretion as Registrar, as he would do if he registered it as Sub Registrar. The property to which the document in question relates is situated in the sub-district of Banka, the Sub-Registrar of which sub-district is subordinate to the Registrar of the District of Bhagulpur; the person who registered it was the Sub-Registrar of Bhagulpur, who was authorized to perform the duties of the Registrar of Bhagulpur with which office his own had been amalgamated; and he received and registered the document in an office and in a set of books which had been constituted and provided for the registration of documents of this kind, and which related to property situated within the district of Bhagulpur. Unless there is some provision in the Act which provides that such a registration shall be void unless it is shown that the officer has, in the exercise of the discretion given him by s. 30, cl. A, elected to register it as Registrar, the document has, I think, been registered under the Act. I have before said that in my opinion where the registration takes place in an office constituted for the registration of documents of its class, the provisions of s. 28 are directory only, and if so, there is nothing in that section to affect the validity of this registration, nor can I find any provision to that effect in any other section of the Act. The only other question which arises in this appeal is whether the misdescription of the property in the deed is sufficient to disentitle the document to be registered so as to render the registration which was effected invalid. The provisions which deal with this question are ss. 21, 22 and 69 of the Act and Rule XI. Section 21, cl. A, provides that such a document shall not be accepted for registration unless it contains a description of the property sufficient to identify it. Cl. (*b*) provides for a particular mode of description. Section 69 gives power to make rules, declaring what territorial divisions shall be recognized under s. 21, *i.e.*, to make rules under cl. (*b*) of s. 21, that clause being the part of the section which deals with territorial divisions. Rule XI provides that certain territorial divisions shall always be **[567]** specified, and s. 22 provides that failure to comply with the provisions of cl. (*b*) shall not disentitle a document to be registered, if the description of the property is sufficient to identify it. In other words, s. 22 declares that cl. (*a*) of s. 21 is mandatory and cl. (*b*) directory only; the rule can have no greater power than the clause itself, of which it, at the most, forms a part.

It appears from the Munsiff's judgment that the name of the mouzah and the number of the *towzi* are correctly given in the deed, but that the

thana and the registration sub-district are incorrectly stated. There can be no doubt that if the name of the mouzah and the *towzi* number are known, the property can be identified in the sense that it can be found from that description; and as that is so, I think that the provisions of s. 21, cl. (*a*) and of s. 22 are complied with, and the document not dis-entitled to registration.

I think that the description was sufficient to identify the property; that the document was effectually registered by the Registrar of the district of Bhagulpur, and that the appeal should be dismissed.

But as the majority of the Judges think that this appeal should be decreed, the judgment of the Court will be that the second appeal be decreed with costs.

O'KINEALY, J.—This was a suit for the sale of certain mortgaged property. The plaintiff said that in the year 1881, Ram Churn, the mortgagor, had mortgaged the land in question as situated within thana Kotwali in the sub-district of Bhagulpur, and that the mortgage bond was registered by the Sub-Registrar of Bhagulpur. At the trial a third party appeared and claimed to be the purchaser by a subsequent registered deed; and he raised as his defence that the land, not lying within thana Kotwali, but within thana Amarpur, was not within the sub-district of Bhagulpur, and the plaintiff's bond was not properly registered so as to give it priority.

Before the Munsif there was no dispute as to the position of the property, and admittedly it is situated within the jurisdiction of the Sub-Registry Office of Banka and not of Bhagulpur. He decided that the registration having taken place in the latter **[568]** Sub-Registry Office, the bond was, by virtue of the provisions of s. 28 of the Act, not duly registered in the terms of s. 59 of the Transfer of Property Act.

On appeal the Subordinate Judge also considered that the property lay within the sub-division of Banka; but finding that the Sub-Registrar of Bhagulpur was then in charge of the office of the District Registrar, and that the latter had, under s. 30 of the Act, power to register this document, he upheld the registration and declared that the mortgage-deed had priority over the purchase.

The case was brought up here on second appeal, and the learned Judges constituting the Bench in charge of the group within which this appeal fell, referred to us the following question:—

"Whether a document affecting immoveable property is registered in accordance with the provisions of the Indian Registration Act within the meaning of s. 49, when it bears a certificate of registration under s. 60, although under s. 28 the officer who made the certificate should not have registered the document."

It appears to me that the decision of such a question is not necessary to the determination of this appeal, nor, indeed, would the decision of it affect the conclusion at which I have arrived. By s. 7 of the Registration Act, the Local Government may authorize any Sub-Registrar, whose office has been amalgamated with that of a Registrar, to exercise and perform, in addition to his own powers and duties, all or any of the powers and duties of the Registrar to whom he is subordinate. In this case the office of the Sub-Registrar of Bhagulpur was amalgamated with that of the District Registrar, and under s. 30 of the Act he was empowered to register this document.

Under s. 21 of the Act, the duty of describing the property properly is thrown on the person applying to have a document registered, and in

1891 JUNE 8. — FULL BENCH. — 18 C. 556 (F.B.).

Bengal, where the thana is the unit of area for the purpose of description, the thana and sub-district in which the land is situated should be set out in the document. In this case the property was not described according to the rules in force. The description runs as follows:—

"A 5-anna 4-pie English share out of the 16 annas of mouzah Basidpur, main and hamlet, bearing *towzi* No. 10 and paying a **[569]** *sudder jama* of Rs. 719, lying within the jurisdiction of thana Kotwali, sub-district Bhagulpur, Collectorate Bhagulpur." This description is erroneous. The property is situated in thana Amarpur, sub-district Banka, and bears a *sudder jama* of Rs. 919-15 annas. But by s. 22 the registration of a document in which the property is not properly described does not become invalid unless it cannot be properly identified, and I consider that identification under s. 22 means such identification as is necessary to carry out the provisions of the Registration Act. In the present case the *towzi* number is correct, but the *sudder jama*, the thana and the sub-division are wrongly given. There is nothing on the face of the deed which would enable the Registrar to carry out the provisions of s. 66 and send a memorandum of the deed to the Sub-Registrar in whose sub-district the property is situated. On the contrary, the description is so misleading as to prevent the Registrar from doing so. I do not think that a misleading description of this kind is saved by s. 22 of the Registration Act, and so thinking, I must hold that the registration is not valid as against the subsequent purchaser.

PIGOT, J.— I agree with Mr. Justice O'Kinealy that the question put to us is not one upon the answer to which the decision of the case depends.

The provisions of s. 21 were in this case not complied with. The territorial division (by which under the rules is meant the sub-district) in which the property was stated to be situated was not that in which it really was. I should not be prepared to hold that this was such an error as of itself to affect the registration. But not merely was there this error, but the property was stated to be within a thana different from that in which it really was situated. This was a false description, and one which under s. 22 disentitled the document to be registered.

It appears to me that a false description or an incomplete description of the property, in respect of matters which from their nature it lies upon the party registering the document to state, being especially within his knowledge, must invalidate the registration, if it be such as to render the description of the property insufficient to identify it.

[570] Upon this ground I hold the document inadmissible in the present case, and think that the question put to the Full Bench does not arise.

But as the Chief Justice has favoured me with a perusal of his judgment, in which he deals with the question put to us, I think I ought to express such opinion as I have formed upon it, although (as I view the case) perhaps extra-judicially.

There would be some difficulty in point of form in answering the question as it stands from the manner in which the certificate is referred to. The certificate under s. 60 is not made by that section, as I understand it, conclusive as to due registration; it is "admissible for the purpose of proving that the document has been duly registered." The document cannot become, by virtue of the certificate, duly registered under the Act.

Substantially, however, the question is whether the document on which the certificate had been endorsed is or is not to be held not to have

been duly registered, if it appears that the Sub-Registrar should not have registered it, by reason of the property being in a sub-district other than that of which he was Sub-Registrar.

I think the question might be answered without having resort to a construction of s. 60, making the certificate conclusive proof.

I think the requirements of s. 28 are directory and not mandatory. It is the duty of the Sub-Registrar not to register a document presented to him, if he be not the officer to whom it ought to be presented.

But, as regards the person presenting the document, I think the observations of the Judicial Committee in *Muhammad Ewaz* v. *Brij Lal* (1) may well be adopted as a guide in determining the effect of the provisions of the section.

Further, the primary object of the Act is to provide a conclusive guarantee of the genuineness of the instrument, and this is attained by such a registration as the present; a second, and no doubt very important one, is to provide a record from which persons who may desire to enter into dealings with respect to the [571] property affected by the instrument, may be able to obtain information as to the title. It is for the second object that the provisions of s. 28, as well as many others in the Act, are framed; such as have reference to the machinery from time to time to be adopted by the executive in carrying out the Act, including the formation of the districts and sub-districts, the alteration of them as may be convenient, the appointment of Registrars and Sub-Registrars, and, in short, all the machinery necessary to enable the records to be regularly and conveniently kept and easily accessible to the public.

It may well be that in respect of those matters exclusively within the control and knowledge of the persons registering the document, which are prescribed by the Act, the omission from it of any of the particulars required by ss. 21 and 22 of the Act might be intended by the Legislature to be fatal to the validity of the registration as in the *St. Lucia* case and *Harding* v. *Carrey* (2); see also, perhaps, *Essex* v. *Baugh* (3).

The present case illustrates what the provisions of the Act may be thought intended to prevent by the rigid exclusion from registration of documents framed in defiance of its provisions. Here we have a document presented so incorrectly describing the property that it would be impossible for the officer to identify it so as to tell that it was not in his sub-district, and difficult at least for any one to identify it at all.

But I do not think an error as to the district or sub-district is one of such omissions. The Act does not declare that registration by a Sub-Registrar, who ought not to register, is void. I do not find anything to show an intention that it should be so. It is the duty of the officer to ascertain the geographical position of all the property conveyed as to sub-districts and districts—see ss. 64 and 65. The limits of the sub-districts must be known to him. They may possibly (of course this is unlikely) be unknown to the person seeking registration. In any case I think the matter is one primarily for the officer, and that if he consents to register, in place of refusing, as he ought to do, a document which ought to be registered elsewhere, it cannot be intended [572] that his neglect should be visited on the applicant, whether grantor or grantee, or by the destruction of the instrument as a conveyance.

It is said that this might lead to opportunities for fraud. The answer appears to be—

(1) 4 I. A. 174 (176). (2) 10 Indiana L. R. 140. (3) 1 Y. & C. C. C. 620.

1891 JUNE 8. — FULL BENCH. — 18 C. 556 (F.B.).

First.—That this could only happen through neglect in the Registration Officers, which cannot be supposed in any degree probable.

Secondly.—That even if it should give some facility for fraud, the mischief, on the other hand, of avoiding instruments on the ground suggested would be likely to be far wider.

I would only further observe that s. 68 seems to regard "any error regarding the office in which any document shall have been registered" as one capable of rectification, which seems to me to confirm the view which I have formed upon this matter. I would, therefore, were it necessary, answer the question in the negative.

MACPHERSON, J.—I also think that the question which has been referred to the Full Bench does not arise, and that it need not therefore be answered. I agree with Mr. Justice Pigot in holding that the document in question contained a misdescription of the property so complete as to disentitle it to be registered; that there was therefore no valid registration, and that the document was inadmissible.

GHOSE, J.—I agree with Mr. Justice O'Kinealy in holding that the registration in question is not valid. I desire, however, to make one or two observations. The property which was mortgaged is situate within Sub-Registry of Banka, but the document was registered by the Sub-Registrar of Bhagulpur. Now it seems to me, looking at ss. 28, 31 and 32, that the Sub-Registrar as such had no power to register the document, unless it be by virtue of ss. 7 and 30 of the Registration Act. He had no doubt the authority to do so in this case (the office of the Registrar of the district and that of the Sub-Registrar having been amalgamated, and the Sub-Registrar having been placed in charge of the amalgamated office) if he chose to exercise the discretion vested in him by s. 30. But the lower [573] appellate Court has found that the registration was "as a matter of fact" not made under that section, and, indeed, one fails to see how it could be otherwise, bearing in mind that the document describes the property as lying within the sub-district of Bhagulpur and not in the sub-district of Banka or any other sub-district, and therefore the officer to whom it was presented for registration was not called upon to exercise the discretion vested in him by that section. The description of the property, as given in the document, as has been pointed out by Mr. Justice O'Kinealy, was so misleading as to prevent the Registrar from carrying out the provisions of the Registration Act, or from exercising any discretion under s. 30. And it therefore follows that the registration is not valid in this case.

T. A. P. *Appeal decreed.*

18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

1891
JAN. 24.

PRIVY COUNCIL.

18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

PRIVY COUNCIL.

PRESENT :

Lord Hobhouse, Lord Macnaghten, Sir R. Couch and Mr. Shand (Lord Shand).

[*On appeal from the High Court at Calcutta.*]

PEACOCK AND OTHERS (*Plaintiffs*) v. BAIJNATH AND OTHERS (*Defendants*) AND GRAHAM AND OTHERS (*Defendants*) v. BAIJNATH AND OTHERS (*Plaintiffs*). [24th January, 1891.]

Sale and consignment of goods—Banian of firm, right of—Right of the consignor, as against the banian, to merchandise consigned to a Calcutta firm—Denial of banian's claim to a lien on general account with the firm—Banian's non-liability to account for past sales already brought into account with consignee—Contract Act. 1872, ss. 103 *and* 178—*Lien.*

There is no rule of law giving a lien to the banian as against his employer, nor is there any custom to that effect. If the banian claims a lien he must prove its existence, either by showing some express agreement giving to him the lien, or by showing some course of dealing from which it is to be implied.

On the other hand, where merchandise consigned has been sold in good faith, and in accordance with the purpose for which the consignment was **[574]** made and the proceeds have been brought into account between the consignee and the banian, he is not liable to account to the consignor. The principal of the agent cannot disturb the account with the sub-agent except on the ground of bad faith.

A banian, not setting up a written agreement, nor asserting that he had advanced to the firm on the security of specific quantities, claimed a lien as against the consignor on merchandise consigned to the firm whether arrived or in transit. The lien alleged was for the general balance of account, in virtue of an agreement extending to the whole of the merchandise consigned, whatever might have been the terms of the consignment between the consignor and consignee.

The banian had made advances, but for them the consideration was the profit to be made by sales. There was no pledge, nor any agreement, express or implied, giving the banian a lien on the goods consigned. It was, therefore, unnecessary to determine whether the banian had notice of the terms of the consignments Nor was it necessary to consider the effect of s. 178 of the Contract Act IX of 1872, there having been no pawn. The banian, having no lien against the consignee, had none against the consignor, and could not question the right of the latter to stop *in transitu.*

[R., 24 M.L.J. 479 = 13 M.L.T. 327 = (1913) M.W.N. 335 = 19 Ind. Cas. 221.]

APPEALS from two decrees (2nd March 1885) of the High Court in its original civil jurisdiction.

The main question was between the consignors of merchandise from England to Calcutta and the banian of the consignees, as to whether the banian had a lien, enforceable against the consignors, in respect of advances made by him to the consignees, who had been declared insolvents. Upon the question of fact, whether, according to the evidence, a lien had been established by terms, express or implied, or was to be inferred from the course of dealing between the banian and the consignees, the Court below had, as to part of the consignors' claim, held that a lien existed, and displaced the right of the consignor. This was the subject of the present appeals, which also questioned the decision of the High Court as to the non-liability of the banian to account to the consignor.

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

In the first of the above suits (557 of 1882) Peacock & Co. alleged that they had consigned from Manchester to Tambaci and Son in Calcutta piece goods of specified marks, which were in the possession of the latter firm when it became insolvent in September 1882; that the defendant, as banian of the firm, refused to re-deliver the goods to the plaintiffs, who claimed a [575] declaration of their right to them and an injunction upon the banian.

The defence was that the goods were subject to the banian's lien, having been pledged to him for advances made to the firm. Peacock & Co. made a similar claim as to bales consigned upon the express terms that the proceeds were to be appropriated to meet their drafts, Tambaci and Son being interested only to the extent of one-third in the profits or loss to arise; also in respect of other bales consigned for sale on commission. They claimed that the bales should be returned or the proceeds of sale paid over to them. They also claimed an account from the banian of sales before the insolvency.

The defence of the banian was, *first*, that this suit should have been included in the former; and, *secondly*, as to the merits, that he had been for years the banian of the firm under an arrangement giving him a lien for advances upon the goods from time to time received and kept in his custody; that he did not know, nor could he have known, that the consignments were made for the proceeds to be realized on the plaintiffs' account, and he did not admit that they were so to be.

An amendment having been made, the Court dealt with the two suits as one.

The other (552 of 1882) of the two suits now in appeal, was brought by the banian against Graham and others, the agents in Calcutta of Peacock & Co., alleging his lien by agreement with Tambaci & Co., that the latter firm in August 1882 received particulars of shipment to them of 55 bales marked P. T. C. coming by S.S. *Knight of St. Patrick*, and 24 cases marked P. by the same ship; that bills of lading on the ship's arrival on 14th September 1882 were endorsed and delivered to the banian to enable him to obtain the goods and hold them; that on the banian applying to the ship's agents, delivery was refused, but was given to the defendants, Graham & Co., who claimed them on behalf of the consignors. The banian sued for a declaration of his lien and an injunction on the defendants. The defence was that the firm of Graham & Co. were entitled as agents for Peacock & Co. the consignors, on the insolvency of Tambaci on the 27th October 1882; that the 24 cases P. [576] were consigned for sale upon the express terms that the proceeds of sale were to be specially appropriated to meet the consignor's drafts, as also were the proceeds of the 55 bales P. T. C.; also that the firm had no power to pledge the goods or assign the bills of lading, except, subject to the terms of the consignment, of which the plaintiff at the time of the alleged endorsement to him of the bills had full knowledge, that Peacock & Co., anticipating the insolvency, telegraphed to Hoare, Miller & Co., the ship's agents, not to deliver to Tambaci and Son, or to their order, but to deliver to the defendants, which they accordingly did.

The Court (30th October 1882) ordered that the goods should be sold, the banian depositing Government securities to the amount of the sale-proceeds; such securities to be held in the joint names of the solicitors for the parties, and subject to the order of the Court. Between September 1882 and April 1883 were instituted five other suits, including one by the trustee in bankruptcy of Tambaci, to all of which the banian was

a party, the main issue in all being whether he was, by reason of the arrangements and course of dealing between him and Tambaci, entitled to a lien upon the merchandize consigned to that firm in Calcutta by merchants and manufacturers in England. In these suits questions were raised as to the title to the goods in the firm's godowns at the date of the insolvency; as to their title to the goods which had arrived in Calcutta, but had not been actually delivered; as to the consignor's right to an account in respect of goods previously sold, as to his right to stop *in transitu*. In January and March 1883 commissions were ordered for the examination of witnesses in England, taken at Manchester in the same year, it being agreed that the evidence should be applicable to all the suits. In May and June 1884 they were heard by a specially constituted Bench of two Judges (CUNNINGHAM and WILSON, JJ.). On the 2nd March 1885 one judgment, applicable to all the suits on the points common to all, was delivered, and afterwards the Court stated its conclusions in separate judgments dealing with each suit. The amended suit (No. 557 of 1882) was dismissed, so far as it sought for an account of the goods sold by the banian and **[577]** accounted for by him to his employors of an estimated value of Rs. 1,70,000. But it was held and declared that the banian was entitled to a lien upon bales P.T. and C., which were in the godowns of the firm at the time of its insolvency. In the second suit (552 of 1882) the Court held on the evidence that the banian's lien displaced the consignor's right to stop *in transitu*. As to both suits, the Court in the first, or general, judgment disposed of points common to all the suits, and stated the following:—"Paul Tambaci and Son carried on business, the father representing the firm in Manchester, and the son in charge of the Calcutta branch, until the death of the father in 1880, when the son left India and went to Manchester, where he directed the business alone, until, on the 27th October 1882, he was adjudicated a bankrupt in the Manchester County Court, on the petition of Peacock & Co., the present appellants. In April 1878, Tambaci in Calcutta employed Evangelo Vassilapolo, who from the departure of the younger Tambaci, until the latter became bankrupt in 1882, remained in charge of the Calcutta branch." The judgment then stated that there were three classes of piece-goods consigned, which the business of Peacock & Co., with Tambaci comprised, *viz.*, (1) goods shipped by Peacock & Co., to Tambaci and Son upon the terms that the proceeds of sale in Calcutta should be specially appropriated to meet the drafts drawn by Peacock & Co., in Manchester against the shipments. This class, called in these proceedings the "lien account goods," bore the mark P. T. C., borne by others also; (2) goods shipped by Peacock & Co., for sale in Calcutta by Tambaci on the joint account of themselves, the consignees and the manufacturers. This class, called in the proceedings the "joint account goods," was marked P. M.; (3) goods belonging entirely to Peacock & Co., and shipped by them for sale by Tambaci as their agent and on their account. This class was called the "pure consignment goods," and was marked P. The contents of two letters were then given. The first, dated 11th August 1875, contained the terms that the accounts of the shipments were to be kept distinct, and that the returns were to be remitted to Peacock & Co., for the protection of their drafts against the shipments. The letter continued thus:—"In consideration of our having made **[578]** this consignment at your request, you are to guarantee to us a clear profit of two per cent. on the transaction, which, with interest, we are to

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

include in our draft. You are to have all profit and bear all loss." The second letter, dated 10th August 1880, related to shipments on account of three firms; another firm, the manufacturers, taking part in the consignment to Tambaci as well as Peacock & Co. This was the joint account, called also the three-thirds account.

The "lien account goods," P.T.C., were dealt with as follows: Peacock & Co., having shipped them under the arrangement of the 11th August 1875, drew upon Tambaci and Son in Manchester at four months. The invoice sent by Peacock to the firm there was not passed on, as it was, to Calcutta, but a new invoice with the alteration that the goods were shipped on account and risk of Tambaci and Son was sent—a difference which appeared to the High Court to be material. Funds were regularly remitted from Calcutta to Manchester to meet the drafts against these P. T. C. goods, down to the time of the bankruptcy. In regard to this the Judges said—"The effect of this course of business appears to us to have been that upon the endorsement of each bill of lading of these P. T. C. goods by Peacock & Co., to Tambaci, the property in the goods represented by it passed to Tambaci, but subject to the terms contained in the letter of the 11th August 1875, accepted on each occasion by Tambaci, and embodied in the heading of the invoice. Those terms seem to us to constitute a trust or appropriation as to the disposition of the goods and their proceeds. As to these P.T.C. goods we are dealing with consignments by an agent to his principal, and it has, no doubt, been held that an agent who consigns to his principal, endorsing and making over the bill of lading to the latter, so as to vest the property in him, cannot, at the same time, by a mere reservation on his part alone, create a trust or appropriation in his own favour: *ex parte Banner* (1). But in the present case there is an express agreement between principal and agent, creating, we think, an appropriation binding upon Tambaci his assignee in bankruptcy and any other person taking with notice."

[579] The judgment then described the relations between Tambaci and Son and the banian, which began in 1873: "The business of a banian is one well known in India, and has been frequently considered by the Courts. It means generally a native agent employed by firms for the purposes of sales, collecting funds, or other transactions, which the banian, from his better information and greater familiarity with the market and the people, is more able than his employers to conduct with advantage. He may act for several firms at once. He is generally a *del credere* agent. He may, or he may not, advance money to his employers. If he does, there is no rule of law giving him any lien."

"At this time Tambaci and Son appear to have been, as indeed they were throughout, without capital, and to have subsisted on various forms of credit. One of these was a system of mutual accommodation between themselves and Peacock & Co. Besides the funds thus supplied, extensive loans were obtained from the local banks. It would appear that the intention of the arrangement with the banian was to treat him as the supplier of funds."

Articles of agreement, drawn up in the office of Messrs. Berners Sanderson & Co., were executed between the banian and Tambaci and Son on the 11th July 1873. These were an ordinary banianship agreement, under which the banian was to provide and pay servants, who were to be under the orders of the firm. He was to be responsible for the fulfilment

(1) L. R. 2 Ch. Div. 278.

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

of sales and payment. On the other hand, the banian was to be entitled to a commission on sales, and to a discount for cash. The agreement said nothing as to advances, and was not observed in practice. The evidence as to the course of business was then stated, and in a tabular form the value of the merchandize which arrived in 1882, with dates, and the advances made by the banian in that year down to September, were given.

The particulars of shipment advising the marks and numbers of the goods shipped were the first documents received by the Calcutta branch from the Manchester house of Tambaci. A week later, and usually a week or 10 days before the ship arrived, these were followed by the invoice and bill of lading. On the arrival of the ship the bill of lading was endorsed by Tambaci, or after his departure to England by his manager Vassilopulo, by an open [580] endorsement and handed to the banian, who then obtained delivery of the goods from the ship and had them sent to Tambaci's godowns. Offers to purchase the goods were made either directly or through the banian to Tambaci, or Vassilopulo, and if accepted were entered in one of the firm's books from which entries contracts of sale with the native dealers were made up and written out by the banian. The amount of the price was then debited in the bill book to the banian, as though he were the buyer, less his commission of $1\frac{1}{2}$ per cent. the name of the actual purchaser not appearing in any of the firm's books, and the debit to the banian being entered as of the due date. The delivery of the goods to the purchaser was effected by the banian, who received payment from the purchaser either in cash or by a "bazar" chitty or promissory note, payable, not to the firm, but to the banian. Payments and advances were from time to time made by the banian to the firm in such amounts as were required. Neither payments nor advances were made against or in respect of any specific sale. In the cash account between the banian and the firm the former was debited with the price of goods sold (as appearing in the bill book) and with interest thereon and credited with his payments and advances with interest thereon. The rate of interest charged by and credited to the banian was 12 per cent. The cash account so made up was adjusted at the end of each year. On the 31st December 1881 there was shown by the account for the preceding year as so adjusted to be due by the firm to the banian Rs. 6,90,042. At the end of September 1882 the balance had been reduced, by the excess of sales over advances and payments, to Rs. 3,31,262. From the 1st August 1882 to 1st September 1882 the sales debited to the banian amounted to Rs. 92,000; and from the 1st to the 19th September to Rs. 4,12,000; while his advances and payments from the 1st August to the 19th September amounted only to Rs. 2,70,003.

The Court then considered the evidence bearing on two questions—*First*, whether the banian had such a lien on the goods which were in the godowns, or of which the bills of lading had been delivered, as justified him, in September, in detaining them by way of security for any balance due to him, on the taking of a general account between him and Tambaci. *Secondly*, whether, [581] if he had such a lien, he could enforce it against the consignors of the goods.

The banian's case was that from the outset in 1873 his advances were to be secured by the goods of which he had the custody; that in 1875 not only the goods in the godowns, but goods in transit were to be treated as security; that in 1882 this was made more explicit, and the particulars of the goods to arrive were looked upon as security. And as to the evidence in

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

support of this, the Court said: " We have, besides the directs oral testimony, certain corroborative facts, the value of which it will be necessary to determine. These are (1) the keys of the godown being placed in the custody of the banian's servant; (2) the fact of the Custom House sircars and godown sircars being his servants; (3) the bazar chitties being made out in his name. As to these it is contended, on the consignor's behalf, that they are equally consistent with the view that the banian was merely the responsible custodian of the goods and the guarantor of their price when once sold. There is another set of facts, *viz.*, (4) that policies of insurance, covering the goods in the godowns, were delivered to the banian; (5) that the bills of lading were upon arrival endorsed and delivered to him for the purpose of giving effect to his security; and (6) that the durwans were the servants of the banian. These allegations the consignors meet, not by questioning their cogency if true, but by denying their truth."

"As to the original agreement, we think that the balance of testimony is in favour of its having been, in the main, such as the banian describes, and that this view is supported by the probabilities of the case. The evidence of the banian himself and Vassilopulo is very distinct, and the corroboration afforded by Mr. Sassoon, whose trustworthiness was unimpugned, is most important. Of the circumstances adduced as corroborating the plaintiff's story, we think that the facts that the keys were in the plaintiff's custody, and that his godown sircars had the clearing of the goods are, at least, as much in favour of the view that the goods were placed in his possession by way of security as of any other view of his position; while the fact that the bazar chitties, instead of being made out in the name of the firm, were made out in the name of the banian, appears to us of some significance [582] as showing the view taken of his position; though, as he was responsible for the price of the goods from the moment of their sale, there was nothing unnatural, apart from any question of security, in the chitties being made out in his name. As to the question of the durwans, we think that the evidence fails to establish in any satisfactory way the existence of a separate set of durwans acting on behalf of the banian.

"As to the bills of lading, we are not satisfied that they were placed in the hands of the banian or his servants at any time prior to the arrival of the goods; so that there is nothing in the fact of the bills of lading being in his custody which, necessarily, indicates that the goods to which they referred were pledged to him, or that he received them for any other purposes than that of obtaining clearance. On the other hand, there can be no doubt that from January 1882, at any rate, the firm was anxious to give to the banian any available security at the earliest possible moment, and certainly gave him to understand that all goods, particulars of which had reached them, would be available as security for his advances. Our view, accordingly, of the evidence as to the bills of lading, is that standing by itself, it proves nothing as to the banian's security.

"Taking it along with the other facts, we think that the proper inference is that the bills were handed over for the purpose of carrying out the whole arrangement between the parties. As to the policies of insurance, we think that the balance of evidence is in favour of the view that they were handed over by way of completing the security afforded to him by the possession of the goods, in the same way as they were transferred to the bank in the case of a loan.

"The conclusion at which, on the whole of the evidence, we have arrived is that from the outset the agreement was that the goods in

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

Tambaci's godowns should be security for the advances made by the banian to the firm; that at some subsequent date it came to be understood between the parties that not only the goods in store, but goods, particulars of which had reached the firm, should be security for the balance from time to time due; that this understanding was made to assume a more definite and precise form at the conversation between Vassilopulo and the banian in [583] January 1882, after which time the plaintiff's fresh advances were confined, as nearly as possible, to amounts equivalent to the value of the goods, estimated as Rs. 250 per bale, particulars of which were received by the firm; and that from this time there is discernible a general correspondence between the particulars received by the firm and the advances by the banian."

"The goods, however, thus pledged must, in our opinion, be held to have become security, not only for the sums advanced at the time upon them, but for the entire existing liability of Tambaci to the banian, and for any future liability of a like nature until they were disposed of in regular course. Their price then went to reduce the general balance due by Tambaci to the banian."

In considering how far the banian had notice of the rights and interests of the several persons in Manchester, a distinct question arose with respect to each class of goods. The difference between the modes of dealing with the several classes of goods threw light upon the question of notice as to each. And the Court was of opinion that the evidence showed an actual and intentional holding forth, and representation, to all concerned of Tambaci as the owner of the goods. It found that as to the P. T. C., or lien account goods, the banian had no notice, or knowledge, of the arrangement set forth in the letter of the 11th August 1875, or that these goods were subject to a trust or appropriation of any kind. The judgment added that the probability was that the banian looked at the goods in the godowns, not merely as an indication of the prosperity of the firm, but as a tangible security for the money which he had advanced.

In the first judgment the Court, disposing of the points raised in suits 557 and 552 of 1883, held that Peacock & Co., were entitled in respect of the "joint account goods" and the "pure consignment goods," but that in respect of the "lien account goods" their title was displaced by the banian's lien. It held, however, that the banian, who had already accounted to the consignee, was not liable to account to the consignor. Afterwards, giving judgment in each suit separately, the Court stated the issues in the first of the above suits, and proceeded as follows :—

"*First*, on the general question as between Tambaci and the banian, whether the latter had a lien on the goods in the godowns we have already expressed our opinion."

[584] "*Secondly*, whether as to each class of goods, that the lien is good against Peacock & Co., regarding them as the owners.

"*Thirdly*, whether in respect of the P. T. C. goods, Peacock & Co., are entitled to sue.

"*Fourthly*, a similar issue as to a one-third share in such of the P.M.C. goods as were shipped on the three-thirds account.

"*Fifthly*, whether the banian is liable to account to Peacock & Co. for the proceeds of goods sold and already accounted for to Tambaci.

"With reference to the second question, we have given our reason for holding that in the case of the P-marked goods, the P. T. C. and the P.M.C., the banian knew them to be Peacock & Co.'s goods, and knew of the

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

interests of the several persons concerned in them. It remains to consider whether his lien is protected by s. 178 of the Contract Act. It is so, unless the circumstances were such as to raise a reasonable presumption that Tambaci was acting improperly in making the pledge he did. We are far from saying generally that the knowledge by a pledgee that his pledgor is not the owner of the goods pledged, but an agent for sale, of necessity invalidates the pledge. To say this would be to ignore the 'usual and ordinary course of business' on which the 5 & 6 Vict., c. 39, was based. But the pledge, to be good, must be one presumably made for the benefit of the principal. It can never, we apprehend, be right for an agent to pledge the goods of a principal to secure the balance due by him on his own general account with the pledgee. In such a case knowledge that the pledgor is an agent is therefore, we think, knowledge that in so pledging he is acting improperly. In *Leuckhart* v. *Cooper* (1) a custom giving such a general lien was held to be bad in law. And in *Kaltenback* v. *Lewis* (2) the reasons why such a general lien is objectionable are clearly pointed out. We think, therefore, that as to the P. T. C. and P. M. C. goods, the title of Peacock & Co. must prevail.

"The case as to the P. T. C. goods is different. Those goods, as we have said, we find to have been Tambaci's goods, subject to a trust or appropriation of the goods and their proceeds. We have **[585]** found also that Baijnath had no notice of this arrangement. It follows, in our opinion, that his lien upon those goods is valid."

"The special point raised as to the P. T. C. goods is this. Those goods were not actually the goods of Peacock & Co., but of a manufacturer on whose behalf they consigned them. And it was contended that they cannot maintain this suit, at any rate without the owners being made parties to the suit. As an objection to the suit for want of parties, we cannot entertain this contention. Any such objection must, by s. 34 of the Procedure Code, be raised before the first hearing. This was not so raised. So that on this point we have only to say whether the plaintiffs have shown any cause of action in themselves as against Baijnath. We think they have. As between Peacock & Co., and Tambaci, the former were the consignors of these goods and the principals in the transaction; Tambaci could not have disputed their title. Baijnath who takes from Tambaci, and with notice, cannot, we think, stand in any stronger position than Tambaci would have stood."

"A similar point was raised with regard to the manufacturer's one-third share of such of the P. M. C. goods as were shipped on what was called the three-thirds account. To this there seem to us two answers, one,—that which we have just given as to the P. T. C. goods; secondly those goods were specifically appropriated to meet the bills drawn against them. And that is a sufficient equitable interest to give a right to sue. —*Lutscher* v. *Comptoir d'Escompte de Paris* (3), *Ranken* v. *Alfaro* (4)."

"The question which remains is as to the claim of Peacock & Co., to hold Baijnath accountable for goods already sold and accounted in due course to Tambaci."

"As to this, we think the claim cannot be supported. There are only three grounds, so far as we are aware, on which a principal has been held entitled to sue a sub-agent employed by his agent."

(1) 3 Bing. N. C. 99.
(2) L. R. 24 Ch. Div. 54 at p. 59.
(3) L. R. 1 Q. B. Div. 709.
(4) L.R. 5 Ch. Div. 786.

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

"The first is title, whereby he may follow his property in the hands of the sub-agent if he finds it there. This was the ground of decision in the House of Lords in *Mildred* v. *Maspons* (1). And on this ground we have held Peacock & Co., entitled to recover certain of their goods."

[586] "The second ground is privity of contract. This was the ground of decision in the Court of Appeal in the case just referred to. There is no such privity here. The position of the banian of a Calcutta firm, which firm receives goods for sale on behalf of principals in Europe, was considered in 1863 in *Orr Ewing* v. *Govinchunder Sein* (2). That was a suit by Glasgow manufacturers, who had consigned goods to a Calcutta firm for sale, against the banian of the Calcutta firm, in which the plaintiffs sought to recover from the banian the price of the goods. He had sold the goods and received the price, and had been debited with the amount in the general account between him and his employers, in exactly the same manner as the banian was in the present case. At the trial the Court found, amongst other things, that there was no privity between the banian and the Glasgow house. A rule *nisi* having been obtained to set aside the verdict or for a new trial on several grounds, that rule was discharged. In the judgments the position of a banian was much considered. Thus Sir L. Peel, C.J., says at p. 539 :—

" 'The mode of dealing between the factors and their banian appears to have been this : They looked to him for payment, and when he had made the sales and the monies due were payable, but before the price was paid, he was debited with this price, and gave credit to them in account for the amount minus his commission.

" 'The defendant was not the buyer of the goods, though the Calcutta house looked to him substantially for the price of them. The form of the contracts and commission show this. According, then, to this course of dealing, his receipts of the money on the sales effected by him as banian would be a receipt of money not to the use of the foreign principals, but simply a receipt according to the course of dealing between him and his principals, the Calcutta house, and independently of any pledge or lien under the Factor's Act.'

" And again, at p. 544 :—

" 'The position of things here is peculiar ; the interposition of such a person as a banian between the factor and the buyers is not known in England ; it is not universal here, though more common, [587] and it must be presumed that one who is in the habit of remitting goods to this market for sale by an European house, sanctions so very general and almost universal a course of trade, which the peculiar state of circumstances renders, if not absolutely necessary, yet convenient and expedient. Such a person cannot properly be described as a servant or clerk, though the general presence of him at the place of business of his principal might seem to give his connexion with the agent at first view that appearance. He is rather a sub-agent of a peculiar kind.' "

" ' The banian in the case, by the course of dealing between him and his principals, became liable as a *del credre* agent. Consequently, he could be called upon to pay, though he had been guilty of no fault or neglect. The giving credit in account between him and his principals, the agent, was, in the absence of fraud, equivalent to payment, and therefore his receipt of the moneys after such accounting was really, by virtue of the bargain between him and the agents, a receipt to his own use and not in

(1) L. R. 8 App. Cas. 874 = 9 Q. B. D. 530. (2) 1 Boul. 534.

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

any manner in fraud or derogation of the right of the distant principal, but in pursuance of a contract effected within the scope of his own agent's authority and for the benefit of the principal himself.'"

"This case is really much stronger than the many cases in England, in which it has been held that no privity existed between foreign principals and English sub-agents, such as the *New Zealand and Australian Land Company* v. *Watson* (1), *Kaltenback* v. *Lewis* (2), because the banian is in the permanent employment of the Calcutta firm."

"The only remaining ground on which a sub-agent could be made liable to account to the principal for goods sold through the sub-agent is fraud, or something equivalent to fraud. The law applicable to India upon this point is now embodied in s. 192 of the Contract Act. This section, which seems to us for this purpose substantially in accordance with the law in force before the passing of the Contract Act, says :—The sub-agent is responsible for his acts to the agent, but not to the principal, except in cases of fraud or wilful wrong."

[588] "The only question, therefore, is whether any fraud of wilful wrong has been shown. We cannot see the slightest pretext for such an imputation. So far as the sale and delivery of the goods is concerned, that was clearly in accordance with the object for which they were sent to Calcutta. As to the banian's mode of accounting for the price, we have not to inquire whether if he had been *prima facie* accountable to Peacock & Co., either for the price as purchaser or for their sale-proceeds as their agent, he could have discharged himself by showing a settlement in account with Tambaci. The question is, he not being *prima facie* accountable, whether anything has occurred to make him so. Now the mode in which he accounted was that in which he was bound to account, and had been bound ever since his employment commenced in 1873. It was a mode of dealing which we know from *Orr Ewing's* case, already cited, to have been prevalent in Calcutta for 30 years at least. As between the banian and Tambaci the course of business went on for nine years, during which time the banian made very large advances on the faith of it, a due proportion of which found its way into Peacock & Co.'s pocket. Throughout those years the banian never had reason to suppose that any remittance to England was in arrear. And now we know, from Peacock & Co.'s own witnesses, that their remittances were received with almost absolute regularity down to a date immediately before the bankruptcy. A clearer case of perfect good faith it is difficult to imagine.

"It follows that, in our opinion, Peacock & Co., have shown a good title to the P. T. C. goods ; that to those of the P. M. C., which were their's alone, they are entitled on that ground, and that to the remaining P. M. C. goods, those on joint account and those on the three-thirds account, they are entitled, in part, by virtue of ownership, and as to the whole, by reason of specific appropriation to meet their bills of exchange. Under the arrangements made for sale of the goods, the banian will have to account to Peacock & Co., for those goods. As to the P. T. C. goods, the banian's lien is good against Peacock & Co. ; and the claim of the latter to an account of goods sold and accounted for to Tambaci fails altogether."

[589] In the second of the above suits, *Baijnath* v. *Graham*, the separate judgment was as follows :—"This suit relates to certain of the goods which arrived in Calcutta by the *Knight of St. Patrick* on the

(1) L. R. 7 Q. B. D. 374. (2) L. R., 24 Ch. Div. 54 = 10 App. Ca. 627.

14th September 1882. The goods on board of her consisted of 10 bales P. X. T., 8 bales P. T. C., 55 bales P. T. C., and 24 cases P. The bills-of-lading were endorsed and made over to the banian, and he obtained delivery of the 10 bales P. X. T. and of 7 bales out of the P. T. C."

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

"But before he could obtain delivery of the remaining goods, they were stopped by Graham & Co., acting under instructions from Peacock & Co. About the remaining one bale out of the eight of P. T. C., there is no dispute the banian is clearly entitled to it. The controversy is as to the 55 bales P.T.C., and the 24 cases P. As to the latter, the reasons which we have given in Peacock & Co.'s suit for holding that the banian had no lien on the goods, which he knew to be theirs, would apply to these goods had they been in the godowns. And he certainly can have no better title because they were stopped before they reached the godowns."

"With regard to the P. T. C. goods, an issue arises entirely different from any that has arisen in any of the previous cases, *viz.*, whether, as between the banian and Peacock & Co., the latter had a right to stop the goods *in transitu.*"

"The position of Peacock & Co., with respect to these goods we have already pointed out. They were agents who bought in Manchester with their own money or on their own credit, and shipped to Tambaci's house in Calcutta. We think therefore, that according to the rule laid down in *Feise* v. *Wray* (1), and often acted upon since, they may, for the present purpose, be regarded as vendors with the right to stop *in transitu.* It was suggested, indeed, that the words 'a seller' in s. 99 of the Contract Act alter the law so as to exclude persons in such a position. But we do not think that is so. It was not denied that all other conditions requisite to entitle Peacock & Co., to stop *in transitu* existed; nor was it questioned that they did, in fact, stop the goods before the *transitus* was over. The only question raised was, whether the bill of lading of these goods was endorsed to **[590]** the banian under such circumstances as to defeat the right to stop.

"The nature of the advances has been already considered. The legal effect of the transaction is now governed in this country by s. 103 of the Contract Act:—'When a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge to secure an advance made specifically upon it in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods *in transitu.*'

"In connection with pledges and liens one distinction is familiar—the distinction between a pledge for an existing debt and a pledge for a new advance. The words 'an advance made upon it' plainly require that the pledge of a bill of lading, in order to defeat the right of stoppage *in transitu*, shall be as security for a new advance, not for a pre-existing debt. The Legislature has thus adopted for this country the view taken by the Privy Council in *Rodger* v. *Comptoir d'Escompte de Paris* (2) and *Chartered Bank of India* v. *Henderson* (3); and not that since taken by the English Court of Appeal in *Leask* v. *Scott* (4).

"But the section requires the advance for which the bill of lading is pledged to be 'made *specifically* upon it.' The construction of these words is by no means free from doubt. It was argued that they are pointed at the distinction between a particular lien on certain goods for a particular

(1) 3 East, 93.
(2) L. R. 2 P. C. Cas. 393.
(3) L. R. 5 P. C. Cas. 501.
(4) L.R. 2 Q. B. D. 376.

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

advance, and a general lien upon all goods to secure advances generally, or a floating balance; and it was contended that they require that there shall be a particular advance of a sum or sums on the security of the particular bill of lading in question apart from any other security. If this were the meaning of the words, the condition is not complied with in the present case. But we do not think the words of the section constrain us to take so strict a view; and the policy of the law is to protect *bona fide* dealings with bills of lading in the ordinary course of business. We think the requirements of the section are complied with when it is shown that any sum is advanced on the [591] terms that it is to be secured by the particular bill of lading in question or the goods represented by it, though it may be secured by other bills or goods also, and though the bill of lading may have been intended to be security not only for the particular sum or sums advanced upon it, but also for some antecedent liability. Reading the section in this sense, we think that the banian is entitled to hold the 55 bales of P. T. C. goods as security for all the sums advanced by him after the arrival of the particulars of shipment by the *Knight of St. Patrick.*"

"We intimated at the close of the hearing that, as the question of costs might give rise to considerations not free from difficulty, we should make no order on that subject without giving the parties an opportunity of being heard. The cases can be set down for argument on this point on the application of any of the parties."

"Lastly, as the goods have been dealt with under arrangments between parties, and it is possible that some unforeseen difficulty may arise in the application of our decision, we think it well to reserve liberty to apply to all parties in all the cases."

The matter of granting leave to appeal in the two suits only was disposed of in *Baijnath* v. *Graham* (1).

Mr. *H.H. Asquith*., Q. C., Mr. *W. C. Smyley*, and Mr. *J. Roskill*, for the appellants:—The Court was wrong in the first case in excepting the P. T. C., or "lien account," goods from the consignments as to which it had correctly allowed the *prima facie* right of the consignor to prevail. This exception was made on the erroneous ground that the consignor's right had been displaced by the banian's lien. The Court below had also been wrong in the second case in holding that the lien alleged by the banian prevailed over the right of the consignor to stop *in transitu* the bales coming by the *Knight of St. Patrick.* Its finding that a lien had been agreed to was against the weight of the evidence; and even if, as between the banian and the firm employing him, the former had a lien for his advances, and on general account, that lien should not have been held to be of any avail as between the banian and the consignor. Again, as to the goods P. T. C., or "lien account" goods, the Court below should have found that the banian had [592] notice of the consignor's interest in them, and should have held that, if the consignor had attempted to pledge them, it would have been invalid. As to the goods coming by the *Knight of St. Patrick*, the appellants had made good their title, and the Court ought to have held that the bills of lading had not been transferred under such circumstances by the consignee as to defeat the right of the consignor to stop *in transitu*. It was also argued that the High Court should have held that the banian was liable to account to the consignor for all the proceeds of the goods claimed by the appellant that had been sold by him before the insolvency of the consignee.

(1) 11 C. 740.

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

The view of the Court below of a banian's position might be accepted, *viz.*, that although he had no lien by custom having the force of law, he might have one by agreement with his employer as against him. But the Court in finding him entitled to the security of the goods whether in Tambaci's godowns, or on their way, had mistaken the effect of the evidence. No lien was presumable from the expressions used or from the course of dealing. And no part of the consignments had been pledged to the banian within the meaning of s. 178 of the Contract Act, 1872. Also, throughout, there never had been a time when the goods had been transferred, with intent to pledge them, from the possession of Tambaci to that of the banian, and yet to make a valid pledge there should be either actually or constructively such a transfer. And, again, as the banian, in fact had notice of the interest retained by Peacock & Co. as against the consignee in the lien account goods P. T. C., a pledge, had there been one would have been invalid, for the reason that the banian would not have been acting in good faith. He knew that Tambaci's business involved the receipt of goods for sale belonging to other firms. He knew that it was a consignment business, in which the goods from Peacock & Co. on "joint account," or as "pure consignments," were not Tambaci's; and the Court found him to have known that as to these classes of goods he had no lien. In the case, however, of the "lien account goods," having regard to the fact that P. T. C. were numbered consecutively with Tambaci's own goods bearing the same mark, the Court found that there was no express notice to the banian of the consignor's interest therein, and concluded that the banian's lien was **[593]** protected by the Contract Act and must prevail. This finding of a lien upon these goods was wrong. The banian had no right to assume that all the goods marked P.T.C., were those in which Tambaci alone was interested. The invoices sent to the Calcutta house on the occasion of each shipment disclosed the consignor's interest, and the banian was thus put upon inquiry. Even if these goods had been pledged within s. 178, which was not admitted, the pledge was not protected, inasmuch as the alleged pawnee was not acting in good faith; or at least was acting under circumstances which were such as to raise " a reasonable presumption that the alleged pawnor was acting improperly. Also the proceeds of the sales effected by the banian before the insolvency ought to be accounted for to the consignor, even if already accounted for by the banian to his immediate employer. The High Court had held the contrary; but this was inconsistent with its having held that the appellants could recover all the goods on "joint account" and on "pure consignment" which were in the godowns at the date of the suspension. The appellants were no less entitled to follow the sales and recover the proceeds of goods than to recover the goods themselves while still remaining unsold. The particulars of shipment had been shown to the banian, not that he might consider each as supporting and becoming security for his advances, but only that he might have early information of goods to arrive, and might effect the sales as early as he could. The bills of lading also were not made over to the banian until the arrival of the ships; and then, not for the purpose of vesting them, or the goods which they represented in him, but simply to comply with the requirements of the ship's agents, and to enable him to obtain delivery of the goods.

Between the 1st and 19th September 1882 there were forced sales and deliveries to the amount of two lakhs of rupees, pressed upon purchasers to get payment before the usual time. This would have involved

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

purposeless trouble and loss if the banian had had the lien claimed. The existence of such a lien was not reconcilable with many proved or admitted facts.

As to the right which the appellants claimed to stop *in transitu*, that must prevail unless the banian had a lien on the specific goods. No lien as against Tambaci and Son would be of any avail as [594] against Graham & Co. claiming, as the consignors, the 55 bales marked P. T. C. on their way. This right had not been defeated by the endorsement of bills of lading to the banian, who had notice of the vendor's title. Particulars of shipment reached Calcutta on August 26th. The ship arrived on 14th September. The bills of lading were endorsed on the arrival of the ship. There was no evidence that the advances of the banian were made specifically against or on the security of the goods included in the particulars of shipment. They were all made prior to the endorsement of the bills of lading; and even if the banian had had a right of lien, it was prevented from operating upon the 55 bales by the stoppage *in transitu*. In any case, as to all goods sold by the banian in August and September 1882, the proceeds ought to be accounted for to the appellants; and so much of the judgment and decree of the lower Court as declared that the banian was entitled to a lien on the P. T. C. goods, and dismissed the claim to an account of the goods sold, ought to be reversed. The following cases were referred to:—

Ex parte Banner (1); *Evans* v. *Trueman* (2); *Kaltenback* v. *Lewis* (3); *Kemp* v. *Falk* (4); *New Zealand and Australian Land Company* v. *Watson* (5); *Spalding* v. *Ruding* (6).

Mr. *J. Rigby*, Q.C., and Mr. *E. F. V. Knox* (with whom was Mr. *R. S. Wright*) for the respondents:—By agreement, confirmed in 1875 and in 1882, the banian had, within the meaning of s. 171 of the Contract Act, IX of 1872, a lien on the P. T. C. goods in the godowns of Tambaci as a security for his general balance of account. By the course of dealing the banian was in the position of a banker lending money to the firm which employed him, and he had a banker's lien under s. 171 of that Act. Also the firm—no trust attaching to their control over the goods, and all the parties acting *bona fide*—had made a valid pledge to the banian within the meaning of the above Act. As to the banian's having had notice of the mode of consignment, and of the interest of the consignors, with the result that no valid lien in his favour [595] could have been effected between the parties by agreement, this view was contrary to the facts rightly found upon the evidence by the Court below. There was nothing to show that the banian had any notice of the terms of consignment of the P.T.C. goods, and it had been found that he had none. There had been, either actually or constructively, a delivery to the banian; for the goods had been placed, with intent to transfer possession to him, under his control, by the making over the keys to him, the endorsement of the bills of lading, and other acts. In like manner, when there was a temporary pledge of part to the Bank of Bengal, possession had been given to the Bank. What was questioned was that there was any trust attaching to the goods which would prevent a pledge. The judgments in *Kaltenback* v. *Lewis*(3) were referred to. It was the general principle of justice that gave power to the consignee *bona fide* to raise money on the goods and this had

(1) L.R. 2 Ch. D. 278.
(2) 1 Moo. and Rob. 10.
(3) L.R. 24 Ch. D. 54 = 10 App. Cas. H.L. 617.
(4) L.R. 7 App. Cas. 573.
(5) L.R. 7 Q.B.D. 374.
(6) 12 L.J. Ch. (N.S.), 503.

been the origin of the English Factors' Acts. Reference was made to Acts 4 Geo. IV., c. 83. 6 Geo. IV. c. 94; 5 and 6 Vic., c. 39; 40 and 41 Vic., c. 39, for which had been substituted the Act of 1889, 52 and 53 Vic., c. 45, dealing with dispositions by mercantile agents, and advances by consignees, and their liens. The agent's disposition was valid when acting in the ordinary course of business, the taker acting in good faith, without having, at the time of the disposition, notice of the agent's want of authority. Reference was made to—

Evans v. *Trueman* (1).
Cole v. *North-Western Bank* (2).
Leuckhart v. *Cooper* (3).
Rodgers v. *Comptoir'd Escompte de Paris* (4).
City Bank v. *Barrow* (5).
Leask v. *Scott* (6).

Section 178 of the Contract Act was dictated by the same considerations of equity. Under it there had been a valid pledge.

[596] As to the claim for an account. To this the banian was in no way liable, he having accounted for the proceeds of sale to the firm that had employed him. With that firm he had contracted, not with the consignor; and the true answer to this part of the claim was given in the judgment of Sir L. Peel, C.J., in *Orr Ewing* v. *Govindchunder Sen* (7), that there was no privity of contract between the consignors and the banian. All the sales effected by the latter were valid as against the consignors within the first exception to s. 108 of the Indian Contract Act.

As to the right of stoppage *in transitu*, the transit had ceased when the goods were at the disposal of Tambaci. The consignors had no right to stop the goods under s. 99 of the Contract Act, 1872, because (*a*) they were not "seller" of the goods within the meaning of that section; also (*b*) they had drawn on the firm of Tambaci for the price of the goods, and their bills had been accepted, which acceptances had not been dishonoured.

Again, the advances on, and the endorsement over, of the bills of lading amounted to an assignment by way of pledge. This had been specifically made upon the bills of lading, in good faith, within the meaning of s. 103 of the Contract Act, 1872. If a present consideration was under that section necessary, and if here not present in actual time, the endorsement over of the bills of lading related to the time when the advance was made. The judgments and decrees of the High Court should be affirmed.

Also were referred to—

Maspons v. *Mildred* (8).
New Zealand and Australian Land Company v. *Watson* (9).
Chartered Bank of India v. *Henderson* (10).
Kaltenback v. *Lewis* (11).

Mr. *H. H. Asquith*, Q. C., replied. Their Lordships' judgment was afterwards, on 24th January 1891, delivered by

---

(1) 1 Moo. and Rob. 10, per Lord Tenterden as to agent's knowledge.
(2) L.R. 10 C.P.Cas (Exch. Ch.) 354; in error from L.R. 9 C.P. 470.
(3) 3 Bing. N.C. 99.
(4) L.R. 2 P.C. 393.
(5) L.R. 5 App. Cas. 664.
(6) L.R. 2 Q.B.D. 376.
(7) 1 Boul. 534.
(8) L.R., 9 Q.B.D. 530=L.R. 8 App. Cas. 874.
(9) L.R. 7 Q.B.D. 374.
(10) L.R., 5 P.C. Cas. 501.
(11) L.R. 24 Ch. D. 54=10 App. Cas. 627.

1891
JAN. 24.

PRIVY COUNCIL.

18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

JUDGMENT.

LORD HOBHOUSE—These suits form part of a group of seven suits instituted for the purpose of deciding questions arising out [597] of the failure of Caralambus Tambaci, who carried on business under the firm of Paul Tambaci and Son. The suits were disposed of by the High Court of Calcutta simultaneously upon evidence and arguments common to the whole. The decrees have not been challenged in appeal except so far as they are adverse to the interests of Messrs. Peacock, Mollison & Co. who are in effect the appellants in both the suits now the subject of these appeals.

The facts of the case have been so fully, accurately, and luminously stated in the judgment of the High Court, and, as stated there, have been so entirely relied on by the counsel, and so repeatedly referred to during several days of argument, that their Lordships do not find it necessary to make any fresh preliminary statement, but will refer to the material facts, as and when they are required, to explain the conclusions arrived at.

The principal question in the High Court, and the only one which their Lordships propose to deal with in these appeals, is the question whether Baijnath, or, as he is usually called, "the banian," was entitled to the lien which he claimed against merchandise in the godowns of Tambaci, and against other merchandise which at the time of Tambaci's suspension of payment was on board ship, consigned by Peacock to Tambaci, and which Peacock claimed the right to stop *in transitu*. The effect of the High Court decrees is to deny the banian's claim of lien over goods marked with certain devices, of which the P. mark may be taken as an example, but to affirm this right over goods marked P. T. and C. The learned Judges were of opinion that he had stipulated for a lien over the whole, but that as to all except the P. T. and C. goods he knew that they were consigned by Peacock under express agreements, that the proceeds should be remitted to meet bills drawn against them, and therefore that Tambaci could not properly pledge those goods as security for the balance of a general current account.

The High Court rightly states that there is no rule of law giving a lien to a banian, neither is there any custom to that effect. If he claims one, he must prove it either by showing some express agreement, written or verbal, that he shall have a lien, or some course of dealing from which it must be implied. The banian [598] relies on both these methods of proof, but he does not allege that there was any written agreement.

The express agreement relied on being only verbal, it is important to see how the banian states it. His plaint was the first step in the litigation, and in it he states, in general terms, that up to the year 1882 he made advances to Tambaci on the security of a lien on the goods in his godowns. With respect to the year 1882, he states with more particularity that he refused to make further advances without further security than the goods in the godowns afforded, and that he was assured by Vassilopulo (who was then managing the affairs of Tambaci in Calcutta) that more goods were coming out, and that in effect he made his advances thenceforward on the security of all the goods shipped from England, whether they had arrived or not.

In his examination on interrogatories the banian was asked whether he did not become Tambaci's banian under the agreement of the 11th

July 1873, and whether that agreement had been rescinded or altered. His answer is to the effect that he was employed under that agreement, and that it was never expressly rescinded, but was modified in some respects. The most important modification was that, whereas the agreement provides that the banian shall deposit with Tambaci Rs. 25,000 in Government securities or cash by way of security against his defaults, it was "shortly after the execution" agreed, at the request of Caralambus Tambaci, that the banian should, instead of the deposit, advance him Rs. 25,000 in cash, with interest at 12 per cent., and on the security of the goods in the godowns.

He then goes on to state that "very soon after the execution" of the agreement, Caralambus Tambaci proposed to him that he should advance funds to the firm from time to time upon the security of the lien and charge upon all goods, for the time being in the godowns of the firm, and that advances were made on that footing.

In the beginning of the year 1875, the banian says he found that Tambaci was enlarging his business, and required more advances, and he asked for a fresh written agreement giving him security, but Caralambus Tambaci put him off by saying that the word of a gentleman was sufficient and that he need not be afraid, [599] "as all the goods in the godowns would remain in my possession as a pledge." At the same time, he says, it was agreed, amongst other things, that his advances should carry interest at the rate of 12 per cent. per annum. As regards the transactions of the year 1882, he affirms the allegations made in his plaint.

The plaint was filed in September 1882; the banian was examined on interrogatories in June 1883; and in August 1883 Caralambus Tambaci was orally examined in England, and cross-examined at great length by the banian's counsel. He denied that there was ever any agreement that the banian should have a lien on any goods for his advances. At the trial of the cause in May 1884 the banian was orally examined. He had then the advantage of knowing Tambaci's oral deposition, whereas Tambaci knew only what the banian had said upon interrogatory, and being in England, could not be recalled to speak to any new matter.

In point of fact some very important new matter is introduced by the banian at the trial. His account now is as follows:—"One day" (which may be taken as being the 9th of June 1873, though it may be a day or two earlier, but the exact day is not material) he was introduced to Tambaci at the office of Mr. Sassoon, and Tambaci asked him to be his banian in the same way in which he was acting for Sassoon. They arranged to go more fully into the matter at Tambaci's house, and Tambaci went away. Sassoon said nothing on that occasion. "One day," probably the next day, or (say) the 10th June, the banian went to Tambaci's house. "I asked him, 'How do you wish the business to be done?' He said he would give me a commission of $1\frac{1}{2}$ per cent., and interest at 12 per cent. per annum, 'and I will take advances from you on my goods.' He further said this, he was carrying on business on a very limited scale, and only required small advances, but hereafter he intended to extend his business, and then he would require larger advances. Then I said to the sahib, 'State to me the nature of the business more particularly.'" Then it was arranged that the banian should have the key of the godowns; that his men should be in charge of the godowns; that the chitties for goods delivered should be made out in his name, "in respect of the advances, which I shall have made on these goods;" that the

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 651.

[600] godown sirkar was to be his man, and the durwan and the cash babu. The two parties then visited the godowns together, and the banian agreed to put a man in charge. The next day (say the 11th June) they met again at Sassoon's office, and "had all the conversation about the terms over again; commission chitty, interest, advances, mode of delivery, and everything over again." This took place in Sassoon's presence, and he joined in the discussion, and said that those were the terms on which the banian was doing business with him. On the 12th June he paid the Rs. 25,000 to the Agra Bank to redeem goods in pledge; and it was probably on the 11th that he began his business as banian.

Sassoon speaks to the two meetings at his office, and he confirms the banian as to the nature of the agreement; but he says that the terms of it were all settled at the first meeting through his intervention, both because Tambaci wished to engage on the same terms on which Sassoon did business with the banian, and because he acted as interpreter when necessary. At the second meeting he says only that he learned they had agreed with each other and commenced the business.

When weighing the conflicting lines of evidence, the High Court addresses itself to the question of antecedent probability. The learned Judges think it improbable that a man like the banian would give such large credit without security to a firm situated as Tambaci's was in 1873. But it must be borne in mind that the business was very greatly enlarged after the banian's employment, and wholly by means of his advances; that besides his commission he got interest at 12 per cent., an amount of 4½ above the average Bank rate upon pledges; and that this charge of interest so completely absorbed the assets of the business that in January 1882 Vassilopulo calculates that the firm is insolvent by exactly the amount it has paid for interest during 1880 and 1881. It may be true that a man supplying money as the banian did, would, though he looked to profit on sales, expect a higher interest than the Bank which made specific advances on specific goods, but hardly so much higher. Their Lordships do not see the *a priori* improbability of the opposite theory, that the banian was glad to carry on a great trade with the credit and connection of Tambaci, of which the whole proceeds, except so much as was necessary for the actual [601] living of the Tambaci's, would come into his pocket in the shape of interest or commission. The great inflation of the business, which proved after a time, when markets were adverse, to be ruinous, could not have been effected without his aid, given long after he knew that Tambaci had no capital of his own. That he should also be a secured creditor seems a somewhat exaggerated amount of advantage to stipulate for.

But there are other considerations affecting the *a priori* probability of a transaction. On Tambaci's part it was, as the banian states it, a dishonest one. In England he was buying goods on express agreements that the money got for them in Calcutta should be appropriated to meet bills drawn for their price, while he was making such arrangements in Calcutta that at the moment of their arrival there they would be subject to a prior lien for the whole amount due on account current with the banian. Indeed, the banian claims by virtue of the fresh agreement in 1875 to have a claim against the goods while yet in transit. It can hardly be thought *a priori* probable that Tambaci would make such an agreement.

No doubt many things that Tambaci knew were concealed from the banian. But the banian alleges one entire agreement, extending to the whole of the goods consigned to Tambaci in Calcutta, and operating

1891
JAN. 24.

PRIVY COUNCIL.

18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 51.

continuously (with the extension in 1875) to the close of the transactions. Now it is proved beyond doubt, and the High Court have found, that as to portions of the goods (*e.g.*, those marked $\frac{FM}{C}$) the banian had notice of the interest of the consignors. Yet he went on maintaining that his agreement gave him a prior lien on those goods. Moreover, he was warned in 1875 by a friend that "commission goods" stood in a different position from others, and was advised to make inquiries on the subject. He says he had a conversation a few days after with the sahib (Tambaci), but it does not appear that he ever made, or if he made that he ever pursued, any serious inquiry on the subject. He held on his course just the same. The agreement then which he alleges is an agreement for a general lien on all goods coming to Calcutta on Tambaci's account, whatever might be the terms on which the vendors had shipped them. It is not *a priori* probable that any experienced man of business, such as the banian **[602]** was even as early as 1873, should rely on such an agreement as that. It seems to their Lordships that the agreement, as stated by the banian, was, on his own side, a hazardous one, and on Tambaci's side dishonourable, both considerations being against its antecedent probability.

The direct oral evidence to support the original agreement alleged by the banian is confined to the banian himself and Sassoon. The High Court attach great importance to Sassoon's evidence. Nobody has impeached Sassoon's veracity. But the weight of his evidence to support the banian depends also upon its accuracy, upon its accordance with the banian's own account, and partly upon the opportunity given for meeting it. The conferences at Sassoon's office and at Tambaci's house in June 1873 are the corner-stone of the banian's case as presented by his oral evidence. It is most important that there should be no doubt as to their tenor. There is no doubt that in some way, and it may have been by conversation in Sassoon's office, arrangements were made that the banian should take charge of merchandise, should incur expenses in employing a staff, should effect sales on commission, should receive the money, and should bring it into account, receiving discount at the rate of 12 per cent. on it if paid before it was due, and paying interest at 12 per cent. if retained after it was due. When a discussion is carried on between three persons, sometimes in English, sometimes in Hindustani, and with one of them acting occasionally as interpreter between the other two (which is Sassoon's account of the first conference), it must be very easy indeed to confuse between a conversation and an agreement, and between such an arrangement as Tambaci alleges and as is embodied in the agreement of the 11th July, and an arrangement to advance money against the security of the goods. Sassoon tells us that "somebody said, if money is to be advanced it must be against the security of the goods." The somebody, he thinks, was the banian, and this was evidently, according to Sassoon's recollection, the first introduction of this important matter between the parties, and he himself took an active part in making the bargain. But the banian's memory is materially different. Nothing, according to him, was done at the first meeting except the introduction of himself to Tambaci, and Sassoon said nothing. **[603]** All the details were settled the next day in the absence of Sassoon at Tambaci's house. They were "made pucka" at the second meeting in Sassoon's office in Hindustani, though Sassoon says only that he then learned that the parties had agreed and commenced business. Now when such differences are found between the parties in their recollection of those occurrences which are the most striking in their nature and the most likely

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 51.

to endure in the memory, they must materially impair the value of statements as to other parts of the conferences which are less likely to endure in the memory, *viz.*, the exact expressions used, whether in Hindustani or in English, concerning the banian's advances and his position with respect to the merchandise he was to keep and to sell. It may be that something was said about advances, but it would be dangerous to hold an agreement proved upon such evidence, even if there were nothing but Tambaci's previous denial to bring it into doubt.

Then as to the possibility of meeting this evidence, which in effect was sprung upon the banian's opponents at the trial. Tambaci the only other person present on these occasions, could not be recalled, which, as the High Court says, was unfortunate; and the appellants are entitled, on that ground at least, to have the evidence very critically examined. But the objection goes somewhat deeper. Why were not these extremely important conferences mentioned earlier? The first person who introduced the name of Sassoon is Tambaci himself. When under cross-examination he stated that Sassoon introduced him to the banian. That would have been the time to press him as to his recollection of the conferences in June 1873. But though several questions were put to him about Sassoon's introduction, nothing was asked about the conferences. On the contrary, it is suggested that it was not Sassoon at all, but Demetriadi, who introduced the banian. His legal advisers then could not have been instructed as to these important conferences which gave birth and shape to the agreement now relied on. Their Lordships find it very hard to believe that, if the banian had really relied on the making of the agreement he now alleges, he would not have put it forward at the earliest moment, whereas he failed to do so when invited by the interrogatories to say under what agreement he carried on business, and failed again, **[604]** when in Tambaci's examination it would have been proper to lay a ground for its introduction. It is not till the trial that he brings forward the conferences which are the origin of his agreement and strongest direct evidence.

As regards the evidence of the banian, the High Court, while thinking him capable of adding a fringe of fictitious evidence to his case, and in fact disbelieving him in some instances, were favourably impressed by his demeanour, and think him not untruthful in the main; and they express belief in his main statement, though not till after satisfying themselves that a number of incidents in the course of the business tell in its favour. Their Lordships accept the view taken of the banian's character, but they cannot help taking his evidence as labouring under two great difficulties.

One has been already mentioned in commenting on Sassoon's evidence. The other is that, at least down to the year 1880, there is no written document produced which is so much as alleged to confirm him. On the 11th July 1873, just a month after the conferences at which the terms of his employment were settled, the written agreement was executed, and it is wholly silent about advances or security, except a security to be given by him to Tambaci. It is a most extraordinary thing that the banian, who thought it necessary that the terms which he had settled with Tambaci should be repeated all over again and "made pucka" in Hindustani before Sassoon (such is his version of the affair), should not think it necessary to see that they were embodied in the formal written agreement. His mode of meeting this difficulty is even more extraordinary. He says that the written agreement was never read over to him, and that he did not, even up

to the time of his examination, know what it contained. "I was under the belief when I signed it that it contained the terms arranged for the pledge of goods advanced on." Their Lordships find it impossible to believe this statement. He did not put it forward when examined on interrogatories. It was not suggested in Tambaci's cross-examination. The agreement was prepared, and its execution witnessed, by a solicitor of the highest standing, to whose office the banian is said by Tambaci to have gone several times about this matter. That solicitor [605] would hardly have permitted a party ignorant of English to execute the agreement without satisfying himself that he understood it. And the banian's then partner in this one business, Mohendro Nath, who knew English well, and who appears to have been taken into the business on account of that knowledge, and who is stated to have accompanied the banian on several occasions to the solicitor's office while the draft was in preparation, and who executed the agreement, is not called to say anything about it.

Their Lordships hold that the oral evidence wholly fails to establish the agreement for lien on which the banian relies in the year 1873. As for the asserted modification or new agreement in 1875, there seems to be no evidence of it but that of the banian himself, given at the trial, and quite contrary to the story told in his answers to interrogatories; unless the statement of his gomashta, Nowrung, can be considered a corroboration. The High Court have justly disbelieved it. But the learned Judges consider that there was an agreement for a lien in 1873 on the goods in the godowns, and that it was extended to goods in transit at some subsequent date, relying on inferences drawn from a variety of circumstances which their Lordships will proceed to consider.

The first is, that the banian had the keys of the godown in which the goods were stored and appointed men to take charge of them. That is no more than was necessary for the performance of his duty to take and keep the goods, and to make sales and to deliver to the buyers. His predecessor in the post, Nolit Mohun, who made no advances, had the same kind of custody. When the banian tries to make out that his custody was of a more exclusive character, and that the durwans were all appointed by him and not by Tambaci, the evidence is against him. The High Court disbelieve him, and treat this story as one of the instances in which he adds a fringe of fiction to his real case. It is observable that when the Bank of Bengal took goods in pledge they were careful to have the exclusive possession of them, changing the locks and appointing their own durwans. Having regard to this difference, and to the fact that the banian thought it desirable to strengthen his case by evidence which was proved to [606] be untrue, their Lordships think that this incident of the course of business bears against the banian's contention.

The next point is, that the bazar chitties were made out to the banian, whereas in Nolit Mohun's time they were made out to Tambaci. That change seems a very immaterial circumstance, if in itself the new practice was more convenient. It certainly seems more convenient that the banian, who, after a contract of sale had been made, was debited in Tambaci's books with the price, and was held responsible for it, and who transacted with the buyers from first to last, should also (even independently of the fact that the firm was usually in debt to him) be the person to whom the buyers should give their notes for payment. Their Lordships think that this incident bears neither one way nor the other on the point in controversy.

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.)= 18 I.A. 78= 5 Sar. P.C.J. 51.

The next point is, that policies of insurance of the merchandise against fire were regularly effected by the banian in the name of Tambaci, and then endorsed by him and handed to the banian. The practice is denied by Tambaci, but is proved to have existed during the whole period of Vassilopulo's management, and must be taken to have been in existence when he assumed the management in April 1878. The High Court consider that the policies were endorsed by way of completing the banian's security. Their Lordships agree that this incident makes more for the banian's theory than for the opposite one, but it does not make very strongly. It is the common case that, at all events in the latter years of the business, the firm was always heavily indebted to the banian, and that he looked for payment to the sales of goods. If then sales should be prevented by fire, it would be, as between Tambaci and the banian, right that the latter should have the substitute for the price, and convenient that he should have in his hands every facility for getting it. It may be observed that no fire ever occurred, so that no occasion has arisen for dispute as to the property in the policies or in the money secured by them.

An important feature in the course of business is the treatment of the bills of lading. At the trial the banian asserted that they were endorsed to him directly upon their arrival in Calcutta; and his gomashta Nowrung backed his assertion. If that had been [607] the case, it would have given support to the banian's contention that he was intended to hold a security upon the coming merchandise. If there was an agreement to that effect, it certainly would be of importance to him that he should have the title assigned to him and should possess the documents of title at the earliest possible moment; but the banian's assertion on this point appears to be part of the fringe of fiction. The facts are the other way, and are so found by the High Court. The object of endorsing over the bills of lading was that the endorsee might obtain delivery of the goods from the ship, and they were never endorsed till the arrival of the ship, which was generally a week or ten days, and sometimes longer, after the arrival of the bills. In his plaint, which was framed at the very beginning of the controversy and before the importance of these details had been observed, the banian states what happened in the case of one ship, the *Knight of St. Patrick*. "On the arrival of the said vessel, ... the said Vassilopulo . . . . . endorsed and delivered to the plaintiffs the bills of lading and the said goods . . . . in order to enable the plaintiffs to obtain delivery of the same, and to hold the same subject to their lien, &c." This is a plain account of the practice of the firm both with Logothetis when he acted as carrier from the ship to the godown, and afterwards with the banian when he became carrier, only with the addition of the then controverted matter of lien. The opinion of the High Court is that the practice as to the bills of lading, standing by itself, proves nothing either way. To their Lordships it appears to bear against the banian's theory, if standing alone.

But it does not stand quite alone. For a considerable period, dating back at least to the year 1877, particulars of shipments of merchandise, which were sent out from Manchester as early as possible, were communicated by Tambaci to the banian. There is the inevitable dispute about the meaning of such a practice. One side says it was because the banian was to advance against those shipments and on the security of the goods shipped; the other side, that it was to facilitate dealings between the banian and the customers at the earliest possible time. Their

1891 JAN. 24.

PRIVY COUNCIL.

18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 51.

Lordships are not now dealing with the events which happened at the end of 1881 and during 1882, about which there are some peculiar [608] features, but with the practice which prevailed for some years previously. If the banian's theory of the communication of particulars were the true one, it is almost impossible to conceive that he would not (as he now alleges he did) get the most important document of all transferred to him as soon as it arrived in Calcutta. But he did not. And the two parts of this practice throw a reflex light on each other. The retention of the bills by Tambaci goes to show that the communication of the particulars was for the mercantile object which he alleges. And the communication of the particulars lends more significance to the fact that the documents of title were retained till the moment when it became necessary to transfer them for the purpose of obtaining delivery of the goods.

It will be seen that, in their Lordships' opinion, the incidents of business hitherto enumerated tell much more against the banian's case than in its favour. But it has been strongly urged at the Bar that during the latter period of his employment the banian did, with the knowledge of Vassilopulo, make advances in contemplation of specific quantities of merchandise either arrived in Calcutta or notified to arrive ; and that it must be taken to have been the contract between the parties at least to that time, that the goods so taken into consideration were to be held in pledge for advances made immediately afterwards. It is not indeed asserted that in any instance there was a specific sum of money advanced on the security of a specified quantity of goods. The lien claimed at this period is still a lien for the general balance of account. But the fact that the banian calculated the amount of goods belonging to Tambaci is said to show that he must have advanced on the security of them.

A number of letters have been put in evidence to sustain this contention. Some were written by Tambaci to the banian, and these contain nothing to the purpose. Others passed between Vassilopulo and Tambaci during the latter part of 1881 and in 1882, and in them Vassilopulo enlarges on the fears and irritation of the banian, and on the necessity of so encouraging him by sales of stock or reduction of debt on the Indian side, and by purchases of new stock on the English side, that he may continue to supply the funds necessary for the existence of the firm. The contention on the banian's part is that, though he was no party to this [609] correspondence, it faithfully reflects the interviews between himself and Vassilopulo, that Vassilopulo's expressions are inconsistent with the idea that the banian was not advancing on the security of the merchandise, that Tambaci approved what Vassilopulo was saying and doing, and that it was not open to him afterwards to say that there was no agreement for such security.

The earliest document relied on, the document before referred to as the only one produced to confirm the banian's case, is of earlier date than this correspondence. It is a list of goods in the godowns, dated the 2nd June 1880, made out by Vassilopulo, and with some calculations written on it by the banian. He sets down the value of the goods, the amount of his advances and his receipts from sales for some time past, and concludes that he may advance more. That is all. The High Court thinks it some corroboration of the banain's case. But that depends upon the view taken of the then subsisting relations of the parties. It appears that Vassilopulo had asked the banian for money at a time when no goods had arrived for two or three months. It is the common case that the

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 51.

banian got his profits by means of the constant influx of goods from England and their sale in Calcutta. It must have been essential to him at all times after the large advances began that he should be well acquainted with the magnitude of the business. And if he had reason to think that its life blood was being dried up by the stoppage of supplies from England, it was natural for him to calculate the amount available for sale in Calcutta before making further advances. The ordinary course of the business would shortly bring the whole of the price into the banian's hands. There is nothing to show that at this time he was looking beyond the ordinary course of business. The incident now under consideration is consistent with the theory he now sets up, but it is equally consistent with the contrary theory.

The banian does not assert that there was any alteration in the terms of his employment, either at this time or later on. His account of what passed in 1882 is as follows:—

"In 1882 I had the arrangement also with Mr. Vassilopulo. In this way there was an arrangement before it was made more pucca in 1882, as regards the goods in transit. The arrangement was the same, only before 1882 I used to advance as much money as he wanted; subsequent to 1882 **[610]** I advanced only to the extent of the goods I received. The arrangement as to the goods in transit was made in 1875. There was no alteration or addition to it in 1882."

Strictly construed, this statement would mean that before 1882 money was advanced by the banian just as asked for, and without any reference to amounts of goods, which would be destructive of his case. Such cannot be his meaning; it is impossible to think that there ever was a time when he had not regard to the volume of the business; and he probably means only that during 1882 he made advances with a more careful eye to the quantities of goods available for sale. But that increase of caution would not give him a lien. The course of the business continued as before.

It is to be noticed that Vassilopulo himself believed that the banian had a lien on all the goods purchased. His views are succinctly stated in his letter of the 7th November 1888, where he combats Caralambus Tambaci's assertion that the banian had no such lien.

"You deny that the goods are pledged to the banian, and, as I hear, will send an affidavit to that effect. But have I said or do I say anything to the contrary? On the contrary, I maintain that there is no agreement of the sort. What I do not deny though, and what I never shall nor can I deny, is that the banian always held the keys of the godowns, and this circumstance, and the manner in which the banian made the advances since January 1882, entitle the banian to a lien. And then, just notice how many other circumstances have turned up in favour of the banian. Nobody can take from him those goods on which he paid the drafts or which he released from the Bank of Bengal."

The same views are insisted on in his evidence. He and the banian are at one in stating that there was new no agreement made in his time. He is indeed drawing a conclusion of law on which his opinion is of no value. He infers a lien from the practice from which it is not to be inferred. And he does not distinguish between the various classes of goods to which it may apply, *viz.*, the goods which are specifically pledged to the Bank and redeemed, and the goods the drafts against which had been paid, and the goods whose proceeds ought by Tambaci's express

agreement to be appropriated to pay the shippers the price still due to them. 1891 JAN. 24.

PRIVY COUNCIL.

18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 51.

The correspondence between Vassilopulo and Tambaci must be read with these conflicting views of the two parties clearly kept [611] before the mind, and with the recollection that the conflict had not until late in 1882 been brought into relief, and that the question is whether Tambaci must have understood Vassilopulo's expressions as meaning that, beyond his interest in obtaining merchandise and selling it, the banian held a legal security upon it. In two or three passages Vassilopulo speaks of "cover" to the banian by purchases and by goods. But he also speaks of "covering" him by sales, which was Tambaci's view of the legitimate way of reimbursing him. He says in one passage that the banian and the Bank in case of insolvency would "take all our stock;" but in the next sentence he says that the creditors in England would "take" the property there, though there was no pledge of that.

Again, he writes of a discussion with the banian, in which he sets forth the great profit which the latter is making—about a lakh a year by interest, besides other profit; and he sets their debt to him against the "value of the goods in your hands." And the conversation proceeds thus:—

"After I had pointed out to him the increase of our business on the one hand, and the profits he makes without any danger on the other, I said to him point blank,—Baboo, you must allow us more accommodation in proportion to the business we are doing, and which is increasing daily. At least 10 lakhs, if you have confidence in our business, our character and honesty, and in the mangement of the business. If you have no confidence, or if you are not prepared to supply us with the requisite accommodation, tell me plainly, because I consider it my duty to place everything before Mr. Tambaci, so that he may do what is necessary in connection with the increase of our business. If we are able to do a large business, let us do it, if not, we must curtail it; in any case though I, as manager here, must know, so as to arrange my transactions accordingly."

After which he says the banian assented to give further help when his other engagements permitted him to do so. That conversation has been very much pressed at the Bar as being impossible to reconcile with the conclusion that the banian had no legal security against the goods. To their Lordships it appears to be consistent with the banian's contention, but to lead more naturally to the inference that the parties to it were not thinking at all of lien or any other legal question, but of the banian's interest in keeping up and extending a business from which he was deriving great profit, without incurring the risk of a partner, and with practical security, as [612] Vassilopulo contended, so long as his advances and the volume of the business answered to one another. As for the mere expression "goods in your hands," *i.e.*, the banian's hands, Vassilopulo frequently speaks of the same goods, or of goods in the same position, as goods in "our" hands, "our" stock, and so forth.

Their Lordships think that too much stress has been laid on those letters passing between Vassilopulo and his principal, but as they have been so much discussed on both sides, their Lordships have examined them, with the result of finding that there are no expressions in them which Tambaci, or indeed any other person knowing the relations of the parties, might not naturally read without suspecting that the banian was setting up a claim to legal security upon the goods, and that no

1891 JAN. 24. PRIVY COUNCIL. 18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 51.

conversation with him is related which is not referable to his commercial advantages and practical security in the increase of the business.

We have evidence of the usual course of business being followed down to July 1882 in the case of the ship *Myra*, which has been relied on at the Bar as showing that the security of the merchandise was a condition of the banian's advances. The particulars of shipments by the *Myra* arrived on the 6th July, and Vassilopulo immediately transmitted a copy to the banian's gomashta, with a written request endorsed upon it that he wanted Rs. 18,000, and that sum was paid to him. It was the only occasion on which a request for money was made in that way. Now if the advance was made on the security of the goods, we should expect that the banian would be very careful to perfect his legal title by getting the bills of lading at the earliest possible moment. But though he asserts that he did procure them on their arrival, he could not prove a single instance in which he had done so. That is strong to show that even in the case where a special request for money was made on showing a special shipment, the consideration for the advance was, not a pledge of the goods, but the profit to be made by their sale, and the reimbursement of general debt by their price when sold, according to the ordinary course of the business.

The upshot of all this examination is that there never were any such agreements for security as the banian alleges in 1873 and 1875, and that the transactions of 1881 and 1882, though they **[613]** show more caution on the banian's part in regulating his advances according to the volume of business, yet left the prior arrangements untouched, and that they remained untouched until Tambaci's insolvency.

This view renders it unnecessary to examine the question of notice, or whether, in the language of the Contract Act, the circumstances raised a presumption that the pawnor was acting improperly. It is also unnecessary to consider whether Messrs. Peacock had a right to stop *in transitu*, because the banian, having no lien, had no interest entitling him to dispute their claim to effect a stoppage.

As to the goods sold and brought into account between Tambaci and the banian, their Lordships agree with the High Court for the reasons given by the learned Judges. It has been argued at the Bar that the sales effected in September 1882, which undoubtedly were large and rapid, were a wrongful act as between Tambaci and the banian, who, it is said, falsely represented Tambaci's wishes to Vassilopulo, and thereby induced him to effect the sales. Without stopping to consider whether, if such a case were proved, it would give such a right to recover the money as Messrs. Peacock claim, their Lordships hold that the evidence does not disclose such a case. They are much more disposed to think that during his visits to Cawnpore Tambaci was behaving deceitfully towards the banian, and leading him to suppose that large sales would be effected, and his debt reduced thereby. Nobody attributes misconduct to Vassilopulo. There is no suggestion that the sales were effected at unfair prices. The sales, though negotiated by the banian and strongly pressed for by him, were the acts of Vassilopulo as manager of the firm, and were in accordance with the purpose for which the goods were consigned. As their proceeds have been duly brought into account between the firm and the banian, the principals of the firm cannot disturb that account except on the ground of bad faith.

It remains to consider how their Lordships' views affect the decrees made below in the two suits.

1891
JAN. 24.

PRIVY COUNCIL.

18 C. 573 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 51.

In *Baijnath* v. *Graham* it was declared that the banian (the substantial plaintiff) is entitled to one bale out of eight, and to 55 others marked P. T. and C.: and Messrs. Peacock (the **[614]** substantial defendants) are entitled to 24 bales with the P. mark. The banian is ordered to pay Messrs. Peacock the sum of Rs. 6,608-14, being the net proceeds of sale of the 24 bales, and their costs of a commission to examine Vassilopulo in Calcutta. Messrs. Peacock are ordered to pay to the banian his costs of suit, and one-fifth of the costs of the commissions to examine witnesses in England. It appears that the one bale was admitted to belong to the banian. Vassilopulo's examination was asked for by the banian and turned out to be useless. It is not clear why Messrs. Peacock are ordered to pay the whole costs of a suit in which they succeeded to a substantial extent; but it is probably because in the other suit, where the victory and defeat were also divided, the banian is ordered to pay costs. It is stated at the Bar that the method of dealing with costs has proved injurious to Messrs. Peacock.

The banian has now failed in this suit entirely, except as to the one bale to which his title is not disputed. Their Lordships have to make the decree such as in their judgment the High Court should have made it at the trial. The proper course will be, first, to affirm the decree so far as regards the one bale awarded to the banian, and the net sale-proceeds of the 24 bales awarded to Messrs. Peacock, and so far as it directs payments of Rs. 6,608-14 with interest to Messrs. Peacock, and so far as it directs payment of the costs of the commission to examine Vassilopulo with interest, and provides for the scale of taxation; *secondly*, to discharge the rest of the decree; *thirdly*, in lieu thereof, to declare that the banian had not at the institution of the suit any right or interest in the 55 bales and the sale-proceeds thereof awarded him; to dismiss the suit so far as regards those bales; to direct him to pay to Messrs. Peacock their price, if sold, with interest at 6 per cent. from the time of sale, or otherwise their value, with interest at 6 per cent. from the institution of the suit, and also to pay them the costs of suit and one-fifth of the costs of the English commissions. Messrs. Peacock must also be repaid the costs paid by them in pursuance of the decree.

In *Peacock* v. *Baijnath*, Messrs. Peacock were ordered to pay the banian's costs occasioned by their having instituted two suits instead of one. The suit was dismissed so far as it concerned the **[615]** goods sold and accounted for. It was declared that the banian was entitled to the bales marked P. T. and C. It was declared that Messrs. Peacock were entitled to 104 bales marked $\frac{\text{P. T.}}{\text{C.}}$ (which is clearly a mistake for $\frac{\text{P. M.}}{\text{C.}}$), and to 52 bales marked $\frac{\text{P. T.}}{\text{C.}}$, and the banian was ordered to pay them Rs. 33,619-18-9, being the sale price of so many of those bales as had not been delivered to them. And the banian was ordered to pay to Messrs. Peacock their costs of suit, except as aforesaid, and one-fifth of the English commissions.

The proper course will be, *first*, to affirm the decree so far as it directs Messrs. Peacock to pay the costs occasioned by bringing two suits, and provides for the scale of taxation, and so far as it relates to goods sold and accounted for, and so far as it relates to the bales marked $\frac{\text{P. M.}}{\text{C.}}$ and $\frac{\text{P. T.}}{\text{C.}}$; *secondly*, to discharge the rest of the decree; and, *thirdly*, in lieu thereof, to declare that out of the bales marked P. T. and C. and mentioned in the plaint, Messrs. Peacock are entitled to be paid the amount

1891 JAN. 24. — PRIVY COUNCIL. — 18 C. 578 (P.C.) = 18 I.A. 78 = 5 Sar. P.C.J. 51.

of the bills drawn by them against such bales, with interest thereon at 6 per cent. from the institution of the suit; to direct accounts, if necessary, for the purpose of ascertaining the amounts due to Messrs. Peacock, and the amount of the value or price of the bales, with interest thereon from the date of suit or of sale, as the case may be; to direct the banian to pay the amount found due on the bills out of the amount of value or price, so far as the same will extend; and to declare that each party ought to bear his own costs of suit, and to be charged with one-half of one-fifth of the cost of the English commissions. The banian must also be repaid the costs paid by him in pursuance of the decree.

As in these appeals each party has succeeded and each failed on a substantial issue, their Lordships award no costs, except that, under the circumstance of the extreme bulkiness of the record, they direct the respondents to pay the appellants one moiety of the costs of it.

Appeal allowed; decree varied.

Solicitors for the appellants: Messrs. *Phelps, Sidgwick and Biddle.*
Solicitors for the respondents : Messrs. *Sanderson, Holland and Adkin.*

C. B.

---

18 C. 616 (P.C.) = 15 Ind. Jur. 472 = 6 Sar. P.C.J. 49.

[616] PRIVY COUNCIL.

PRESENT :

Lords Hobhouse, Macnaghten, and Morris, Sir R. Couch and Mr. Shand (Lord Shand).

[*On appeal from the Court of the Recorder of Rangoon.*]

MUTIA CHETTI AND OTHERS (*Defendants*) *v.* A. V. SUBRAMANIEM CHETTI AND OTHERS (*Plaintiffs*). [9th June, 1891.]

Partnership shares—Interest—Civil Procedure Code—Act XIV of 1882, *s.* 32.

The parties to the suit, the heirs and representatives of the original partners, a family carrying on a banking business, made and acted upon a new arrangement of their shares, the amounts of which were found in the first Court, and affirmed on appeal. A decree for an account, and an award of interest at twelve per cent. on the amounts found to be due upon the shares from the date of the closing of the business was maintained.

APPEAL from a decree (12th August 1885) of the Recorder of Rangoon.

The three plaintiffs, representing Subramaniem Chetti, deceased in 1864, filed their suit on the 1st December 1882, for partnership accounts with interest against the defendants, representing Peria Carpen Chetti, and his son-in-law, Sethumbram Chetti, by whom a banking business had been carried on in Rangoon from 1863 to 10th May 1869.

Mutia Chetti, on behalf of himself and his brothers, admitted the original partnership, and an adjustment, alleged to have taken place among the partners on the 11th May 1869, but that a new partnership or an alteration of the amounts of the shares had taken place was denied, the same business according to the defendant's case having been continued with the shares at the same amounts, until the death of Sethumbram Chetti in August 1877.

The fourth defendant filed a statement supporting the plaint. 1891 JUNE 9.

The Recorder (MR. R. S. T. MACEWEN) considered the suit as one between the plaintiffs, with the fourth defendant, on the one side, and the rest of the defendants on the other. He therefore directed that the fourth defendant should be made a plaintiff under s. 35 of the Code of Civil Procedure. He found that the plaintiffs had established the new arrangement of the 10th May 1869 set up by them, and that their shares under that arrangement were as follows :—Sethumbram Chetti, now represented by the [617] first three defendants, had four shares; Annamally, and the second and third plaintiffs, had two and-a-half shares; Arnachellum, fourth defendant, had one and-a-quarter shares; to the deities or, in other words, to be spent in charity, were assigned more than one-sixteenth of the whole. Each share represented Rs. 4,000. An account was directed.

PRIVY COUNCIL.

18 C. 616 (P.C.) = 18 Ind. Jur. 472 = 6 Sar. P.C.J. 49.

He awarded interest at 12½ per cent. to the plaintiffs, from the 27th January 1878, when the business was closed, till the institution of the suit on the 1st December 1882. Upon an account, it was found that the defendants had to pay to the three plaintiffs Rs. 4,680 and to the 4th plaintiff Rs. 8,929, and a decree accordingly followed.

On this appeal—

Mr. *J. D. Mayne* appeared for the appellants.

Mr. *Asquith*, Q. C., and Mr. *A. Agabeg*, for the respondents.

For the appellants it was argued that the Court ought to have found that the partnership had continued throughout, without any change of shares, and that the interest should not have been awarded as it had been.

For the respondents it was argued that the evidence had established the partnership shares from May 1869 to have been as found, and that the rate of interest allowed by the Court was not excessive.

Mr. *J. D. Mayne* replied.

Afterwards (June 9th) their Lordships' judgment was delivered by :—

JUDGMENT.

MR. SHAND.—The appeal in this case relates to a banking business which was carried on in Rangoon from 1863 to 1878 by Sethumbram Chetti and others, members of a family living in the neighbourhood of Madura, in the Madras Presidency, and in which considerable profits were realized on the amount of capital employed. The parties are agreed as to the terms on which the co-partnership existed from 1863 to 1869. They are further agreed that in the latter year an account was made up showing the profits which had been realized during the six preceding years, and bringing out as at that date the sums of capital and profits belonging to each of [618] the partners. The controversy between them has reference to the period from May 1869 until January 1878, when, in consequence of the death of Sethumbram Chetti, who had much the largest interest in the business, the co-partnership was dissolved and had to be wound up.

The plaintiffs in their plaint averred that it had been agreed between the partners that after the 10th of May 1869 each share of the business should be of the amount and value of Rs. 4,000; that Sethumbram Chetti, now represented by the 1st, 2nd and 3rd defendants, should have four shares; that Annamally Chetti, the 1st plaintiff, and the 2nd, the 3rd plaintiffs should have 2½ shares; that the 4th defendant, Arnachellum Chetti, who was afterwards made a plaintiff in the suit, should have 1¼

1891
JUNE 9.
—
PRIVY COUNCIL.
—
18 C. 616 (P.C.) = 18 Ind. Jur. 472 = 6 Sar. P.C.J. 49.

shares; and that a small part of a share should be set aside for charitable purposes. It was further alleged that the business had been carried on until its close upon this agreement; and the plaintiffs claimed to have the partnership accounts ascertained and stated on that footing accordingly. The learned Recorder of Rangoon by his judgment and decree has given full effect to this claim. A detailed investigation into the partnership accounts has followed, and judgment and decree has been granted in the plaintiffs' favour for the sums brought out as due to them, respectively, interest having been allowed to each of the partners at the rate of 12½ per cent. on the sums at their credit from the date on which the business was closed till the institution of the suit in the Court of Rangoon.

The defendants who have appealed from these judgments have maintained, as they did in the Court at Rangoon, that the business having been admittedly carried on from 1863 to 1869 on the agreement that Sethumbram Chetti should have 2 $\frac{1}{16}$th shares, Subramaniem Chetti, the ancestor and predecessor of the three original plaintiffs, 13/16ths of a share, and Peria Carpen Chetti, now represented by certain of the defendants, 5/16ths of a share, no such change took place in the latter year in the arrangements and agreement of the partners as the plaintiffs allege, but that what occurred in 1869 was merely that an account showing the shares of capital and accruing profits of each partner, after debiting their respective drawings, was made up, the profits being only apportioned, **[619]** and allowed to remain as capital, without any further change being made in the partners' interests, and that capital was not drawn out or added to by any of the partners.

The appeal raises no point of law. The question is one of fact to be determined entirely on the evidence written and parol adduced before the Court in Rangoon. Their Lordships having heard a full argument and considered that evidence, have found no reason for holding that the judgment of the Court of Rangoon, in favour of the plaintiffs, ought to be set aside. They are further of opinion that the judgment is sound, and in accordance with the great preponderance of the evidence. This being so, it is unnecessary to go over in detail the matters on the proof bearing on the question of the alleged new arrangement in 1869 for a modification of the shares of the partners in the future capital and profits of the business. Their Lordships are satisfied that the Recorder was right in finding it to have been proved that there was such a new arrangement in that year, and that to the effect alleged by the plaintiffs. They agree in holding that this arrangement was reduced to writing by the witness Pallaneappa Chetti that the agreement, or "pungadu," was written by him on a "cadjan" or palm leaf, and was signed by the parties interested, at first by Sethumbram Chetti and Annamally Chetti, and at a later time by Arnachellum Chetti; and they regard the evidence of the plaintiffs on this point as most materially strengthened, not only by the evidence of certain of the arbitrators who were called in to settle disputes which arose between the partners in their accounts, and who depose that they had the written agreement before them, but also by the fact that the defendants refrained from adducing Mootiah Chetti, one of themselves, as a witness in the proceedings at Rangoon, after a body of evidence had been led tending strongly to show that the deed had passed into his hands after the death of his father, Sethumbram Chetti, into whose custody it had been given.

Their Lordships are also of opinion that it has been proved that the deed making the new or modified arrangement was acted on by the parties

1891 June 9. — Privy Council. — 18 C. 616 (P.C.) = 15 Ind. Jur. 472 = 6 Sar. P.C.J. 49.

(first) by the withdrawal by Sethumbram Chetti of the surplus capital beyond 16,000 rupees, representing his four shares in the business after 1869, or at least of the [620] greater part of that surplus, and by the other partners making up and putting into the business the sums required to complete their shares; and (secondly) by the partnership accounts made up seven years after the new arrangement was made, in accordance with which the profits were ascertained and divided.

It may be added that the new arrangement appears to have been only a natural and reasonable one, inasmuch as it gave somewhat larger advantages to Annamally Chetti and Arnachellum Chetti than they would have obtained under the original partnership, for it was contemplated that with an increasing business they should in future give a personal superintendence, such as they had not previously done, as in point of fact they did; and it is difficult, if indeed possible, to reconcile the actings of the partners in their dealings with their accounts after 1869,—the withdrawal by Sethumbram Chetti of 7,000 rupees from the business, and the payment in of sums by the other partners to make up their capital,—with the view maintained by the defendants that the interests of the partners were not to undergo any change.

Their Lordships will humbly advise Her Majesty to dismiss the appeal, and to affirm the decrees complained of, including the award of interest to the plaintiffs, as to which they see no reason to differ from the view taken by the Recorder. The appellants must pay the costs of the appeal incurred by the respondents who have appeared.

Solicitor for the appellants: Mr. *R. T. Tasker.*

Solicitors for the respondents: Messrs. *Bramall and White.*

C. B.

---

18 C. 620 (P.C.) = 18 I. A. 121 = 15 Ind. Jur. 403 & 542 = 6 Sar. P.C.J. 40.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, Lord Morris, Sir R. Couch, and Mr. Shand.

[*On appeal from the Court of the Recorder of Rangoon.*]

THE IRRAWADDY FLOTILLA COMPANY (*Defendant*) v. BUGWANDAS (*Plaintiff*). [24th, 25th, and 28th April and 4th July, 1891.]

Common carrier—Liability for non-delivery not affected by ss. 148, 151, *and* 152 *of the Contract Act, IX of* 1872—*Carriers' Act, III of* 1865—*Construction—The Railways Acts, IV of* 1879 *and IX of* 1890, *as to the liability of carriers by railway.*

That the duties and liabilities of a common carrier are governed in India by the principles of the English common law on that subject, [621] however introduced, has been recognized in the Carrier's Act, III of 1865.

His responsibility to the owner does not originate in contract but is cast upon him by reason of his exercising this public employment for reward.

His liability as an insurer is an incident of the contract between him and the owner not inconsistent with the provisions of the Contract Act; and the law of carriers, partly written and partly unwritten, remained as before that Act.

The Railways' Acts of 1879 and 1890 reduced the responsibility of carriers by railway to that of bailees under the Contract Act, but this does not affect the construction of the law relating to common carriers and the Act of 1865.

Notwithstanding some general expressions in the chapter on bailments, a common carrier's responsibility is not within the Contract Act, 1872.

1891
JULY 4.

PRIVY
COUNCIL.

18 C. 620
(P.C.) =
18 I.A. 121 =
15 Ind. Jur.
403 & 542 =
6 Sar. P.C.J.
40.

The decision of the High Court in *Moothoora Kant Shaw* v. *I. G. S. N. Company* (1) approved and that of the Bombay High Court in *Kuverji Tulsidas* v. *G. I. P. Railway Company* (2) not supported.

[F., 14 Bur. L. R. 77 ; Appr., 19 B. 165 (185) ; R., 17 B. 417 ; 17 B. 725 ; 34 B. 192 (201) = 11 Bom. L. R. 335 = 2 Ind. Cas. 475 ; 35 M. 728 (738) = 11 Ind. Cas. 570 (575) = 21 M. L. J. 600 = 10 M. L. T. 57 = (1911) 2 M. W. N. 285 (292) ; 40 C. 716 = 17 C. L. J. 639 (641) = 17 C. W. N. 633 = 19 Ind. Cas. 245 (246) ; 8 C. W.N. 349 (351) ; 9 Ind. Cas. 966 (971) = 32 P. W. R. 1911 ; (1913) M.W.N. 558 = 25 M. L. J. 162 (165) = 14 M. L. T. 137 = 20 Ind. Cas. 546 (548); 32 M. 95 (127) = 4 M. L.T. 110 = 18 M.L.J. 497; 36 M. 229 (F.B.) = 13 M.L.T. 20 (41) = 18 Ind.Cas. 417 = 24 M.L.J. 135.]

APPEAL from a decree (3rd January 1890) of the Recorder of Rangoon.

The decree, from which this appeal was preferred, was in favour of the plaintiff, now respondent, for Rs. 3,315, in a suit for the value of 195 bales of cotton destroyed by fire whilst on board the steam-ship *Yomah*, belonging to the defendant Company, now appellant, to be carried by them.

On the 4th December 1888, when the bales had been put on board to be carried from Mingyan, in Upper Burma, down the river to Rangoon, and whilst the *Yomah* was lying at the former place, the fire broke out from some unexplained cause.

The question now raised was, whether the appellant Company, as carriers of goods for hire, were answerable for the goods, independently of any negligence on their part, or were responsible only for that amount of care which the Contract Act, IX of 1872, in ss. 151 and 152 relating to bailment, required of all bailees alike in the absence of special contract. The sections are set forth in their Lordships' judgment.

The respondent commenced this suit on the 30th March 1889, alleging the negligence of the appellants' servants to have caused the loss.

[622] He also alleged that it would have been possible to save the cotton, he having sent coolies to remove the bales, but that the servants of the appellants prevented this being done.

The defence was that the goods had been received by the defendant Company on the terms that the latter should take such care of them as was required under ss. 151 and 152 of the Contract Act, 1872, and that the appellants had taken such care.

The Recorder found that the fire broke out suddenly, and was not due to any negligence on the part of the defendants' servants ; that all usual precautions were taken ; that everything that could be done was done to stop the fire which spread rapidly ; that even assuming that application was made for the removal of the cotton by bringing in a gang of coolies, which, however, he doubted, such an application could not have been granted, as the only possible chance of putting out the fire would have been lost if the hatches had been opened. There was thus no negligence on the part of the defendants' servants. The Recorder, nevertheless, considered that *Moothoora Kant Shaw* v. *India General Steam Navigation Company* (1) was an express authority that the defendant company was liable as a common carrier, and this liability was not affected by ss. 151 and 152 of the Contract Act, 1872 ; and that notwithstanding a decision to the contrary effect by the Bombay High Court in *Kuverji Tulsidas* v. *The G. I. P. Railway Company* (2), he was bound by the decision of the Calcutta High Court. He accordingly gave judgment for the plaintiff for Rs. 3,315.

(1) 10 C. 166. (2) 3 B. 109.

1891
JULY 4.
PRIVY COUNCIL.
18 C. 620 (P.C.) = 18 I.A. 121 = 15 Ind. Jur. 403 & 542 = 6 Sar. P.C.J. 40.

The Recorder on the 9th May 1890 gave his certificate, under ss. 595 and 614, Civil Procedure, that the decree in this case involved a substantial question of law, and that it was a fit one for appeal to Her Majesty in Council directly from his Court.

On this appeal—

Mr. *R. B. Finlay*, Q. C., and Mr. *Reginald Browne* (with whom was Mr. *J. D. Fitzgerald*) appeared for the appellants.

[623] Their arguments are stated in their Lordships' judgment. The following outline is, however, added :—

The liability of a carrier for hire is defined and limited by legislation in India, and is not governed by the English law on that subject. The Carriers' Act, III of 1865, assumes that a common carrier is under the stringent rule of the English common law, without directly enacting that he is so. That Act was not repealed. But inasmuch as the delivery of the goods by the customer to a common carrier constitutes a bailment to him, the responsibility for non-delivery is now determined by chap. IX of the Contract Act, 1872, which deals exhaustively with the whole subject of a bailee's responsibility and applies, except in the cases mentioned in its own saving clauses. These are (section 1) that it shall not affect the provisions of any Act not expressly repealed by it, nor any usage or custom of trade, nor any incident of any contract not inconsistent with its provisions. By these words the liability of a carrier is not excepted from the operation of the Contract Act, 1872, it being an incident distinctly inconsistent with the ss. 151 and 152. The carrier's liability is not a usage or custom of trade, but part of the common law as being a custom of the realm of England introduced into India. That Act III of 1865 should not be repealed and yet that the greater responsibility of the common carrier should cease as being inconsistent with the bailment sections in the Act of 1872, involves no difficulty. This results from the fact of this responsibility existing independently of Act III of 1865. The contention is that this liability is within the scope of the Contract Act, 1872, and that the bailment sections of the latter Act are substituted for it; that *Kuverji Tulsidas* v. *G. I. P. R. Company* (1) was correctly decided by the Bombay High Court ; and that the judgment of the Calcutta Court (2) is not in accordance with law.

The Railway Acts, IV of 1879 and IX of 1890, were referred to.

That there was negligence has been negatived by the finding of the Court below, and the appellants cannot be held liable **[624]** in the absence of negligence. Reference was made to *Mackillican* v. *The Messageries Maritimes* (3), where a company, not a common carrier, was held liable under s. 151 of the Contract Act, 1872.

Mr. *J. G. Barnes*, Q. C., and Mr. *Aviet Agabeg*, for the respondent. —The defendant Company are common carriers within the meaning of the Carriers' Act III of 1865, and not bailees, whose liability is governed by the provisions of the Contract Act, 1872. Neither the law imposing the more complete liability on the carrier nor Act III of 1865 has been superseded. If the appellants' contention were correct, the principal sections in the latter Act would be rendered of no effect ; and in connection with this regard should be had to the proviso in the Contract Act, 1872, that no Act shall be taken to be repealed by it unless expressly in the Act itself declared so to be. It does not appear to be the intention, as shown by the latter enactment, to alter the

(1) 3 B. 109. (2) 10 C. 166. (3) 6 C. 227.

1891
JULY 4.
——
PRIVY
COUNCIL.
——
18 C. 620
(P.C.) =
18 I.A. 121 =
15 Ind. Jur.
403 & 542 =
6 Sar. P.C.J.
40.

law recognized in the Carriers' Act. 1865. The Railway Act, IV of 1879, in no way assists the appellants' argument, excluding the operation of the Carriers' Act, 1865, from affecting the liability of carriers by railway; but consequently treating it as in force as regards other carriers. The liability of the common carrier was said in *Morgan* v. *Ravey* (1) to arise from the customary relation between the parties founded on the custom of the realm.

Even if, however, the common law liability has been got rid of, and negligence, to enable the respondent to recover, has to be established against the company or their servants, still it is not necessary to prove it affirmatively by evidence of their acts or omissions. There are some cases of loss by accidents, where the accident itself, without further proof of negligence, gives rise to a presumption of it—*Scott* v. *London Dock Company* (2).

Mr. *R. B. Finlay*, Q.C., replied.

JUDGMENT.

Their Lordships' judgment was afterwards, on July 4th, delivered by

LORD MACNAGHTEN.—The question involved in this appeal is one which has given rise to a conflict of judicial opinion in India. [625] In 1878 the High Court of Bombay held that the effect of the Indian Contract Act, 1872, was to relieve common carriers from the liability of insurers answerable for the goods entrusted to them "at all events," except in the case of loss or damage by the act of God or the Queen's enemies, and to make them responsible only for that amount of care which the Act requires of all bailees alike in the absence of special contract. In 1883 the same point was brought before the High Court of Calcutta. The case was referred to a Full Bench, and the Court came to the conclusion that the liability of common carriers was not affected by the Act of 1872.

Their Lordships have now to determine which of these authorities is to be preferred. There is no other question in the case. It was admitted that the appeal must fail unless the decision of the High Court of Bombay can be supported.

For the present purpose it is not material to inquire how it was that the common law of England came to govern the duties and liabilities of common carriers throughout India. The fact itself is beyond dispute. It is recognized by the Indian Legislature in the Carriers' Act, 1865, an Act framed on the lines of the English Carriers' Act of 1830 (11 Geo. IV. and 1 Wm. IV., c. 68).

The preamble of the Act of 1865 recites that "it is expedient not "only to enable common carriers to limit their liability for loss of or "damage to property delivered to them to be carried, but also to declare "their liability for loss of or damage to such property occasioned by the "negligence or criminal acts of themselves, their servants, or agents." The Act defines a common carrier as "a person, other than the Government, "engaged in the business of transporting for hire property from place to place "by land or inland navigation, for all persons indiscriminately," and it includes under the term person "any association or body of persons, whether incorporated or not." Section 3 declares that no common carrier shall be liable for the loss of or damage to property delivered to him to be carried, exceeding in value 100 rupees and of the description contained in the

(1) 6 H. & N. 265. (2) 34 L. J. Exch. 220.

1891 JULY 4. — PRIVY COUNCIL. — 18 C. 620 (P.C.) = 18 I.A. 121 = 15 Ind. Jur. 403 & 542 = 6 Sar. P.C.J. 40.

schedule, unless the value and description thereof are declared. Section 4 authorizes every common carrier to require payment for the risk undertaken in carrying such property at such rate of charge as he may fix, **[626]** provided that notice of a rate of charge higher than the ordinary rate is exhibited in the manner prescribed by the Act. Section 5 provides that in case of the loss of or damage to such property, the person entitled to recover in respect of such loss or damage shall also be entitled to recover any money actually paid in consideration of the risk. Section 6 provides that the liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule, shall not be deemed to be limited or affected by any public notice, but that any such carrier, not being the owner of a rail road or tramroad constructed under the provisions of Act XXII of 1863, may, by special contract, signed by the owner of the property to be carried, or some one on his behalf, limit his liability in respect of the same. Section 7 declares that the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried only when such loss or damage shall have been caused by negligence or a criminal act on his part, or on that of his agents or servants. Section 8 declares that, notwithstanding anything thereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the negligence or criminal act of the carrier, or any of his agents or servants. Section 9 enacts that in any suit brought against a common carrier for the loss, damage, or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage, or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. Section 10, the last section of the Act, is not material to the present inquiry. The schedule to the Act contains a list of articles of large value in small compass, corresponding with the list contained in the English Carriers' Act.

The Indian Contract Act, 1872, recites that "it is expedient to define and amend certain parts of the law relating to contracts." Section 1 repeals the enactments mentioned in the schedule, among which the Carriers' Act, 1865, is not included and then proceeds as follows :—"But nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed nor any usage or custom of trade, nor any incident of **[627]** any contract not inconsistent with the provisions of this Act." Their Lordships may observe in passing, and indeed it was admitted by the learned Counsel for the appellants, that the words "not inconsistent with the provisions of this Act," are not to be connected with the clause "nor any usage or custom of trade." Both the reason of the thing and the grammatical construction of the sentence—if such a sentence is to be tried by any rules of grammar—seem to require that the application of those words should be confined to the subject which immediately precedes them.

Chapter IX of the Act of 1872 treats of bailments. Section 148 defines bailment in words wide enough to include bailment for carriage. Sections 151 and 152 are in the following terms :—

"151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

1891 JULY 4. — PRIVY COUNCIL. — 18 C. 620 (P.C.) = 18 I.A. 121 = 15 Ind. Jur. 403 & 542 = 6 Sar. P.C.J. 40.

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in s. 151."

The only section in the Act in which bailment for the purpose of carriage is mentioned is s. 158. That section, however, deals only with gratuitous bailments.

The learned Counsel for the appellants took their stand on ss. 151 and 152 of the Act of 1872. They pointed out that the rule there laid down extends to every description of bailment. They argued that one measure of liability, and one measure only, is to be applied to all cases in the absence of special contract. A special contract, they said, if not an expressed contract, must at least be a contract special to the occasion. It would be absurd to speak of a condition which the English common law attaches to all contracts of carriage by common carriers as a special contract. There was nothing in s. 1 of the Act of 1872 inconsistent with this view. The Carriers' Act, 1865, was preserved intact; it was only the common law that was altered. No usage or custom of trade was affected; the only thing affected was the customof the realm. And if the duty cast on common carriers by the custom of the realm could properly be described as an incident of the contract [628] between the carrier and the owner of the property to be carried, it was, as they maintained, inconsistent with the provisions of the Act of 1872.

In support of their arguments, the learned Counsel for the appellants turned to the Indian Railways Act, 1879, and to the Indian Railways Act, 1890. Their Lordships think that no assistance is to be derived from either of those Acts. The Act of 1890 reduces the responsibility of carriers by railway to that of bailees under the Act of 1872. But then it declares that nothing in the common law of England, or in the Carriers' Act, 1865, shall affect the responsibility of carriers by railway. The reason for dealing with railways in this exceptional manner may perhaps be found in the circumstance that railways in India are to a great extent in the hands of the Government, and it will be remembered that the Government is excepted from the definition of a common carrier in the Act of 1865. The Act of 1879, which is now repealed, declared that nothing in the Carriers' Act, 1865, should apply to carriers by railway. But it did not negative the application of the common law of England to such carriers. In s. 10 it spoke of "the obligation imposed on a carrier by railway by the Indian Contract Act, 1872." It did not, however, declare that the obligation was to be the measure of the liability of carriers by railway, but only that their liability was not to be reduced below that limit except in a specified manner. It may be that s. 10 was so expressed, in view of the decision of the High Court of Bombay which had been pronounced in the preceding year, and it may be that the Legislature then assumed that decision to be correct. But, however that may be, the section is much too obscure in meaning to throw any light on the present question.

Notwithstanding the able arguments of the learned Counsel for the appellants, it seems to their Lordships that there are several considerations, not all of equal weight, but all pointing in the same direction, which lead irresistibly to the conclusion that the Act of 1872 was not intended to alter the law applicable to common carriers.

The Act of 1872 does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. No doubt it treats of bailments in

1891 JULY 4. PRIVY COUNCIL. 18 C. 620 (P.C.) = 18 I.A. 121 = 15 Ind. Jur. 403 & 542 = 6 Sar. P.C.J. 40.

a separate chapter. But there is nothing to show [629] that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts. On the other hand, it is to be borne in mind that at the time of the passing of the Act of 1872, there was in force a statute relating to common carriers, which, in connection with the common law of England, formed a Code at once simple, intelligible, and complete. Had it been intended to codify the law of common carriers by the Act of 1872, the more usual course would have been to have repealed the Act of 1865 and to re-enact its provisions, with such alterations or modifications as the case might seem to require. It is scarcely conceivable that it could have been intended to sweep away the common law by a side wind, and by way of codifying the law to leave the law to be gathered from two Acts, which proceed on different principles, and approach the subject, if the subject be the same, from different points of view.

At the date of the Act of 1872 the law relating to common carriers was partly written, partly unwritten, law. The written law is untouched by the Act of 1872. The unwritten law was hardly within the scope of an Act intended to define and amend the law relating to contracts. The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward. "A breach of this duty," says Dallas, C.J., (*Bretherton* v. *Wood*, 3 B. & B., 62) "is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of a contract to support it." If in codifying the law of contract, the Legislature had found occasion to deal with tort, or with a branch of the law common to both contract and tort, there was all the more reason for making its meaning clear.

Passing from these general considerations to the language of the Act of 1872, it is to be observed that the Act of 1865 is not merely left unrepealed by the later Act. As it is not "expressly repealed," nothing in the Act of 1872 is to "affect" its "provisions." It seems a strong thing to say that the provisions of an Act are not affected, when the whole foundation upon which the Act rests is displaced, and almost every section assumes a different meaning, or comes to have a different application. Moreover, there is certainly one provision in the Act of 1865 which is [630] deprived of much of its original significance, and, so far at least, is rendered nugatory, if the appellants' view is correct. The combined effect of ss. 6 and 8 of the Act of 1865 is that, in respect of property not of the description contained in the schedule, common carriers may limit their liability by special contract, but not so as to get rid of liability for negligence. On the appellants' construction the Act of 1872 reduces the liability of common carriers to responsibility for negligence, and consequently there is no longer any room for limitation of liability in that direction. The measure of their liability has been reduced to the minimum permissible by the Act of 1865.

Another consideration is suggested by s. 4 of the Act of 1865. That section authorizes common carriers to charge extra rates for the risk involved in carrying articles of great value in small parcels. The risk intended to be covered is the risk of carriers who are also insurers, and part of the extra charge would of course be in the nature of a premium for insurance. When the Act of 1872 was passed, the Act of 1865 had been in operation for seven years, and it may be presumed that common carriers, in some cases at least, had taken advantage of the Act of 1865 in settling

1891 JULY 4. — PRIVY COUNCIL. — 18 C. 620 (P.C.) = 18 I.A. 121 = 15 Ind. Jur. 403 & 542 = 6 Sar. P.C.J. 40.

their rates. It seems hardly fair that common carriers should be relieved from the liability of insurers, without any provision pointing to a re-adjustment of their charges, and without distinct notice of a change affecting so materially the interests of the public.

Then the Act of 1872 provides that nothing in the Act contained shall affect any usage or custom of trade. It was said that the liability of common carriers as insurers was not a usage or custom of trade. That may be conceded. But it is certainly singular that, according to the appellant's argument, usages and custom of trade, which are local and partial, are not to be affected, while a custom so universal as to be a custom of the realm, or, in other words, part of the common law, is not treated with the same respect.

It was hardly disputed that the liability of a common carrier as an insurer was an incident of the contract between the common carrier and the owner of the property to be carried. Is that incident inconsistent with the provisions of the Act of 1872? No one could suggest that it was inconsistent, merely by reason of **[631]** its being a term of the contract implied and not expressed. Then it would seem that the proper way of trying whether it is or is not inconsistent with the provisions of the Act of 1872 would be to write it out as part of the contract. Would it then be inconsistent? Clearly not. It would be within s. 152; it would be a special contract, saved by that section. It is difficult to see how a term of a contract can be inconsistent with the provisions of the Act of 1872 if it is implied, while it would not be inconsistent if it were expressed in the contract.

These considerations lead their Lordships to the conclusion that the Act of 1872 was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, they think that common carriers are not within the Act. They are therefore compelled to decide in favour of the view of the High Court of Calcutta, and against that of the High Court of Bombay.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Solicitors for the appellants: Messrs. *Sanderson, Holland, and Adkin.*

Solicitors for the respondents: Messrs. *Bramall and White.*

C. B.

18 C. 631.

1891 JULY 3.

APPELLATE CIVIL.

18 C. 631.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

PEARY MOHUN AICH (*Judgment-debtor*) v. ANUNDA CHARAN BISWAS (*Decree-holder*).* [3rd July, 1891.]

Execution of decree—Transfer of decree for execution—Civil Procedure Code (*Act XIV of* 1882), ss. 223, 230—*Limitation Act* (*XV of* 1877), ss. 5, 6—*Extension of time when Court is closed.*

Where parties are prevented from doing a thing in Court on a particular day not by any act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity.

[632] Where, therefore, after previous attempts to execute a decree, dated the 7th September 1877, an application for transfer of the decree under s. 223 of the Code was made and granted on the 2nd September 1889, and on the 9th September (the Court having been closed from the 3rd to the 8th inclusive on account of the Mohurrum) the decree-holder applied for execution under s. 230 of the Code; *held*, that he was entitled to the benefit of the rule laid down in s. 5 of the Limitation Act upon the broad principle above stated. *Shooshee Bhusan Rudro* v. *Gobind Chunder Roy* (1) applied in principle.

[**F.**, 3 C.L.J. 339=10 C.W.N. 535; **Appl.**, 22 M. 179=8 M.L.J. 265; 13 C.L.J. 467=10 Ind. Cas. 51 (53); **R.**, 36 B. 268 (271)=13 Bom. L.R. 1153=12 Ind.Cas. 811; 16 C.W.N. 20=12 Ind. Cas. 33; 5 Ind. Cas. 416; 6 Ind.Cas. 752=13 O.C. 103; 12 Ind. Cas. 810=7 N.L.R. 176; 4 O.C. 188 (190); 11 O.C. 220; **Com.**, 16 C.W.N. 721 (725)=14 Ind. Cas. 173 (174).]

THE decree in this case sought to be executed was that of the Munsif of Sealdah, bearing date the 7th September 1877. After various attempts to execute this decree, the decree-holder on the 2nd September 1889 applied to transfer it for execution to the Munsif of Bagirhaut. An order was therefore made, directing the transfer to be made. On the 9th September (the Court having been closed from the 3rd September to the 8th September inclusive on account of the Mohurrum) the decree-holder applied to the Munsif of Bagirhaut for execution. On that date the certificate required under s. 224 of the Code had not reached the Court, and did not, as a matter of fact, do so till the 10th September. The judgment-debtor therefore opposed the application on that ground, and also on the ground that it was made more than 12 years from the date of the decree sought to be enforced, the decree-holder not being entitled to the benefit of s. 5 of the Limitation Act, inasmuch as s. 230 of the Code itself provided a term of limitation. The Munsif held that the decree-holder was entitled to apply for execution notwithstanding the non-arrival of the certificate, the order for transfer having been made on the 2nd September, and on this point referred to *Nilmoney Singh Deo* v. *Birressur Bannerjee* (2). On the point of limitation he held that s. 6 of the Limitation Act did not disentitle the decree-holder to the benefit of s. 5 of that Act; and that the application for execution having been made on the 9th September was therefore in time.

The judgment-debtor appealed to the Subordinate Judge, and that officer affirmed the order of the Munsif, adding that although s. 230

* Appeal from Order No. 111 of 1891, against the order of Baboo Koylash Chunder Mookerjee, Subordinate Judge of Khoolna, dated the 30th of December 1890, affirming the order of Baboo Narendra Krishna Dutt, Munsif of Bagirhaut, dated the 19th of August 1890.

(1) 18 C. 231. (2) 16 C. 744.

1891 JULY 3. — APPELLATE CIVIL. — 18 C. 631.

of the Code prescribed a special law of limitation, yet that section should be considered with the provisions of [633] the General Limitation Act, not, however, for the purpose of giving a longer period of limitation, but as showing the meaning of the law itself.

The judgment-debtor appealed to the High Court.

Baboo *Chandra Kant Sen*, for the appellant.—Where, by a special law other than that of the Limitation Act, a fixed period of limitation is given in which to make any application or file any suit, then such special limitation is to be applied, see s. 6 of the Limitation Act, 1877; in this case, therefore, s. 230 of the Code prevents the decree-holder from having the benefit of s. 5 of the Limitation Act. This rule has been upheld in the Full Bench case of *Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (1), and the cases therein cited.

Baboo *Dwarka Nath Chackerbatty*, for the respondent, referred to *Shooshe Bhusan Rudro* v. *Gobind Chunder Roy* (2), *Behari Loll Mookerjee* v. *Mungolanath Mookerjee* (3), *Khoshelal Mahton* v. *Gunesh Dutt* (4).

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

JUDGMENT.

This second appeal arises out of an application to execute a decree made by the Munsif of Sealdah on the 7th September 1877. After various attempts to execute the decree, the judgment-creditor on the 2nd September 1889 applied for the transfer of the decree to the Bagirhaut Court under s. 223 of the Code. An order for transfer was made, and on the 9th September the Court having been closed from the 3rd to the 8th (inclusive) on account of the Mohurrum holidays, the decree-holder applied to the Munsif of Bagirhaut for execution of the decree under s. 230. Upon that application being made, the judgment-debtor objected, *inter alia*, that the application ought not to be granted, as it had been made more than 12 years from the date of the decree sought to be enforced (s. 230, Code of Civil Procedure).

Both the lower Courts have held that the Court having been closed from the 3rd to the 8th September, and the application [634] having been made on the 9th, the day on which the Court re-opened, s. 5 of the Limitation Act operates to prevent the application from being barred.

It is contended before us that the period of limitation (12 years) being prescribed by the Code of Civil Procedure and not by the Limitation Act, s. 5 of the latter Act is not applicable so as to modify the strict provisions of s. 230 of the Code. The judgment-debtor relies upon s. 6 of the Limitation Act, and upon a series of decisions cited in the recent Full Bench case of *Nagendra Nath Mullick* v. *Mathura Mohun Parhi* (1), in which it was held that the provisions of the Limitation Act were not applicable to suits under Act X of 1859.

We are of opinion, however, that s. 6 of the Limitation Act has no application to the present case. The Code of Civil Procedure is neither a special nor a local law. It may be that the word "prescribed" in s. 5 is intended to be read as "prescribed by this Act," but whether that be so or not, it seems to us that the decree-holder is entitled to the benefit of the rule laid down in that section upon the broad principle referred to in the case of *Shoshee Bhusan Rudro* v. *Gobind Chunder Roy* (2), that

(1) 18 C. 368. (2) 18 C. 231. (3) 5 C. 110. (4) 7 C. 690.

where the parties are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity. This principle has been followed in several cases, *viz.*, *Behari Loll Mookerjee* v. *Mungolanath Mookerjee* (1), *Golap Chand Nowluckha* v. *Kristo Chunder Dass Biswas* (2), *Hossein Ally* v. *Donzelle* (3), and *Khoshelal Mahton* v. *Gunesh Dutt* (4), and it has been recognized (as regards future enactments) by s. 7 of the General Clauses Act, I of 1887.

We hold, then, that the Court having been closed on the day when this application might have been lawfully granted within the 12 years, and the application having been made on the day the Court re-opened, it must be taken to have been made within time. We accordingly dismiss the appeal with costs.

T. A. P. *Appeal dismissed.*

---

18 C. 635.

[635] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

BUNKO BEHARY GANGOPADHYA AND ANOTHER (*Opposite party*), *Appellants* v. NIL MADHUB CHUTTOPADHYA (*Petitioner*), *Respondent.**
[30th June, 1891.]

Execution of decree—Execution proceeding struck off—Civil Procedure Code (*Act XIV of* 1882), ss. 373, 647—"*Suit.*"

Section 647 of the Code of Civil Procedure does not operate to extend the rule laid down in respect of a suit in s. 373 to an application for execution. *Radha Charan* v. *Man Singh* (5) not followed.

[Appr., 17 A. 106 (111); R., 26 B. 76=3 Bom.L.R. 431; 13 C.L.J. 532=11 Ind. Cas. 385 (386).]

ONE Nil Madhub Chuttopadhaya having obtained a decree against one Basanta Kumari Debi, applied for execution. The judgment-debtor took the objection that the decree-holder had assigned his rights under the decree to a third person, and that therefore he had no longer any right to execution. Thereupon the pleader on behalf of the decree-holder stated that his client would not proceed with the execution proceedings, but would bring a regular suit to set aside the deed of assignment set up by the judgment-debtor. The Subordinate Judge thereupon dismissed the application "for want of prosecution." The decree-holder subsequently renewed his application for execution, contending that his pleader in the former proceeding had no authority to state that execution would not be proceeded with.

The Subordinate Judge held that the order dismissing the application for want of prosecution was binding on the decree-holder, and prevented his present application from being granted.

---

* Appeal from Order No. 69 of 1891, against the order of C. B. Garrett, Esq., Judge of 24-Pergunnahs, dated the 16th of December 1890, reversing the order of Baboo Amirta Lal Chaterjee, Subordinate Judge of 24-Pergunnahs, dated the 1st of October 1890.

(1) 5 C. 110. (2) 5 C. 314. (3) 5 C. 906.
(4) 7 C. 690. (5) 12 A. 392.

1891 June 20. — Appellate Civil. — 18 C. 635.

The decree-holder appealed to the District Judge, who held that the pleader for the decree-holder in stating that he would not proceed with execution had exceeded his instructions, and that the order dismissing the former application for want of prosecution was not such an order as could prevent the renewal of his application. He therefore directed execution to issue.

The judgment-debtor appealed to the High Court.

[636] Baboo *Nilmadhub Bose*, for the appellant, contended that the first order not having been set aside, the matter was *res judicata*; and further, that the decree-holder not having obtained leave to withdraw his former application with liberty to renew it, was, under s. 373 read with s. 647 of the Code, debarred from making the present application. On the latter point he cited *Kifayat Ali* v. *Ram Singh* (1), *Sarju Prasad* v. *Sita Ram* (2), *Fakir Ullah* v. *Thakur Prasad* (3), and *Radha Charan* v. *Man Singh* (4), as showing that s. 373 when so read applied to execution proceedings.

Baboo *Akhoy Coomar Banerji*, for the respondent, referred to *Tarachand Megraj* v. *Kashinath Trimbak* (5) as dissenting from the view taken by the Allahabad Court; and also to *Laljee Sahoo* v. *Bysakhi Lall* (6), and *Wajihan* v. *Bishwanath Pershad* (7).

JUDGMENT.

Judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

BEVERLEY, J.—This is a second appeal from an order of the District Judge of the 24-Pergunnahs, reversing an order of the First Subordinate Judge of that district, by which he had held that a certain application to execute a decree was barred.

It appears that there had been a previous application to execute the decree, and in that proceeding the judgment-debtor had appeared and objected that the decree-holder had assigned his rights under the decree to a third person. Upon that the pleader for the decree-holder intimated that he would not proceed with the application for execution, but would advise his client to bring a regular suit to set aside the alleged deed of assignment. The Subordinate Judge therefore dismissed that application for non-prosecution. The first Court was of opinion that the dismissal of that application operated as a bar to the present application; but this view was overruled by the District Judge.

On appeal before us it is contended—

(1) That the order on the previous application was an order to the effect that execution could not proceed at the instance of the [637] decree-holder, and until that order was set aside, it operated as a bar to any subsequent application by him.

(2) That if the action of the decree-holder be construed as a withdrawal of the application, that withdrawal was made without leave of the Court, and therefore under s. 373 of the Code of Civil Procedure (read with s. 647) no subsequent application to execute the decree could be entertained.

As regards the first argument, it seems to us that there was no finding that execution could not proceed at the instance of the original decree-holder such as would bar a subsequent application by him. No enquiry

(1) 7 A. 359. (2) 10 A. 71. (3) 12 A. 179. (4) 12 A. 392. (5) 10 B. 62. (6) Misc. App. 45 of 1891. (7) 18 C. 462.

on that point seems to have been made. All that appears is that the decree-holder having been met by a certain objection, declined to proceed with his application, which was accordingly dismissed or struck off for non-prosecution. Such an order could not operate as *res judicata*.

On the second point the learned pleader for the appellant has relied on several decisions of the Allahabad High Court, namely, *Kifàyat Ali* v. *Ram Singh* (1), *Sarju Prasad* v. *Sita Ram* (2), *Fakir Ullah* v. *Thakur Prasad* (3), and *Radha Charan* v. *Man Singh* (4). The last case is the decision of a Full Bench of the Allahabad Court, and although not binding upon this Court, it is entitled to our utmost respect and most serious consideration. It appears to have been expressly dissented from recently by a Division Bench of this Court in *Wajihan* v. *Bishwanath Pershad* (5); and the decision of that Bench has been followed by two other Benches in *Radha Kishen Lall* v. *Radha Pershad Singh* (6) and in *Laljee Sahoo* v. *Bysakhi Lall* (7). It also appears that a Division Bench of the Bombay High Court in *Tarachand Megraj* v. *Kashinath Trimbak* (8) has expressed an opinion opposed to that of the Allahabad Court.

In the Full Bench case refered to, Edge, C. J., remarks as follows :—"It has been argued here to-day that s. 373 does not apply to proceedings in execution. Unless we are to apply, so far as may be, the principles provided for the guidance [638] of Courts in the other sections of the Code of Civil Procedure, there would, in a great number of cases, be no provision for what should be done in execution proceedings, as the sections which exclusively relate to execution proceedings are deficient and far from exhaustive, if we are to regard them as the only sections which supply the procedure in execution cases. In my opinion s. 647 makes s. 373 applicable. I think that 'suit' and 'appeal' in that section apply to those proceedings generally known as a suit and an appeal, that is, to suits and appeals in the strict acceptation of the terms, and that in s. 647 the words 'suit' and 'appeal' were not intended to cover proceedings for the enforcement of rights decreed in a suit or appeal." The learned Chief Justice then goes on to refer with approval to the decisions in the cases of *Sarju Prasad* v. *Sita Ram* in I. L. R. 10 All., 71, and *Fakir Ullah* v. *Thakur Prasad*, I. L. R., 12 All., 179. The other Judges of the Full Bench (STRAIGHT, BRODHURST, TYRRELL, and MAHMOOD, JJ.) concurred with the Chief Justice.

Now the first paragraph of s. 647 of the Code runs as follows :—

"The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction other than suits and appeals."

It appears to us that this provision of the Code was intended to apply to matters such as applications for probate, certificates of guardianship, or to collect debts, which, especially when contested, partake of the nature of suits, and to which the procedure laid down in the Code is clearly more or less applicable. We do not think that the term "proceedings other than suits and appeals" was intended to include or have reference to proceedings in execution of decree. Such proceedings have been frequently held to be proceedings in the suit, and are expressly described as such in the Code, as, for example, in s. 3. Moreover, the Code lays down a procedure for the execution of decrees, *viz.*, chap. XIX, comprising ss. 223 to 343 ; and it would scarcely be necessary for the Legislature to declare again

(1) 7 A. 359. (2) 10 A. 71. (3) 12 A. 179.
(4) 12 A. 392. (5) 18 C. 462. (6) 18 C. 515.
(7) Misc. App. 45 of 1891. (8) 10 B. 62.

1891
JUNE 30.
—
APPELLATE CIVIL.
—
18 C. 635.

in s. 647 that those sections shall be followed "as far as may be practicable" in the execution of decrees.

[639] But, whether or not s. 647 applies to execution proceedings, we entertain very little doubt that that section cannot operate to extend the rule laid down in respect of a suit in s. 373 to an application for execution. In the first place the rule laid down in the second paragraph of that section is not a matter of procedure, but a substantive rule of law. It is a rule based on the general principle that no person shall be allowed to institute successive suits on the same cause of action. But that rule is not applicable to execution proceedings, in which the Code itself (s. 230, for example) contemplates successive applications to execute the same decree. And even if the rule laid down in s. 373 be held to be a rule of procedure, it is clear to our minds that it is not applicable to proceedings in execution, inasmuch as the principle of the rule is opposed to the principle of the Code in regard to those proceedings.

For these reasons we are unable to concur with the decision of the Allahabad Court, and as that decision has not been followed by any Bench of this Court, we think it unnecessary to refer the matter for the decision of a Full Bench.

This appeal will be dismissed with costs.

T. A. P. *Appeal dismissed.*

---

18 C. 639.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

JASODA DEYE (*Decree-holder*) *v.* KIRTIBASH DAS AND ANOTHER (*Judgment-debtors*).* [2nd July, 1891.]

Execution of decree—Execution of decree by recorded decree-holder—Civil Procedure Code (Act XIV of 1882), s. 232.

The person appearing on the face of the decree as the decree-holder is entitled to execution, unless it be shown by some other person, under s. 232 of the Civil Procedure Code, that he has taken the decree-holder's place.

Khetter Mohun Chattopadhya v. *Issur Chunder Surma* (1) relied on.

[R., 10 C.L.J. 396 = 14 C.W.N. 752 (759) = 3 Ind. Cas. 324.]

THIS was an application for execution of a mortgage decree by one Jasoda Deye. The judgment-debtor objected to the execution, [640] on the ground that Jasoda Deye had obtained the decree in her capacity of widow of her late husband Kashinath Dass, and that the decree really belonged to her husband's estate. Some time previous to Jasoda Deye's decree, the judgment-debtor, as reversioner to the estate of Kashinath Dass, had instituted a suit to oust the widow from her possession of the estate of her husband. He subsequently obtained a decree in that suit, under which Jasoda Deye was removed, and a Receiver was appointed.

It appears that the Receiver did not take any steps to put himself upon the record in the place of the decree-holder, Jasoda Deye.

The Subordinate Judge held that Jasoda Deye did not pay, as alleged by her, the consideration money of the mortgage bond out of her *stridhan*;

---

* Appeal from Order, No. 118 of 1891, against the order of Baboo Dwarka Nath Bhuttacharjee, Subordinate Judge of Midnapore, dated the 14th of March 1891.

(1) 11 W.R. 271.

that the decree really belonged to Kashinath Das's estate, and that the Receiver to that estate was alone entitled to execute the same.

From this order the decree-holder appealed to the High Court.

Dr. *Rashbehari Ghose*, for the appellant.

Baboo *Debendro Nath Ghose*, for the respondent.

The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows :—

JUDGMENT.

This is an appeal against an order of the Subordinate Judge of Midnapore, dismissing an application for the execution of a decree.

The decree-holder is the appellant, Jasoda Deye, and the decree was in respect of a bond by which property was mortgaged. The decree-holder seeks to execute by sale of the mortgaged property in the hands of the judgment-debtor.

The application has been refused upon the objection of the judgment-debtor that the decree-holder, Jasoda Deye, obtained a decree only in her capacity of widow of her late husband, Kashinath Das, and that the property really belonged to the estate of Kashinath. Before the decree had been obtained a suit had been brought by the judgment-debtor, as reversioner to the estate of Kashinath, to obtain the removal of the widow Jasoda from her position as possessor of the estate of her husband, and in that suit a Receiver to the estate was appointed; and by the decree passed in that suit the widow was ousted. The Receiver does not appear to have **[641]** taken any steps whatever to get himself put upon the record as decree-holder in this case or to obtain execution. In fact he has not appeared at all. But, upon the objection of the judgment-debtors, the Subordinate Judge referred to the suit brought by them to oust the widow from possession of the estate, and being satisfied that the consideration for this bond really was part of the property of Kashinath's estate, he held that not the widow, but only the Receiver was competent to execute the present decree.

It has been urged before us that the Subordinate Judge had no choice under the Code of Civil Procedure but to grant execution at the instance of the recorded decree-holder, unless the assignee, whether by conveyance or, as is alleged in the present instance, by operation of the law, should come in under s. 232.

Authority for this contention has been shown to us in the case of *Khettur Mohun Chuttopadhya* v. *Issur Chunder Surma* (1), where it was held that the Court was bound to allow execution at the instance of the recorded decree-holder, unless intimation had been given in the regular way prescribed by law for the admission of another person in the decree-holder's place. And we think that the contention is sound that the decree-holder who appears upon the face of the decree is entitled to execute, unless it be shown by some other person under s. 232 that he has taken the decree-holder's place.

It seems to us, therefore, that in this case we must direct that the execution do proceed at the instance of the decree-holder, Jasoda Deye; but that, under the circumstances, the Court below, being satisfied that the decree really appertains to the estate of Jasoda's late husband, and it might be dangerous to allow her to receive the proceeds of that decree, will be at liberty to retain the money, if realized, for the purpose of being

(1) 11 W.R. 271.

1891 JULY 2. — APPELLATE CIVIL. — 18 C. 639.

made over to the appointed Receiver, who will deal with it as part of the estate; of course paying to the decree-holder the income of the capital sum.

It is contended on her behalf that she is entitled as widow to the whole of the purchase-money of this property, and that, at all events, if it be her husband's estate, she is entitled to the value of her life-interest in that. We think it is unnecessary in these proceedings to give any opinion as to whether the decree-holder is entitled to all or any of this money. The only point we have to decide is whether [642] in the eye of the law the recorded decree-holder is entitled to execute the decree, and we think she is. The result is that we must set aside the order of the Court below, and send the case back that execution may proceed. Each party will bear their own costs.

A. F. M. A. R. *Appeal allowed.*

---

18 C. 642.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

KARTICK CHUNDER GHUTTUCK AND OTHERS (*Defendants 1 to 3*) *v.* SARODA SUNDURI DEBI (*Plaintiff*).*
[2nd July, 1891.]

Limitation Act (*XV of* 1877), *arts.* 127, 142 *and* 144—*Suit by a person claiming share in joint family property.*

The word ' person ' mentioned in art. 127 of Schedule Second to the Limitation Act means some person claiming a right to share in joint family property, upon the ground that he is a member of the family to which the property belongs.

Radhanath Doss v. *Gisborne* (1), *Ram Lakhi* v. *Ambica Charan Sen* (2), and *Hornnara Chunder Gupta Roy* v. *Aunoardi Mundul* (3) relied on.

[Appr., 7 C.W.N. 155 (157); R., 23 B. 137 (140).]

THIS was a suit to recover possession of the share of the plaintiff's father in a Hindu joint family property. The plaintiff alleged that her father was joint in food and estate with his four brothers; that in the year 1872 her father died, leaving her surviving as his sole heiress; that she being then a minor, her paternal uncles, the defendants 1 to 3, took charge of her estate; that subsequently, when she attained majority she held possession of her father's share jointly with her uncles. She further alleged that when she went to live in her husband's house, she used to enjoy the profits of her share. But in Falgoon 1288 the defendants 1 to 3 separated and divided her father's share among themselves. In Bysack 1289 she demanded her share, which the defendants refused to give her, and subsequently dispossessed her of the same.

[643] The plaint was filed on the 10th of January 1889.

The defendants urged various pleas, the chief of which were that the plaintiff's father was disqualified by leprosy from inheriting the property; that he (the father) had left a son surviving him; and that the suit was barred by limitation.

---

* Appeal from Order, No. 256 of 1890, against the order of H. F. Mathews, Esq., Judge of Burdwan, dated the 11th of August 1890, reversing the decree of Baboo Kali Dhan Chatterji, Munsif of Raniguпge, dated the 9th of December 1889.

(1) 14 M.I.A. 1. (2) 11 C. 680. (3) 14 C. 544.

The first Court found that the plaintiff was the only child of her father; that he did not suffer from leprosy, and hence was not disqualified to inherit. It further held that the plaintiff was never in possession of her father's estate, and that the suit was barred by limitation.

The lower appellate Court held that the suit was not barred, inasmuch as art. 127 of the Second Schedule to the Limitation Act applied to the case. It also further held that the fact of the plaintiff's exclusion not being known to her till within twelve years before the institution of the suit, her remedy was not barred by limitation.

The defendants now preferred this second appeal to the High Court.

Baboo *Karuna Sindhu Mukerji*, for the appellants.

Dr. *Rashbehari Ghose* and Baboo *Digamber Chatterjee*, for the respondent.

Baboo *Karuna Sindhu Mukerji*.—Article 127, sch. II to the Limitation Act has no application to this case. It contemplates the case of a person excluded from a joint family. The plaintiff being a member of her husband's family cannot be considered to be a member of the same family with the defendants—*Amritolal Bose* v. *Rajni Kant Mitter* (1), *Radanath Doss* v. *Gisborne* (2). This article also provides for a suit to 'enforce a right' and not to 'establish a right,' and therefore applies to suits for partition when the property has remained joint family property. The words 'excluded' and 'inclusion' apply to previous inclusion—*Saroda Soondaree Dossee* v. *Doya Moyee Dossee* (3). Article 127 has also been construed strictly, and has not been extended to a purchaser of a share in joint family property—*Ram Lakhi* v. *Ambica Charan Sen* (4), *Horendra Chunder Gupta Roy* v. *Aunoardi Mundul* (5).

[644] At the time the plaintiff instituted the suit, the defendants' family was not a joint family. She was dispossessed in 1289, more than seven years before the suit. She must therefore prove possession within twelve years—*Tulshi Pershad* v. *Raja Misser* (6), *Obhoy Churn Ghose* v. *Gobind Chunder Dey* (7). This case falls either under art. 142 or 144.

Dr. *Rashbehari Ghose*.—Article 127 has been properly applied. The plaintiff was at one time a member of the joint family, and at all events the property in suit was admittedly joint family property. The provisions of the English law as to possession amongst tenants in common may be looked into—*Darby and Bosanquet*, 284. See also the case of *Hari* v. *Maruti* (8). If there be any doubt as to art. 127, art. 144 should apply. The cases cited by the other side are distinguishable.

Baboo *Karuna Sindhu Mukerji* was not called upon.

The judgment of the Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

JUDGMENT.

This is an appeal against an order of remand passed under s. 562 of the Code of Civil Procedure by the District Judge of Burdwan. He differed from the Munsif, who held that the suit was barred by limitation, and having come to the conclusion that the suit was not barred, the Judge reversed the Munsif's decision and remanded the case to be disposed of on the merits. In passing this order the District Judge had overlooked the fact that the Munsiff had already decided the suit on the merits, he

(1) 2 I.A. 113. (2) 14 M.I.A. 1. (3) 5 C. 938. (4) 11 C. 68.
(5) 14 C. 544. (6) 14 C. 610. (7) 9 C. 237. (8) 6 B. 741.

1891 JULY 2. — APPELLATE CIVIL. — 18 C. 642.

having tried every issue laid down. The District Judge, therefore, if he thought the suit was not barred by limitation, should have himself determined the case on the merits; and if he thought it necessary to take further evidence, he should not have sent the case back as he did, but should have kept it on his own file and directed the Munsif to take further evidence and submit the same to him. He could not legally get rid of the case by remanding it under s. 562.

But the question whether the Judge was right in holding that the suit was barred by limitation was fully argued before us yesterday.

[645] The suit was brought by a Hindu lady to recover possession of what had been her father's share in what she stated was joint family property. Her father had died a good many years ago, that is, in the year 1272 or 1865, and the suit was brought on the 10th January 1889. The plaintiff was a married woman. It was found that her father had no son surviving him, and that in point of fact the plaintiff would be entitled at his death to inherit his estate, whatever it was. But the Munsif considered that the suit was barred by limitation, because the plaintiff had not been in possession of her father's estate at any time since his death, which had occurred some twenty-four years before the suit was brought. And upon the merits the Munsif found that the plaintiff failed to prove that the land in question claimed by the defendants had ever belonged to the plaintiff's father. That was a finding which went directly to the merits of the suit.

Upon appeal the District Judge considered that the Munsif was wrong in holding the case was barred by limitation, because he thought that the article of the schedule to the Limitation Act applicable to this case was art. 127 and that therefore the plaintiff was not bound to prove her own possession at any time before the suit was brought. Article 127 is applicable to a suit by a person excluded from joint family property to enforce a right to a share therein, and the period of limitation begins to run when the exclusion becomes known to the plaintiff. The Judge considered the suit as falling within the scope of art. 127, and was of opinion that the plaintiff could not be said to have become aware of her own exclusion from her share of the property until she had asked for it and been refused, or, at all events until, the separation took, place between the members of her father's family who held joint possession after her father's death, which separation, she said, took place in Falgoon 1288, and within twelve years before this suit was brought.

We think that the Judge was in error in holding that art. 127 applies to the case. It seems to us that the person mentioned in art. 127 who is the plaintiff in the case must mean some person claiming a right to share in joint family property, upon the ground that she is a member of the family to which the property belongs. There is authority for our opinion in the observations of their Lordships of the Privy Council in the case of *Radanath Das* v. [646] *Gisborne* (1). That decision was passed with reference to the old Limitation Act, XIV of 1859; but cl. 13 of s. 1 of that Act, which deals with cases of this kind, is similar in wording to art. 127 of the present schedule. Their Lordships state that they were of opinion that that section, namely, s. 13, " is a section which deals with suits between one or some member or members of the joint family, and

(1) 14 M. I. A. 1.

1891 JULY 2. — APPELLATE CIVIL. — 18 C. 642.

some other member of the joint family, complaining of what we should term in this country an ouster of some members by others or of a failure by the member in occupation to account for profits, or to pay maintenance where it is due." Clause 13 of Act XIV of 1859 embraced rather more than art. 127 of the present schedule; it also included suits for maintenance.

The Judge of the Court below thought that this Article was not confined to suits brought by members of a family because of the use of the word 'person.' We do not think that the use of this term is sufficient to alter the meaning of the law. We think from the context, as well as from the decided cases, that we are bound to hold that a person who comes as plaintiff must also be a member of, and not a stranger to, the family to which the joint property belongs—See *Ram Lakhi* v. *Ambica Charan Sen* (1), *Horendra Chunder Gupta Roy* v. *Aunoardi Mundul* (2). In the present case the plaintiff is no longer a member of the family to which this property belongs. She is a lady now of mature age who was married at the age of five, and who, after the death of her father, when she was about 18, left her father's family; and it is proved that from that time, some twenty-four years, she had lived in her husband's house and never in her paternal residence with the members of the joint family. We think, therefore, that this case must fall under either art. 142 or 144 of the schedule. According to the plaintiff it will come under art. 142, for the plaintiff says in her plaint that she was in possession by enjoying the profits, and that she had been ousted by their refusing to pay what the defendants had agreed to pay. Her story on this point was disbelieved by the Munsiff, and he came to the conclusion that she had had no sort of possession of the estate or of any property of the estate from the time of her father's death.

The District Judge comes to no certain finding upon this point. He does not distinctly confirm the Munsiff's finding that the **[647]** plaintiff's story is false as to her having received so much money and so much rice annually from the defendants. But he says, admitting this to be false, still it is not shown that she ever resigned her share or acquiesced in her exclusion from it. The Judge further seems to think that, though she had no actual enjoyment from the time of her father's death, she had still a right to obtain a share upon the ground that the exclusion was not known to her till within twelve years before suit and that she had never resigned her share.

We suppose that the Judge meant to say that the possession of the defendants had not been adverse to the plaintiff. We think that he ought to have come to some distinct finding upon this matter instead of leaving it to be a matter of conjecture what he thought; and if he thought the long possession of defendants was not adverse to this plaintiff, he should have given reasons for the opinion. Further, the Judge ought to have found before reversing the Munsiff's decree that the property in question was really property to which the plaintiff was entitled by reason of the share claimed having belonged to her father. The Munsiff found against her upon that point, which was the main point in the case so far as the merits are concerned.

It seems to us, therefore, that the decree of the lower appellate Court cannot stand, but it must be set aside, and the case must go back to the District Judge for a finding whether the property in question did belong

(1) 11 C. 680. (2) 14 C. 544.

1891 JULY 2. — APPELLATE CIVIL. — 18 C. 642.

to the plaintiff, and, if so, whether the plaintiff is still entitled to obtain a share with reference to the law of limitation as contained in art. 142 and 144.

Costs of the appeal will abide the result.

A. F. M. A. R. *Case remanded.*

---

18 C. 647.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

THAKUR MAGUNDEO (*Defendant*) *v.* THAKUR MAHADEO SINGH AND ANOTHER (*Plaintiffs*).* [10th July, 1891.]

Res judicata—Suit in ejectment—Civil Procedure Code (*Act XIV of* 1882), *s.* 13.

A, as *ticcadar*, brought a suit to eject *B* from certain lands, which he claimed as *majhes* land, or land which is ordinarily cultivated by the [648] landlord himself or by the *ticcadar*. *B* pleaded his right of occupancy. The Court found that the land was *majhes* land, but dismissed the suit on the ground that *A* had failed to prove notice to quit. Afterwards *A* brought a suit against *B* for ejectment, from the same land. *B* again pleaded his right of occupancy.

Held, that *B* was not precluded from raising the same plea, inasmuch as the finding in the previous suit upon the issue whether *B* was an occupancy tenant was not conclusive against him; nor could that issue be said to have been 'finally decided' in that suit within the meaning of s. 13 of the Civil Procedure Code.

Run Bahadur Singh v. *Lucho Koer* (1) and *Nundo Lall Bhuttacharjee* v. *Bidhooe Mookhy Debee* (2) relied on.

[F., 9 C.L.J. 493=4 Ind. Cas. 175 (176); R., 17 A. 174 (184)=15 A.W.N. 47; 18 B. 597 (602); 23 B. 296 (302); 24 C. 900 (905); 36 C. 193=5 C.L.J. 611 (628); 40 C. 29 (35)=16 C.L.J. 9=16 C.W.N. 877=15 Ind. Cas. 453; 9 C.W.N. 60 (64); 7 Ind. Cas. 15 (17); 9 Ind. Cas. 1060=120 P.L.R. 1911=101 P.W.R. 1911; 56 P.R. 1904=84 P.L.R. 1904; 7 C.P.L.R. 139.]

THIS was a suit by the plaintiffs as *ticcadars* of Dehat Sadam which included mouzahs Sawag and Ocho, to recover possession of 5 annas of *majhes* land, or land which is ordinarily cultivated by the landlord himself or by the *ticcadar*, in mouzah Sawag and 6 annas of *majhes* land in mouzah Ocho, and to eject the defendant therefrom.

The plaintiffs alleged that the defendant having refused them khas possession of the said *majhes* land, they brought an action in ejectment against him, and in that suit the defendant denied the claim of the plaintiffs, and alleged that he held 6 annas of ryoti or *jebandari* land in each of the said mouzahs; that the Munsiff, thereupon, found that the land was *majhes* land, but as the defendant was not a trespasser, he was entitled to notice under the law; and that the plaintiffs' suit was therefore, on the 2nd September 1887, dismissed. They further alleged that they had instituted this suit after due service of notice for ejectment upon the defendant.

The defendant raised the same pleas as in the former suit. He contended that the land in question was ryoti or *jebandari* land; that he

---

* Appeal from Appellate Decree, No. 1058 of 1890, against the decree of F. Cowley, Esquire, Judicial Commissioner of Chota Nagpore, dated the 2nd of June 1890, affirming the decree of Moulvie Ali Ahmed, Munsiff of Hazaribagh, dated the 29th of December 1888.

(1) 11 C. 301. (2) 13 C. 17.

had acquired a right of occupancy; that the suit was not maintainable without the proprietor being made a party; that the plaintiffs were merely temporary lessees, and that the term of their lease extended only up to the year 1294.

The first Court held that the defendant was precluded under s. 13 of the Civil Procedure Code from raising the pleas **[649]** which he had already raised in the former suit, and it therefore decreed the plaintiff's suit.

The defendant appealed to the Judicial Commissioner of Chota Nagpore, who affirmed the decision of the first Court.

The defendant now preferred a second appeal to the High Court.

Baboo *Koruna Sindhu Mukerji*, for the appellant.

Baboo *Mohendro Nath Bannerji* and Baboo *Nagendra Nath Chatterji*, for the respondents.

Baboo *Koruna Sindhu Mukerji*.—The Court below was wrong in holding that the defendant was precluded from raising the objections which he raised on the ground of *res judicata*. The former suit was simply dismissed, and as no finding upon the issue as to the occupancy right was embodied in the decree, the defendant had no right of appeal—*Shama Soonduree Debia* v. *Digamburee Debia* (1). The Court below has relied on the case of *Niamut Khan* v. *Phadu Buldia* (2), but the principle therein laid down has not been followed by the Privy Council—*Run Bahadur Singh* v. *Lucho Koer* (3). That case should be taken to have been impliedly overruled—See *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (4). The decree in the former case was only a dismissal for want of notice—See also *Devarakonda Narasamma* v. *Devarakonda Kanaya* (5), *Muttukumarappa Reddi* v. *Arumuga Pillai* (6), *Anusuyabai* v. *Sakharam Pandurang* (7), *Jamaitunnissa* v. *Lutfunnissa* (8).

Baboo *Mohendro Nath Bannerji*, for the respondents, argued that the question as to whether the land was *majhes* land or not being directly and substantially in issue in the previous suit, had been heard and finally decided in favour of the plaintiffs, and it was therefore *res judicata*. In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at—*Kali Krishna Tagore* v. *The Secretary of State for India in Council* (9). The Full Bench case of *Niamut Khan* **[650]** v. *Phadu Buldia* (2) was conclusive on the point. The opinion of their Lordships in the case of *Run Bahadur Singh* v. *Lucho Koer* (3) was an *obiter dictum*.

Baboo *Koruna Sindhu Mukerji* in reply.

The judgment of the Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

JUDGMENT.

The appeal is by the defendant in the original suit; and the suit was to eject him from land claimed by the plaintiffs, who were the ticcadars, as *majhes* land, by which we understand land ordinarily cultivated by the landlord himself or by the ticcadar. The defendant pleaded that he had a right of occupancy in this land as a raiyat, and could not be turned out of it.

The Courts below have both held that this matter is *res judicata* and the defendant is no longer entitled to be heard in respect of it, upon

(1) 13 W.R. 1. (2) 6 C. 319. (3) 11 C. 301.
(4) 13 C. 17. (5) 4 M. 134. (6) 7 M. 145.
(7) 7 B. 464. (8) 7 A. 606. (9) 16 C. 173.

1891 JULY 10. — APPELLATE CIVIL. — 18 C. 647.

the ground that in a previous suit brought by the plaintiffs to eject the defendant, the same objection was taken and the Munsif decided it in favour of the plaintiffs, but dismissed the plaintiffs' suit, because they had not given the defendant a proper notice to quit. The Courts below held that the finding on this point in that suit was a bar to its being raised and tried in the present suit; and the Courts relied upon the Full Bench decision of this Court in the case of *Niamut Khan* v. *Phadu Buldia* (1).

No doubt that decision is directly in favour of the lower Court's decision; but we observe that that decision has not been followed in this Court and the Privy Council in a more recent case have expressed an opinion which is in opposition to the judgment of the Full Bench. The case of *Run Bahadur Singh* v. *Lucho Koer* (2) was brought to the notice of the lower appellate Court, but that Court thought it was not an authority in the present case, because the decree in that case did not turn upon the particular opinion expressed, and on which reliance was put by the defendants' pleaders. In that case before their Lordships of the Privy Council the appellant had appealed against the decree of the High Court. The respondent preferred a cross-appeal against [651] certain findings recorded in the judgment of the High Court. Their Lordships observed:—" It was unnecessary for her to do so, inasmuch as those findings could not be subsequently held to be conclusive against her, because the decree of the Court below was not based upon any such finding, but in spite of it." This observation applies to the present case. The decree by which the plaintiff's suit was dismissed on the previous occasion was made in spite of the finding in their favour that the land in question was *majhes* land; and in the case *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (3), a Division Bench relying upon this observation of the Privy Council in the case of *Run Bahadur Singh* v. *Lucho Koer* (2) held that the findings of the lower Court in favour of the party appealing were not to be used as *res judicata* in a subsequent suit.

In the present case the respondent's vakil relies upon the terms of s. 13 of the Code, the law regarding *res judicata*; and points out that Courts are prohibited from trying any issue between the parties which has been heard and finally decided by such Courts in a former suit.

It appears to us that the last element is wanting, namely, " finally decided." We think that the finding of the Court in the previous suit was not final, inasmuch as the decree was not based upon it, and there could be no appeal against it, because the decree was in favour of the party against whom the finding was recorded.

Upon the whole we think that the appellant is entitled to have the same question tried which he raised in this suit. We accordingly set aside the decrees of the Courts below, and send this case back to be tried upon the merits.

Costs of this appeal will abide the result.

A.F.M.A.R. *Case remanded.*

---

(1) 6 C. 319. (2) 11 C. 301. (3) 13 C. 17.

18 C. 652.

1891 JUNE 29.

APPELLATE CIVIL.

18 C. 652.

[652] APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

NITYAHARI ROY AND OTHERS (*Appellants*) v. DUNNE AND OTHERS (*Respondents*).* [29th June, 1891.]

Ferries—Ferry rights, infringement of—Right to restrain party starting a second ferry—User for twenty years—Crown grant—Limitation Act (*XV of* 1877), *Part IV, and* s. 23.

In a suit brought to establish the right to a ferry franchise and to restrain the working of a rival ferry.

Held—There is nothing in the law of Bengal as it was before the acquisition by the British Government, or in the regulations before or after 1793, to show that any person is entitled to claim a monopoly of a right of ferry by prescription or by any other means than a grant from the Crown. To such a monopoly part IV of the Limitation Act of 1877, relating to the acquisition of ownership by prescription, is not applicable.

The franchise of a ferry is not necessarily appurtenant to land, but when a right of ferry was claimed as appurtenant to certain villages, *Held* that the grant of such right by the Crown would not be destroyed by mere *non-user* without waiver, nor by the running of an opposition ferry. The franchise would continue as long as the grant continued, and until the person who set up an opposition ferry could show a Crown grant, or give evidence from which a Crown grant could be presumed, the cause of action would remain.

The disturbance of a right of ferry is in the nature of a nuisance [*Yard* v. *Ford* (1)], and the cause of action in the case of the violation of this right is a continuing wrong within s. 23 of the Limitation Act (XV of 1877).

[Appr., 39 C. 53 (57) = 15 C.W.N. 972 = 11 Ind. Cas. 180; R., 9 Ind. Cas. 846.]

THIS was a suit brought by the plaintiffs to establish their right to a ferry called Permutta-Guzarghat-Aglapur, to recover possession of the same, and to have a ferry which had been established by the defendants put a stop to. The plaintiffs' case was that the Permutta-Aglapur ferry was settled by Government as part of the zemindary No. 113, comprising a 6-anna share of pergunnah Khalilabad; that they and their predecessors in title had been in enjoyment of the ferry right for a period of more than 20 years prior to suit, and had thereby acquired a [653] prescriptive right from which a grant should be presumed; that in consequence of the various changes in the course of the river from time to time the direction or track of the ferry had to be changed, so that for more than 20 years it had to be plied between *chur* Parmessarpatti, *chur* Angutia, *chur* Mohespur, &c., on the eastern bank, and mouzahs Bairajani, Deogram, and Angutia, &c., on the western bank of the river Dhuleswari; that the ferry in dispute was at the date of suit known as the Manikgunge-Guzarghat ferry, and that in Falgun 1286 the defendants set up a rival ferry, and eventually succeeded in dispossessing the plaintiffs in Kartic 1289. The plaintiffs therefore sued for possession and *mesne* profits, and alleged that the defendants had no right to work the ferry started by them, and asked for a perpetual injunction restraining them from working such ferry or interfering in any way with their (the plaintiffs') right.

The defendants denied that the plaintiffs ever had any ferry right at the place at which it was claimed by them, and stated that the ferry

---

* Appeal from Original Decree, No. 23 of 1890, against the decree of Baboo Krishna Chunder Chatterjee, Subordinate Judge of Dacca, dated the 18th of December 1889.

(1) 2 Saund 172.

1891 JUNE 29. — APPELLATE CIVIL. — 18 C. 652.

of Manickgunge had belonged to them and their predecessors for more than 20 years. They further alleged that their ferry did not interfere in any way with the plaintiffs' Permutta-Aglapur ferry wherever they might have had it, and also pleaded limitation as a bar to the suit.

Eleven issues were settled by the Subordinate Judge, the first three of which became immaterial during the progress of the suit. The remaining issues were as follow:—

(4) Have the defendants dispossessed the plaintiffs, and have the plaintiffs any cause of action?

(5) Is the plaintiffs' cause of action barred by limitation?

(6) Has the plaintiffs' claim for easement been properly joined with that based on the permanent settlement of the plaintiffs' mehal, and should the suit fail for misjoinder?

(7) Are the plaintiffs entitled to the ferry-right claimed by them on all or any of the grounds stated by them in the plaint?

(8) Has the defendants' ferry caused any loss or damage to the ferry claimed by the plaintiffs, and are the plaintiffs entitled to have the defendants' ferry removed?

[654] (9) Are the plaintiffs entitled to recover any wassilat or damages from the defendants; and if so, what amount?

(10) Are the plaintiffs entitled to a permanent injunction?

(11) What relief, if any, are the plaintiffs entitled to?

The Subordinate Judge dismissed the suit without costs for reasons which, together with the nature of the evidence adduced at the hearing, appear sufficiently for the purpose of this report from the judgment of the High Court.

The plaintiffs appealed to the High Court.

Mr. *Jackson*, Dr. *Rash Behary Ghose*, and Baboo *Harendar Nath Mitter*, for the appellants.

Mr. *J. T. Woodroffe*, Baboos *Hem Chandra Banerjee, Umakali Mukerjee, Tarak Nath Palit* and *Chandra Kumar Chatterjee*, for the respondents.

The judgment of the High Court (O'KINEALY and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

This is a suit brought to establish a right to a ferry franchise, called the Permutta-Guzarghat-Aglapur ferry, in the neighbourhood of Manickgunge, and to have it declared that the defendants have no right to ply or run the ferry said to have been carried on in the vicinity of the plaintiffs' ferry.

The plaintiffs stated that the Permutta-Guzarghat-Aglapur ferry was settled with their predecessors in title with the settlement of a 6-anna share of pergunnah Khalilabad entered in the Government rent-roll as No. 113; and they asserted that from the time of the Permanent Settlement downwards till about 1286 they had been in undisputed possession of this ferry. They further stated that in the year 1286 the defendants set up a rival ferry, and by degrees succeeded in putting an end to their ferry in 1289. In para. 3 of the plaint they said:—

"The said ferry-ghat had always remained in the ownership and possession of the plaintiffs Nos. 1 to 15, though its landing places had to be changed in consequence of the changes in the course of the river, and of alluvion and diluvion and other causes. At the present day the ferry-boats have to ply sometimes between *chur* Parmessarpati, *chur* Angutia,

chur Mohespur, &c., on the eastern bank, and Mouzahs Bairajani, Deogram and Angutia, &c., on the western bank of the river, for the purpose of conveniently [655] carrying men across it, and other reasons. The aforesaid ferryghat of the plaintiffs also had existed for more than twenty years at the places aforesaid and their contiguous places on the bank of the river Dhuleswari for the purpose of conveniently carrying men across it, and on account of changes in the course of the river, alluvion, diluvion, and other causes."

This is the ferry described by the plaintiffs for which they asked for the declaration in the first prayer in the plaint.

In answer, the defendants pleaded that the ferry set up by the plaintiffs had never been plied in the different places stated by them. They said that even if the claim put forward by the plaintiffs had any substantial basis of truth, yet it was barred, inasmuch as the right had not been used for very many years. Moreover, they claimed a right in themselves to a ferry-ghat called Manickgunge Factory ferry, which, if not on the track of the ferry set up by the plaintiffs, lies within its immediate vicinity. They did not set up an exclusive monopoly of it: but they said that they plied for more than a period of 20 years, and that their ferry was requisite in the interests of their tenants as well as the interests of the public.

In this state of the pleadings, the Subordinate Judge fixed eleven issues for trial.

It is unnecessary now to refer to the 1st, 2nd and 3rd issues. The real ground of dispute depended upon the decision of the 4th, 5th, 6th and 7th issues, the further relief asked for having depended upon the answer given to the remaining four issues.

The 4th issue was, whether the defendants had dispossessed the plaintiffs. That the Subordinate Judge decided in favour of the persons who brought the suit.

The 5th issue referred to the plea of limitation. That also the Subordinate Judge decided in favour of the plaintiffs.

The 6th issue referred to a matter of pleading, that is to say, whether the plaintiffs were justified in basing their title both upon prescription and upon the grant in the same suit. That also was decided in favour of the plaintiffs.

The 7th issue runs as follows:—

"Are the plaintiffs entitled to the ferry right claimed by them on any or all of the grounds stated by them in the plaint?"

[656] This issue the Subordinate Judge decided in favour of the defendants. He held that a suit to establish a ferry right over such an extensive reach of the river as is claimed by the plaintiffs was preposterous. The ferry claimed he considered existed from a long time, but the plaintiffs had failed to show that the starting point from the western side of the river was fixed for twenty years, so as to give a good title by prescription. Further still, the plaintiff was unable to show that he possessed any land on the eastern bank of the river where he could land his passengers. Therefore his claim could not be decreed. In addition, the Subordinate Judge held that the plaintiffs had given no evidence to show that the defendants' ferry would have caused them (the plaintiffs) any damage or loss if they plied their own ferry; and as a consequence flowing from this finding, he decided that, even if the plaintiffs had proved their right to ferry, they could not receive compensation or obtain an injunction. He, therefore, dismissed the suit.

1891 JUNE 29. — APPELLATE CIVIL. — 18 C. 652.

The plaintiffs have appealed to this Court. They still assert the right to ferry, covering several villages as described in paragraph 3 of their plaint. But they urge that even if they had been unable to prove that general right, yet, inasmuch as it is clear that they had a Crown grant acknowledged by the Government from the time of the Permanent Settlement, they should have got a declaration of their more restricted right.

The history of the ferry can be traced partly in official documents from the time of the Permanent Settlement. Some of these documents were filed in an inquiry made by the Deputy Survey Collector on the 17th of March 1858.

The first is a document of the year 1202, which purports to be a statement of the assets of 6 annas share of pergunnah Khalilabad, and as revenue to be paid to Government on account of it, there is entered in it Rs. 12-14-4 gundas on account of the ferry-ghat of Pearapur-Aglapur.

The next document in which reference is made to this ferry-ghat is dated in the year 1217. It is a list of the mehals comprising the zemindari of Radha Nath Rae as entered in the Government rent-roll, and in it there is given, as a source of [657] Government revenue attached to the 6-anna share of pergunnah Khalilabad, the ferry-ghat of Pearapur-Aglapur.

Both these documents have been objected to by the respondents. The document of the year 1217 was objected to in the Court below, and the objection was disallowed.

We think that these documents are admissible in evidence. In this country the Government has always asserted its paramount right to deal with ferries; and at the time of the Permanent Settlement the proceeds of some of them formed part of the assets upon which the Permanent Settlement was based. Both these documents are copies of originals apparently in the Collector's office. They were put in evidence before the proper Revenue Authorities in 1858, when they made inquiries in regard to the existence of this very ferry; and in a village register prepared by them as part of their duty in connection with the survey, the existence of this ferry-ghat is recognized. In that register it is admitted by the officers of Government that there existed a ferry-ghat called Pearapur-Aglapur, which, on inquiry, was found to be appurtenant at that time to villages 3054, 3839 of the *thakbast*. Thus we have it that in the year 1858-59 the plaintiffs based their claim against Government on the strength of these documents, and the claim was admitted.

There is no dispute that the Government is in a position, if it likes, to create a franchise. We think that both the documents and the village register prepared in 1861 by the proper authorities are admissible to show that in the year 1859 the plaintiffs made a claim to the franchise, and, on a proper inquiry made by Government, that claim was admitted.

The next acknowledgment made by the Crown of the existence of this ferry is to be found on the face of the *thakbast* maps of Deogram and Mohespur. In effect it amounts to this, that a summary inquiry, No. 306, having been instituted, it was found that this ghat was appurtenant to the villages of Deogram and Mohespur belonging to Khalilabad, and an endorsement was made on the map to this effect under the orders of Government. We thus see that at two distinct and separate times, within the last thirty years, namely, in 1861 and in 1876, the Crown has admitted the right of the plaintiffs to hold a ferry, [658] on the basis that it has been permanently settled with them in the same manner as their estate.

We think that thier claim is amply supported by the other evidence on the record.

The plaintiffs have produced a series of kabuliats from 1272 down to 1286, and the oral evidence in support of the existence of the ferry is overwhelming.

We are, therefore, of opinion that the Subordinate Judge was right in holding that the plaintiffs have, from time immemorial, had a franchise granted to them by the Crown which enabled them to claim a monopoly of the right to ferry within reasonable limits across the river. The grant itself has not been produced, and Pearapur-Aglapur is at some distance from Deogram. But still in 1859, in 1861, and again in 1876 the monopoly was found, by the proper Government officers to be appurtenant to two villages, namely, Deogram and Mohespur, within the pergunnah of Khalilabad. There is still another matter for consideration. It is a general principle that ancient grants may be explained by modern user. In this case the user spoken to by the witnesses, which undoubtedly existed, was in the immediate vicinity, if not from the boundary between those villages as is found by the Subordinate Judge, and must be taken to be a user supported by the right by which it was claimed. Consequently, although we think that the plaintiffs have established a right of ferry appurtenant to Deogram and Mohespur on the left bank of the river, they have not been able to establish anything more; and we agree with the learned Subordinate Judge that their claim, so far as it asserts that right to establish a ferry beyond the purview of those villages, must be rejected.

As regards the claim set up by the defendants, we agree with the Subordinate Judge in finding that they have failed to show that their ferry has been in existence for anything like twenty years. They have not been able to show us that the Government ever recognized the existence of such a ferry at the time of the Permanent Settlement, at the time of the survey in 1858-59, or at the time when the village register was prepared by the Survey Authorities in 1861, or in 1876 when the plaintiffs' right was acknowledged. No doubt the defendants are correct in saying **[659]** that the ferry on the maps of 1858-59 is not described as the Aglapur ferry, but by another name, Manickgunge. But these documents show only one ferry there. The village Aglapur had been swept into the river, and, although the title continued to be described as it was at the time of the Permanent Settlement, the local name seems to have changed with the locality from which the boat started on the west of the river, and this is not unreasonable. That there was only one ferry, and that belonged to plaintiffs, is satisfactorily proved by the oral evidence.

Further, it appears from the very accounts which they (the defendants) themselves have put in that no such ferry existed before the year 1286. Thus, in the copies of the accounts kept by the Ghosal family for the year 1286, we find an entry on the 19th Falgun of that year to the following effect:—

"Expenses incurred in conducting a criminal case between ourselves and Hari and Nandalal Babus of Baliati, arising out of our having established a ferry on the river Dhuleswari, between mouzah Deogram on its western bank and mouzahs Barakul and Chandni on its eastern bank, which (mouzahs) belong to our zemindari."

On the 30th Falgun of the same year a similar entry is made. In the entries, dated the 6th Bysak 1287 and the 12th Assar 1287, the ferry is described as a "new ferry;" and on the 3rd of Assar 1287 there is the following entry:—

1891 JUNE 29. — APPELLATE CIVIL. — 18 C. 652.

"The patni of the ferry over the river Dhuleswari here used to get from before the sum of Rs. 2 annually as his salary. The said ferry having this year come into our possession, the patni is paid for his salary for the present year, Re. 1."

It would therefore appear that even without the negative evidence afforded by the non-existence of any entry of a ferry as belonging to the defendants in the Government records, or the oral evidence which is strongly in favour of the plaintiffs, the evidence of the books filed by the Ghosals themselves shows beyond the shadow of a doubt that they first succeeded in running a ferry in that locality some time in the year 1287.

In answer the respondents have urged that the claim made by the plaintiffs is entirely novel; and that it is barred. Now a right to keep a ferry is not indissolubly connected with land, and a **[660]** franchise can be given to a person independently of it. If he is unable to obtain a right of way for the passengers from the land to his boat and from his boat to the land on the opposite shore, the grant is incapable of being put in force for the time being. The respondents, therefore, urge that a right to ferry passengers by itself is not of necessity a right connected with land, or an interest in land, to which the twelve years' rule of limitation would apply, and assert that on any other supposition the claim would be barred. Again, they urge that a right of this nature, a monopoly, can no more be acquired in this country than it can in England, save by a grant from the Crown; and that so far as the plaintiffs' claim is based on prescription it must fail.

In order to decide these questions it is necessary for us to give a short history of the law relating to ferries as we think it exists in this country. This portion of the revenue under the Mahomedan rule was called *sayer*, and is known as such to this very day. In the present case it is so described in all the early documents. *Sayer* consisted of duties and customs levied on goods and persons, and in the *Ain Akbari* ferries are described in the same paragraphs with import and export duties levied at ports. In it also the duties of the patni or ferryman and the toll that he can levy are fixed by law—[see Gladwin, Part II, p. 284].

One of the first rules which the Government promulgated in 1772 was to suppress the *sayer* duties levied in Bengal. On the 11th June 1790 a Regulation was promulgated for the guidance of the Board of Revenue with reference to *sayer* or internal duties. That Regulation was principally directed against such *sayer* duties as were levied in hats or bazaars, and the Government, although it expressly declared in it that the imposition and collection of internal duties of any kind were exclusively its own privilege and could not be exercised by any subject without express sanction, yet, in the interest of the landlords, it adjudged it advisable to interfere as little as possible with the impositions they levied. This, therefore, is an express declaration of Government that the Dewani had never recognized in private individuals the right to levy any tolls of the denomination of *sayer*, and this is repeated in the preamble to Reg. XXVII of 1793. When the Permanent Decennial Settlement **[661]** was made, the revenue of such zemindari ghats as were allowed was taken as an item of the assessment and granted to the zemindar. In Reg. XIX of 1816, s. 9, there was a distinct admission of this practice. It enacted that if the profits derived from any resumed ferry may appear to have been included in the permanent assessment of the estate to which it has been heretofore annexed, the Board, or Commissioner, under whose orders the inquiry into the nature of the ferry was

conducted, must report the case for the orders of the Governor-General in Council. But whether the profit of the ferry was or was not taken into consideration at the Permanent Settlement, the Legislature of this country never acknowledged any right in the ferry-holder which could be enforced against the Government in the Civil Courts.

After the time of the Permanent Settlement the same ferries were established by enactment. The first Regulation is XVIII of 1806, which, dealing with ferries in the same category as tolls on boats passing through canals, enacted that ferries should be established at places convenient for the public within the 24-Pergunnahs, and fixed the rates payable to the ferry-man. An exemption was made in favour of persons who could otherwise cross the *nalla*, and they were freed from toll. In 1816 the Government considered it expedient that all ferries should be placed under the complete control of the Collectors of Land Revenue. Every owner of a ferry was licensed, and any other person plying a boat for hire was liable to be convicted and fined a hundred rupees, and the boat was to be confiscated. This Regulation continued till 1819, when it was repealed by Reg. VI of that year, and the ferries were then placed under the superintendence of the Magistrate. All important ferries were declared public, and these the Magistrate had the power to resume. Other ferries of an unimportant kind were not interfered with further than was necessary for the maintenance of the police and the safety of passengers and property. But whether we search the law as it was before the acquisition by the British Government, or the Regulations before or after the year 1793, there is no indication that any person was entitled to claim a right of ferry, that is to say, to a monopoly, by prescription or by any **[662]** means other than a grant from the Crown. Since then the only law under which a person can acquire ownership by prescription is that in Part IV, Act XV of 1877; but that portion of the law we think would hardly apply to a right such as is claimed in the present suit, that is to say, not a right merely to land or water, or air, nor a right to ask payment for ferrying a traveller across a river, but an additional right, namely, a right to a monopoly, a right to prevent other people from exercising a right which they would ordinarily possess. So far, therefore, as mere prescription is concerned, the inclination of our minds is that the claim must fail unless it is supported by evidence sufficient to justify a jury in holding that there had been a grant from the Crown. It has, no doubt, been argued by the appellant that the case-law is decisive of the question in his favour. The first case is that of *Sishtee Dhur Ghose* v. *Shib Kishen Mitter* (1). It is the converse case to that of *Luchmessur Singh* v. *Leelanund Singh* (2). The former decided that when the ferry had not been recognized by Government, nor its profits treated as an asset at the time of the Permanent Settlement, and was in the continuation of a highway, no monopoly existed; the latter decided that if the profits of the ferry formed a part of the revenue assessed at the time of the Permanent Settlement, a monopoly existed. So far these decisions are not in favour of the general proposition put forward by the plaintiff. But in *Kishore Lall Roy* v. *Gokool Monee Chowdhrain* (3), it was said that the Legislature recognized proprietary rights in a private ferry of such a nature that another party may not so interfere with the profits arising therefrom as would be the result by running a boat, if not exactly on the same line, at least within such a distance as, for all practical purposes, would be the same as if it were on

(1) S. D. A. (1852) 402. (2) 4 C. 599. (3) 16 W.R. 281.

1891 JUNE 29. — APPELLATE CIVIL. — 18 C. 652.

the same line. No doubt that would be so in case of a Crown grant, but no such distinction of the kind has been made in this case, and the declaration is made without any limitation. There is no authority given for the general proposition, and we do not know of any. The case of 1852 is hardly consistent with it, and the only other case before the Sudder Dewani Adawlut was that of *Rajib Lochun Roy* v. *Kumri Bebee* (1), **[663]** and it has no bearing on the question of the existence of a monopoly. It decided, and decided only, that the lessee of collections made on a bridge erected in place of a ferry must pay the rent specified in his lease. No reference was made in it to the case decided in 1852. But the point was in issue in the case of *Parmeshari Proshad Narain Singh v. Mahomed Syud* (2). There Garth, C.J., and White, J., held against the opinion of Mitter, J., that a right of exclusive ferry could be acquired by twenty years' user. But the Chief Justice considered that he was bound by the recognition of such rights as private property from times anterior to the Permanent Settlement, and White, J., considered he was equally fettered by the decisions in the cases of *Rajib Lochun Roy v. Kumri Bebee* (1) and *Kishore Lall Roy v. Gokool Monee Chowdhrain* (3). We have already referred to the former case, and the question that arose in it. The latter is, no doubt, in favour of the appellant's contention; but, with the exception of this case, we can find none. No doubt the Dewani and the Regulations recognized ferries in the sense that engagements to pay tolls were not absolutely illegal, and so they did in regard to ground rents in markets; but not in the sense that the owners possessed a monopoly. We have not been able to find the other authorities referred to either in the case of *Parmeshari Proshad Narain Singh* v. *Mahomed Syud* (2) or *Kishoree Lall Roy* v. *Gokool Monee Chowdhrain* (3).

This being the conclusion we have arrived at, we should have been compelled to refer the matter to a Full Bench if we considered that a proper decision of the present case depended on the answer which would be given to the point decided in them. But we do not think so. In the present case the evidence of the numerous acknowledgments of the plaintiffs' ferry by Government, who up to the present day receives a portion of the profits as revenue, is amply sufficient to support their claim. And we think, with Mr. Justice L. S. Jackson in the case of *Luchmessur Singh* v. *Leelanand Singh* (4), that it is now too late in this country to dispute that when the proceeds of a ferry are entered as part of the assets upon which the Permanent Settlement has been made, **[664]** the owner has not a franchise. So far, therefore, there seems to us no substantial difference between the law relating to markets and ferries in this country and the law in England.

In regard to the question of limitation, although we agree with the respondents that the franchise of a ferry is not necessarily appurtenant to land, yet, looking at the language of Reg. XIX of 1816, it might be a matter for consideration whether this ferry, appurtenant as it is to the villages of Deogram and Mohespur, is not subject to the twelve years' limitation. But whether this is so or not, it seems to us that the plaintiffs' grant is not destroyed by mere non-user, and nothing more. No doubt they can waive their right to exercise the grant, but non-user without waiver is not, we consider, sufficient. Neither does the running of an opposition ferry extinguish the right. The franchise continues as long as their grant

(1) S.D.A. (1854), 153. (2) 6 C. 608. (3) 16 W. R. 281. (4) 4 C. 599.

continues, and until the person who sets up an opposition ferry can show a Crown grant, or give evidence from which a Crown grant is presumed, the cause of action remains.

1891 JUNE 29. — APPELLATE CIVIL. — 18 C. 652.

In England the disturbance of a market, and apparently also of a ferry right, is looked upon more or less in the nature of a nuisance—*Yard* v. *Ford* (1). And, adopting this view, it would seem to follow that in the case of a violation of a ferry the cause of action is a continuing wrong, falling within s. 23 of Act XV of 1877—*Rameshur Pershad Narain Singh* v. *Khoonji Behari Pattuk* (2).

All the objections raised by the respondents have failed. We concur in the opinion expressed by the Subordinate Judge that they have not put forward an honest defence, and they have endeavoured by all the means in their power to destroy the grant of the plaintiffs. On the other hand, the plaintiffs have raised unnecessary difficulties by the manner in which they have framed their case. They set up an unreasonable claim and supported it by general evidence. To our minds the position of the ferry on the left bank of the river is definitely settled as appurtenant to Deogram and Mohespur. We do not think that the plaintiffs [665] can be properly bound down to run their ferry on the boundary line of those two villages, because we think that the franchise of a ferry may, like the somewhat analogous case of the franchise of a market, be given within limits ; and the owner may change the site of it to any other place within the area to which it is limited, provided he does not interfere with the prescriptive rights of other persons if the grant is subject to this limitation. If this were not so, the franchise of a ferry on many of the large rivers of this country might cease to be available after one rainy season.

But in regard to the landing place on the eastern side of the river the evidence is very indefinite. The plaintiffs seem to have unnecessarily limited their case to proving that they had land on the eastern side of the river, and failed. From our point of view, however, the mere failure to prove that they possess land on the eastern side of the river does not establish that their franchise may not be enforced. The evidence of the leases filed by the defendants themselves, although not believed to be genuine documents, shows what view they take of the ferry. In them it is declared that the ferry is for the purpose of conveying the public across the river. Again, the kabuliats filed on behalf of the plaintiffs, which are undoubtedly genuine, contain a clause requiring the lessees to convey the Government mail over the river in their boats. Manickgunge is a large village which has greatly increased in later years. In it Civil and Criminal Courts have been established, and a police-station erected. It possesses a large school. Large markets and fairs are held in the immediate neighbourhood, and on the opposite side of the river where the ferry ran, and does still run, hats and markets have been established. For the traffic that must of necessity arise, there is, putting the Jaghir ferry out of consideration, only one ferry, and, so far as we can make out, it is, as one would naturally conclude, a public highway connecting two public highways on land. The general public crossed to these different hats and fairs up to 1286 by the plaintiffs' ferry alone. Since that time no doubt the river has changed its course, and the eastern bank of the river has followed the river and is a trifle more to the west. But, so far as we can see on the record, the public thoroughfare runs down to the water's

(1) 2 Saund 172. (2) 6 I.A. 3

1891 JUNE 29. — APPELLATE CIVIL. — 18 C. 652.

edge, and now, as then, the public pass on a public way **[666]** between two highways on the banks. On these points there is no difference between the plaintiff and defendant, as a comparison of the evidence of Madhub Patni, Gour Kishore Biswas, on behalf of the latter with the documents P^1 to P^5 will show.

If that be the case, it seems clear to us that the plaintiffs are in a position to use their franchise, and should be allowed to do so.

On the other hand, if, owing to the fault of the plaintiffs we refuse to give them relief in this suit, it may well be, looking at s. 43 of the Civil Procedure Code, that they may find this decision an impediment in their way of ever in the future bringing a suit to assert the franchise to which they are undoubtedly entitled.

We think the injury to the appellant from a total dismissal of his suit would be excessive, and that the question is merely one of costs. While therefore on the one hand we dismiss the suit in so far as it relates to damages and asks for an injunction, and direct that the appellants do pay the costs of the respondents in this appeal, yet on the other we consider it necessary for the ends of justice that the following issues should be tried by the Court below :—

First.—Up to the year 1286-87 or later, when the plaintiffs ceased to ply their ferry, were the passengers landed at a place over which they had a right of way on the eastern bank ?

Secondly.—If the river has receded since then, has the public right of way followed the river, and have the public still a right of way to the ghat? If so, on what precise locality is the seat of this public right of way?

The Subordinate Judge will take such evidence as the parties may wish to produce, and will submit his return to this Court within a month from the date of the receipt by him of the record.

The case will continue on the files of this Court.

H. T. H. *Case remanded.*

---

18 C. 667.

[667] CIVIL REFERENCE.

Before Mr. Justice Norris and Mr. Justice Beverley.

PETU GHORAI (*Plaintiff*), *Appellant v.* RAM KHELAWAN LAL BHUKUT (*Defendant*) *Respondent.** [2nd February, 1891.]

Bengal Tenancy Act—Bengal Act VIII of 1885, *ss.* 103, 106, 108 (*cl.* 3)—*Court Fees Act VII of* 1870, *sch. II, art.* 17, *cl. VI—Record and Settlement of Rents—Practice—Appeal from decision of Revenue Officers.*

The Court-fee payable on a memorandum of appeal presented to the High Court under s. 108 (cl. 3) of the Bengal Tenancy Act of 1885 is that prescribed by art. 17 (cl. VI) of Sch. II of the Court Fees Act.

[Overruled, 23 C. 723 (730).**]**

THIS reference arose out of an appeal preferred against an order of the District Judge of Midnapore rejecting an appeal preferred to him from

---

* Civil Reference in Miscellaneous Appeal 224 of 1891 against a decision, dated 11th October 1891, of J. Pratt, Esq., District Judge of Midnapore, rejecting an appeal from the decision of Baboo Rajendra Nath Ray, Settlement Officer of Midnapore, dated the 1st September 1890.

a decision of the Settlement Officer of that district on the ground that the memorandum of appeal was inadequately stamped, and that the deficiency was not paid when called for.

The proceedings before the Settlement Officer out of which the appeal to the District Judge arose were taken under Chap. X, ss. 103, 106 of the Bengal Tenancy Act of 1885, and the appeal to the High Court against the District Judge's order rejecting the appeal was preferred under cl. 3 of s. 108 of the same Act.

On the filing of this appeal, which was presented as one against an appellate order as distinguished from a decree, and on which a 2-rupee stamp had been affixed, a question arose as to the proper Court-fee payable on the memorandum of appeal.

The Deputy Registrar referred to the High Court the question whether the appeal was to be registered as an appeal from an appellate order or as an appeal from an appellate decree.

[668] His order of reference ran as follows :—

"Section 107 declares that an order passed under Chap. X shall have 'the force of a decree,' and all appeals, such as the present, have hitherto been treated and registered by the office as appeals from appellate decrees. If the appeal is to be treated as an appeal from an appellate decree, the amount of Court-fee payable on the memorandum of appeal would be Rs. 10 under cl. VI, art. 17, sch. II of the Court Fees Act of 1870, as the vakeel states that the subject-matter cannot be assessed at a money value. It has, however, been described as an appeal from an order, and a Court-fee of only Rs. 2 has been paid on it under art. 11, sch. II of the Court Fees Act, which prescribes Rs. 2 as the Court-fee on a memorandum of appeal to the High Court against an order '*not* having the force of a decree.'

"The vakeel for the appellant contends that cl. VI of No. 17 of sch. II of the Act does not apply, as the proceedings before the Settlement Officer were not initiated by a suit. It should be noted, however, that although that is so, s. 107 of the Tenancy Act directs that in all proceedings under Chap. X, the procedure to be adopted is that laid down in the Code of Civil Procedure for the trial of suits. He also urges that, inasmuch as appeals from orders passed under s. 158 of the Tenancy Act, which orders under cl. 3 of that section are also declared to have the force of decrees, have been held by this Court—*Bhupendro Narayan Dutt* v. *Nemaye Chand Mandal* (1)—to be appeals from orders, and, for the purpose of Court-fee, to come under art. 11 of sch. II of the Court-Fees Act, this appeal should also be treated as an appeal from an order, and not as an appeal from a decree."

On the hearing of this reference—

Babu *Harendra Nath Mookerjee*, appeared for the appellant and contended as stated in the referring order.

The order of the Court (NORRIS and BEVERLEY, JJ.) was as follows :—

ORDER.

The question referred to us is as to the proper Court-fee to be paid on a memorandum of appeal presented to this Court under s. 108, cl. 3 of the Bengal Tenancy Act.

---

(1) Misc. App. 275 of 1887, decided by Tottenham and Ghose, JJ., on 2nd August 1887.

1891 FEB. 2. — CIVIL REFERENCE. — 18 C. 667.

[669] The practice hitherto has been to treat such appeals as appeals from appellate decrees.

It is contended, however, that the appeal should be regarded, for the purpose of the Court-fee, as an appeal from an order, and that a Court-fee of Rs. 2 is sufficient under sch. II, art. 11 of the Court Fees Act.

This contention is based—

(i) On the argument that the disputes referred to in s. 106 of the Bengal Tenancy Act are not expressly described as *suits*.

(ii) On the authority of an order made by a Division Bench of this Court (TOTTENHAM and GHOSE, JJ.) on the 2nd August 1887, in which it was held that an appeal under s. 158, cl. 3 of the same Act, must be treated as an appeal from an order, and that the memorandum of appeal from an order under that section is subject to a Court-fee of Rs. 2 only.

On the first point it is to be observed that by s. 106 it is provided that "in all proceedings under the last foregoing section the Revenue Officer shall, subject to rules made by the Local Government under this Act, adopt the procedure laid down in the Code of Civil Procedure for the trial of suits, and his decision in every such proceeding shall have the force of a decree." And by the rules therein referred to (Chap. VI, Rule 32), the proceeding is to be "dealt with as a suit between the parties under the Tenancy Act, in which the objector shall be plaintiff and the other parties defendants."

As regards the second contention, it is to be observed that by cl. 3 of s. 158 "the order on any application under this section shall have the effect of * * a decree," and a memorandum of appeal against such an order is expressly excluded from the purview of art. 11, sch. II of the Court Fees Act.

We are of opinion, therefore, that the practice which has been hitherto observed is correct, and that the memorandum of appeal in the present case should bear a Court-fee of Rs. 10 under art. 17, cl. VI of that schedule.

T. A. P.

19 C. 1 (F.B.)

[1] FULL BENCH.

1891
MARCH 24.

FULL BENCH.

19 C. 1 (F.B.).

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, Mr. Justice O'Kinealy. Mr. Justice Macpherson and Mr. Justice Ghose.

MACKENZIE AND ANOTHER (*Defendants*) *v.* HAJI SYED MAHOMED ALI KHAN (*Plaintiff*).* [24th March, 1891.]

Bengal Tenancy Act (*VIII of* 1885), *s.* 184, *sch.* III, *part* I, 2 (*b*)—*Suits on registered contracts—Limitation—Limitation Act* (*XV of* 1877), *sch.* II, *art.* 116.

Suits for rent, founded on registered contracts in respect of lands subject to the provisions of the Bengal Tenancy Act, are governed by the limitation provided in that Act.

[Appl., 4 C.L.J. 553 (554); 16 C.P.L.R. 52 (54); 5 C.L.J. 19 (23)=11 C.W.N. 57; R., 17 C.L.J. 372 (380)=19 Ind. Cas. 865 (869); D., 19 C. 489 (499)]

THIS was a reference to the Full Bench made by Petheram, C.J., and Ameer Ali, J., with the following opinion: —

"This appeal arises out of a suit brought by the plaintiff to recover from the defendants arrears of rent for the years 1291, 1292, 1293, and 1294, and a portion of 1290, in respect of mouzah Sultanpur, held in *ticca* by the defendants. The suit, which was instituted on the 24th of June 1889, was founded on a registered *kabuliut*, dated the 20th of January 1880, executed in favour of the father of the plaintiff by the then manager of the factory. The rent fixed under the *kabuliut* was payable by ten instalments in [2] each year. In their written statement, the defendants among other pleas, raised the objection that the plaintiff's claim in respect of the arrears of rent for a period beyond three years, from date of suit, was barred by the provisions of sch. III of the Bengal Tenancy Act.

"The Subordinate Judge has overruled this plea, holding that a suit for rent, based upon a registered contract, was subject to the limitation provided by art. 116, sch. II of Act XV of 1877, and that consequently no portion of the plaintiff's claim was barred by limitation. On this question he expresses himself thus:—'With reference to the first issue, I have to observe that the registered lease, dated the 20th January 1880, Ex. IV, is admitted by the defendants. Now it has been a settled point of law that rent due under a registered lease is recoverable for a period of six years, and that art. 116, sch. II, Act XV of 1877, and not art. 110 of the said schedule, is applicable to the case (Indian Law Reports, XV, Calcutta, 221), or in other words six years' and not three years' limitation will apply. It is true that, under the ordinary relationship of landlord and tenant not based upon a registered deed or contract, the landlord is bound to sue the tenant for arrears within three years, or

* Appeal from Original Decree No. 283 of 1889, against the decree of the Subordinate Judge of Mozufferpore, dated the 2nd of August 1889.

1891 MARCH 24. — FULL BENCH. — 19 C. 1 (F.B.).

art. 110 would apply; but in a case where the landlord holds an additional security, *viz.*, a registered lease, I think in justice and equity the penal law should be construed, not strictly, but liberally; and by a liberal construction it is just and proper that he should take advantage of his additional security, *viz.*, the registered lease.

"The defendants have appealed to this Court, and one of the objections taken on their behalf is founded on the question of limitation. The suit was instituted on the 24th of June 1889, corresponding with the 11th of Assar 1296, and it is contended on their behalf that all sums which became due prior to Assar 1293 are barred under the limitation provided by the Tenancy Act, and in support of this view the learned Counsel for the defendants relies on the ruling in *Iswari Pershad Narain Sahi* v. *Crowdy* (1). In that case it was held that a suit for rent, whether founded on a registered contract or not, was subject to the limitation provided by the Tenancy Act. The case of *Omesh Chunder Mundul* v. [3] *Adarmoni Dasi* (2), on which the Subordinate Judge relied, was brought to the notice of the learned Judges who decided the case of *Iswari Pershad Narain Sahi* v. *Crowdy* (1), but they seemed to be of opinion that as there was no reference to the Bengal Tenancy Act in the previous case, they were not precluded from considering the question as *res integra*. It however appears to us that, having regard to the way in which the two cases have been decided in this Court, there is a conflict of authority on the question of limitation applicable to suits for rents founded on registered contracts, and as the point is one of importance, we think it right that the matter should be settled by a Full Bench. Besides, it is not clear from the wording of cl. (*b*), art. II, Part 1 of sch. III of the Tenancy Act, whether the period provided therein, *viz.*, three years, refers to all kinds of tenancies, or to merely such tenancies the rents of which, in the absence of any express contract, became due at the end of the agricultural year prevailing in the locality. For these reasons we refer the following question to a Full Bench" :—

"Whether suits for rent, founded on registered contracts in respect of lands subject to the provisions of the Tenancy Act, are governed by the limitation provided in that Act."

Mr. *Henderson* and Babu *Karuna Sindhu Mkherjee*, appeared for the appellants.

Babu *Srinath Das* and Babu *Nilmadhub Sen*, appeared for the respondent.

The arguments appear sufficiently from the order of reference.

The opinion of the Court (PETHERAM, C.J., PIGOT, O'KINEALY, MACPHARSON, and GHOSE, JJ.) was as follows :—

OPINION.

This was a suit for arrears of rent due on account of the years 1291, 1292, and 1293 in respect of a mouzah called Sultanpur. The suit was brought on a registered *kabuliut*.

The learned Judges who heard the appeal made to this Court have referred to us for decision the following question :—Whether suits for rent, founded on registered contracts in respect of lands subject to the provisions of the Tenancy Act, are governed by the limitation provided in that Act.

[4] We think the question must be answered in the affirmative. By s. 184 of the Rent Act, all suits for arrears of rent must be instituted

(1) 17 C. 469. (2) 16 C. 221.

within the time prescribed in sch. III of that Act, and that in a suit for rent is declared to be three years. We think that this suit is governed by that Act, and the limitation is three years.

1891 MARCH 24. — FULL BENCH. — 19 C. 1 (F.B.).

A. A. C.

---

19 C. 4.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

GUNGA PERSHAD (*Defendant*) *v.* JAWAHIR SINGH AND OTHERS (*Plaintiffs*) AND OTHERS (*Defendants*).*
[20th July, 1891.]

Mortgage, suit on—Leave to bid given to mortgagee, effect of—Civil Procedure Code—Act XIV of 1882, *s.* 294*—Satisfaction not calculated on what mortgaged premises are worth, but on what they fetch—Credit for amonut bid.*

A decree-holder (a mortgagee) who has, after obtaining leave to bid at a sale, purchased the mortgaged premises, is in the same position as an independent purchaser, and is only bound to give credit to the mortgagor for the actual amount of his bid.

Mahabir Pershad Singh v. *Macnaghten* (1) followed.

[R., 18 A. 31 (33) = 15 A.W.N. 144; 24 M. 96 (113); 4 C.L.J. 246 (253); 3 S.L.R. 17 (28) = 1 Ind.Cas. 952; D., 18 M. 153 (156).]

THESE were two analogous suits, heard together by consent of parties brought to recover moneys lent under two mortgage bonds, bearing the same date—the 25th September 1885—against defendants 1 to 6, who were the mortgagors and the members of a joint Hindu Mitakshara family, and defendants 7 to 9, who were prior encumbrancers on the mortgaged properties.

Defendant No. 7, Gunga Pershad, one of such prior encumbrancers, had already obtained a decree against a portion of the properties held by him on mortgage, and had, with leave of the Court, himself become the purchaser for a sum of Rs. 40,000. The petition of defendant No. 7, asking for permission to bid, ran as [5] follows:—"Your petitioner wishes to purchase the judgment-debtors' property in satisfaction of his decree, should no one offer a higher bid........., and prays that he may be accorded permission to purchase the judgment-debtors' property in satisfaction of his decree........." The order on such petition was—"Let the decree-holder bid and be allowed to set off the decretal amount against the purchase-money."

The plaintiff alleged that the real value of the property bought in by defendant No. 7 was more than a lakh of rupees, and that, therefore, as the amount due under the decree obtained by defendant No. 7 was less than that sum, his decree had been satisfied in full, and that he, the petitioner, was entitled to enforce his own lien irrespective of the mortgage of defendant No. 7.

The Subordinate Judge found that the real value of the property at the time of its purchase by defendant No. 7 was one lakh and thirty-three

---

* Appeals from Original Decrees, Nos. 122 and 123 of 1890, against the decrees of Baboo Sham Chand Dhur, Subordinate Judge of Gya, dated the 31st of January 1890.

(1) 16 C. 682.

1891 JULY 20. — APPELLATE CIVIL. — 19 C. 4.

thousand odd rupees, whilst his decree was one for under a lakh of rupees, and therefore held on the authority of the cases of *Hart* v. *Tara Prasanna Mukherji* (1), *Gulab Singh* v. *Pemian* (2), and *Sheonath Doss* v. *Janki Prosad Singh* (3) that the plaintiffs, the second mortgagees, were entitled to treat the debt of defendant No. 7 as paid off, and were therefore entitled to enforce their own claim without reference to the mortgage of defendant No. 7. He, therefore, without deciding the other issues (which were unnecessary under the above finding) decreed the suit with costs.

The defendant No. 7 appealed to the High Court.

Dr. *Rash Behari Ghose* (with him Babu *Jogesh Chunder Roy*), for the appellant—The mortgagee having obtained leave to bid is in the same position as an independent purchaser—*Hart* v. *Tara Prasanna Mukherji* (1), *Mahabir Pershad Singh* v. *Macnaghten* (4). There, therefore, can be no reason why he should be debited with any amount in excess of the price for which property was sold. If these points are decided in my favour, the cases should be remanded for decision on other points arising.

Mr. *C. Gregory* and Baboo *Uma Kali Mukerjee*, for the respondent, referred to *Gulab Singh* v. *Pemian* (2), and contended **[6]** that on the authority of *Hart* v. *Tara Prasanna Mukherji* (1) the decree-holder, when purchasing with leave the property was bound to prove that the property purchased by him had realized a fair price before he could take out further execution.

JUDGMEMT.

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

PETHERAM, C. J.—These were two suits brought by the mortgagees of certain properties to recover the mortgage money, and they have obtained decrees.

The appellant is the defendant No. 7, who held a mortgage of some of the properties included in these mortgages, his mortgage being prior in date to that of the plaintiffs in both these suits.

The Subordinate Judge who tried the suits has disposed of the defendant's claim on the ground that he had himself put up a portion of the property mortgaged to him for sale, and had bought that property himself for a sum considerably less than its value, and that the true value of the property so put up and so purchased by him exceeded greatly the amount of his debt, and that under the authority of the case of *Hart* v. *Tara Prasanna Mukherji* (1), the second mortgagees were entitled to treat his claim as paid off and done with, and were entitled to enforce their lien without reference to his mortgage. In coming to this conclusion the learned Subordinate Judge, relying upon that case, has noticed the case of *Sheonath Doss* v. *Janki Prosad Singh*, reported in I.L.R., 16 Calc., 132, decided by this Court, and has endeavoured to reconcile the two; but he has not noticed the case of *Mahabir Pershad Singh* v. *Macnaghten*, reported in I.L.R., 16 Calc., 682, decided by the Privy Council. This case of course is binding upon this Court; and if it overrules the case of *Hart* v. *Tara Prasanna Mukherji*, the case in the Privy Council is to be acted upon.

With reference to the case of *Sheonath Doss* v. *Janki Prosad Singh* (3), we think that it was sufficient authority for the learned Subordinate

(1) 11 C. 718. (2) 5 A. 342. (3) 16 C. 132. (4) 16 C. 682.

Judge to have acted upon, as showing that the [7] mortgagee having obtained leave to bid was in the position of an independent purchaser.

However that may be, the case in the Privy Council makes the matter clear, because LORD WATSON, in delivering the judgment of the Privy Council, says :—"Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser."

If that is so—and on the authority of the Privy Council that must be taken to be so—this person, having obtained leave to bid, was an independent purchaser, and he was only obliged to give credit for the amount of his bid, and consequently we think that the learned Subordinate Judge was wrong in the conclusion he came to on this point; but having come to this conclusion on this point, he did not proceed to try the other issues. One of the other issues in the case which had been originally proposed to be raised, but which had not been accepted, and which is to be found at p. 12 of the paper-book, is in these words—"Whether, or not, by reason of the mocurree right in mehal Khakhri having been purchased at auction sale by the defendant No. 7, the decree of the said defendant has been fully satisfied; and whether or not he is entitled to put other properties up to sale." Taking the view of the law laid down by the Privy Council, it is clear that that issue becomes most material, and consequently we set aside the judgment of the Subordinate Judge and remand the case to him with directions to try that issue, having regard to the remarks which we have made.

In addition to that, at p. 97 of the paper-book, are the other issues in the case, and the fourth of those issues is this—"as between the parties to these suits, who has priority of lien over the mortgaged premises." That issue also was not tried at the trial because it was not necessary in consequence of the decision of this point of law, but now it is necessary that this issue should be tried, because, having regard to the remarks made before us by Baboo Uma Kali Mukerjee, it may happen that, upon an enquiry being made into this point, it will turn out that a portion of the amount which was advanced by this defendant No. 7 was not advanced in such a way and in such terms as to give him priority over the second mortgagee, and consequently this issue as well as the other will have to be tried.

[8] In dealing with the previous issue, I ought to have mentioned the form of the petition for leave to bid. It will be found at pp. 79 and 80 of the paper-book, and it asked leave "to buy the property for the amount of the petitioner's decree if no one else made a higher bid," and the leave seems to have been given in the terms of the petition. Having regard to that, it may be that, upon a thorough enquiry, it will be found that the bid which was in fact made of Rs. 40,000 was made upon the basis of this petition, and then, as between all the parties, although a bid of Rs. 40,000 was recorded, it must be taken to be a bid for the amount of the decree-holder's decree. If that should turn out to be so, then probably the Subordinate Judge will consider that this defendant No. 7 was in fact paid off by what had taken place. These are questions which will have to be decided by the learned Subordinate Judge upon the trial of these two issues, and with these remarks we remand these two cases for the trial of those issues, retaining the case upon the files of this Court. We reserve the question of cost till the final decision of these appeals.

T. A. P. *Appeal allowed and case remanded.*

1891
MARCH 11.

APPELLATE CIVIL.

19 C. 8.

19 C. 8.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ghose.

SURENDRO PROSAD BHUTTACHARJI (*one of the Defendants*) v. KEDAR NATH BHUTTACHARJI (*Plaintiff*).*
[11th March, 1891.]

Jurisdiction—Sayer compensation—Malikana—Civil Procedure Code (*Act XIV of* 1882), s. 16.

A mortgaged at Calcutta to *B* his sayer compensation, payable at the General Treasury at Calcutta in respect of a certain hat within the Diamond Harbour sub-division. In a suit to enforce the mortgage bond in the Court of the Munsif of Diamond Harbour, *held* that sayer compensation did not partake of the nature of malikana, that it was not immoveable property or any interest in immoveable property within the meaning of s. 16 of the Code of Civil Procedure, and that therefore the Munsif had no jurisdiction to entertain the suit.

Bungsho Dhur Biswas v. *Mudhoo Mohuldar* (1) distinguished.

[R., 36 C. 665=13 C.W.N. 596=1 Ind. Cas. 520.]

[9] THIS was a suit to enforce a mortgage bond, whereby one Upendro Mohun Bhuttacharji, the husband and father of the defendants, Kamini Debi and Surendro Prosad Bhuttacharji, mortgaged to the plaintiff Kedar Nath Bhuttacharji, his sayer compensation payable at the General Treasury at Calcutta in respect of Harir Hat in the Diamond Harbour sub-division. The mortgagor and mortgagee were residents of Calcutta, and the bond was executed in Calcutta. The suit was instituted in the Munsif's Court at Diamond Harbour, and was dismissed by the District Judge on the ground of want of jurisdiction. On appeal, a Division Bench of the High Court remanded it to the Court of first instance for the determination of an issue as to jurisdiction, that is, the issue whether the suit related to immoveable property situated within the jurisdiction of the Court, and if not, whether the Court had jurisdiction to entertain it.

Upon the evidence adduced by the plaintiff, the Munsif came to the conclusion that, since the grant of the sayer compensation, the Courts of the 24-Pergunnahs and the Collector of the District had all along been exercising jurisdiction respecting all matters connected with it. He was of opinion that the sayer compensation, granted under Reg. XXVII of 1793 was a grant of money in respect of a right within the meaning of s. 3 of the Pensions Act (Act XXIII of 1871), and by s. 6 the suit was barred for want of a certificate from the Collector. Accordingly, the Munsif dismissed the suit.

The defendants appealed to the District Judge of the 24-Pergunnahs, who held that the Munsif had jurisdiction to try the suit on the grounds that sayer compensation was not a pension and the Pensions Act had no application to it; that there was no difference between a suit for sayer compensation and one for malikana; that in both cases the owner had lost the land, and both sayer and malikana were equally profits arising out of land; that if the defendants had not been proprietors of the market,

* Appeal from Appellate Decree, No. 1054 of 1890, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 5th of May 1890, affirming the decree of Baboo Rebati Churn Banerjee, Munsif of Diamond Harbour, dated the 21st of November 1889.

(1) 21 W.R. 383.

they could not have levied sayer or obtained compensation for its withdrawal, and the money paid to them by Government was an interest in land, a profit owing to them as proprietors; and that the plaintiff had shown that in a previous suit the Courts of the 24-Pergunnahs had exercised jurisdiction with respect to this sayer, and that the [10] Collector had assessed road cess on the defendants in respect thereof. The District Judge accordingly decreed the appeal.

The defendant, Surendro Prosad Bhuttacharji, appealed to the High Court.

Baboos *Bhowani Churn Datt* and *Abul Krishna Ghose*, for the appellant.

Mr. *Douglas White* and Baboo *Gopi Nath Mukerji*, for the respondent.

The judgment of the Court (O'KINEALY and GHOSE, JJ.) was as follows :—

JUDGMENT.

This was a suit to enforce a mortgage bond. It was executed in the town of Calcutta, and what was hypothecated to the plaintiff was a certain *sayer* compensation payable at the General Treasury at Calcutta. Both the plaintiff and the defendants are residents of Calcutta, and the main question that arises in this appeal is whether the suit was cognizable by the Munsif's Court at Diamond Harbour.

The ground upon which it is alleged that the suit would lie in the Munsif's Court at Diamond Harbour is that the *sayer* compensation, which was hypothecated by the bond, was compensation in the nature of *malikana*, which the Government allowed in lieu of *sayer* collections from a *hat* within the jurisdiction of that Court; and in regard to this ground the question that we have to consider is whether the said sayer compensation is immoveable property, or any interest in immoveable property, within the meaning of s. 16 of the Civil Procedure Code.

Now, it will be found on a reference to Reg. XXVII of 1793, and its preamble that the duties which the owners of *gunges*, *bazaars*, *hats*, &c., used to levy on commodities sold in those places, were designated *sayer* collections, and these duties, it was declared by the said Regulation, to be "internal duties" which it was the exclusive privilege of Government to impose and collect—a privilege not exerciseable, according to "a well-known law of the country," by any subject without their express sanction. These duties, it will be observed, were in no sense rent or profits which the owner of a *hat* or *bazaar* was entitled to receive for the use of land, or for houses, shops, or other buildings erected [11] thereupon. And by the Rules published on the 11th June 1790, the landholders were prohibited from collecting such duties; it being declared at the same time that they should thereafter be levied by Government, the Government paying to the landholders one-tenth of the collections after defraying the establishment charges (see s. II). Subsequently, on the 28th July 1790, it was resolved to abolish these duties altogether, and to allow the owners of the *hats*, *gunges* and *bazaars* certain compensations in lieu of the share of the collections which they used to receive (s. IV); and by a rule passed on the 6th August 1790 it was declared that "the proprietary right in the ground on which *hats* and *bazaars* are held is to continue vested in the landholders, but the public are to have the free use of it," and that "the ground on which *hats* and *bazaars* are now held is accordingly to be continued to be appropriated to this purpose (*i.e.*, exposing goods for sale) free of all charges to the vendors." (See s. V.) Then, by the Rules passed

1891 MARCH 11. — APPELLATE CIVIL. — 19 C. 8.

on the 8th April 1791, the principle upon which the compensation was to be fixed, and the mode in which, and the parties to whom, it was to be allowed, were laid down (s. VI).

This was the state of the law under which sayer compensations were allowed by Government; and we think that the examination of the preamble and the several sections of Reg. XXVII of 1793, we have referred to, shows that the said compensation had no reference whatever to any rent or profit arising out of the land, but to the internal duties on commodities which were levied when such commodities were exposed for sale—duties which, as was distinctly declared, the owners of the *hats* and *gunges* were not entitled to levy *as landholders*. The compensation that was allowed to them was not because they were, by reason of the abolition of the *sayer* duties, deprived of any portion of the *profit arising out of the land*, but because, as we can gather, they were in the habit of levying such duties for a long time; and the Government thought proper in the first instance to allow them one-tenth of the collections and eventually, when they abolished the duties altogether, they determined to allow the landholders some compensation, year after year, for the loss they suffered by being deprived of a share of the collections. In this view of the matter, it seems [12] to be obvious that *sayer* compensation does not in any sense partake of the nature of "malikana," which, as it is well understood, is a right to receive a portion of the profits of an estate, for which Government may make a settlement with another person, when the real proprietor neglects to take a settlement. In that case, the proprietor loses the land: here the landholder does not lose the land or any portion of the profit *arising out of the land.*

The learned Judge of the Court below refers in his judgment to the fact that the Collector has assessed on the defendants road cess on account of the *sayer* compensation. Whether the Collector was right in doing so or not, it is not necessary for us to express any opinion. All that we need say is that this fact cannot give to the *sayer* compensation a character which, under the Regulation and the orders of Government we have referred to, it does not possess.

The learned Counsel for the plaintiff, in the course of his argument, relied upon the observations made by a Division Bench of this Court in the case of *Bungsho Dhur Biswas* v. *Mudhoo Mohuldar* (1). But those observations do not help him. The question that the Court had then to consider was indeed very different from that which we have now to determine; and the *hat* with which we are concerned is a *hat* which (unlike the *hat* in that case), it must be taken, existed at the time of the passing of Reg. XXVII of 1793.

A question was raised before us on behalf of the defendants whether the *sayer* compensation is not in the nature of a pension contemplated by the Pension Acts, (XXIII of 1871); but in the view we have already expressed it is not necessary to determine this question.

The result is that the suit must be dismissed upon the ground that the Munsif's Court at Diamond Harbour had no jurisdiction to entertain it; and that this appeal will therefore be decreed with costs.

C. D. R. *Appeal decreed.*

---

(1) 21 W.R. 883.

19 C. 13.

1891 JULY 10. — APPELLATE CIVIL. — 19 C. 13.

[13] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

GOPI MOHAN ROY AND OTHERS (*Judgment-debtors*) *v.* DOYBAKI NUNDUN SEN AND OTHERS (*Decree-holders*).* [10th July, 1891.]

Jurisdiction—Execution of decree—Property outside jurisdiction of Court—Civil Procedure Code (Act XIV of 1882), *ss.* 19 *and* 223, *cl.* (*c*).

The Court that has the power to pass a decree for sale of a property has also power to carry out its decree by selling that property, whether any portion of that property be within the local limits of its jurisdiction or not.

Per Ghose, J.—S. 223, cl. (*c*) of the Civil Procedure Code leaves it to the discretion of the Court to send the decree for execution to the Court having local jurisdiction.

Maseyk v. *Steel and Co.* (1) commented upon.

[F., 21 C. 639 (641); 1 O.C. (Sup.) 58 (59) (B); R., 22 C. 871 (875); 39 C. 104 (109) = 14 C.L.J. 228 = 16 C.W.N. 402 = 11 Ind. Cas. 417; 5 O.C. 9 (11).]

THIS was an application for the execution of a decree passed, in 1890, under s. 88 of the Transfer of Property Act. The decree was for the sale, under one and the same mortgage, of two properties, one of which was situated within the jurisdiction of the Beerbhoom Court, and the other within the jurisdiction of the Nya Doomka Court.

The judgment-debtors objected to the sale of the property which was situated within the local limits of Nya Doomka Court, upon the ground that the Beerbhoom Court could not sell immoveable property which was outside its local limits.

The District Judge of Beerbhoom held that the Court had territorial jurisdiction under s. 19 of the Civil Procedure Code to pass a decree for sale, and that being so, it had territorial jurisdiction also to sell, unless the decree-holders chose to apply under s. 223, cl. (*c*) of the Civil Procedure Code. He accordingly overruled the objection of the judgment-debtors and ordered the sale to proceed.

From this order the judgment-debtors appealed to the High Court.

[14] Baboo *Kalikissen Sen*, for the appellants.

Baboo *Golap Chunder Sircar*, for the respondents.

Baboo *Kalikissen Sen* contended that the Court executing the decree was not competent to order the sale of immoveable property situated outside its local limits. He relied on s. 223, cl. (*c*) of the Civil Procedure Code, and the case of *Prem Chand Dey* v. *Mokhoda Debi* (2), and contended that s. 19 of the Civil Procedure Code only authorized the institution of a suit, but did not authorize the Court passing the decree to sell immoveable property outside its local jurisdiction.

Baboo *Golap Chunder Sircar* argued that under s. 19 of the Civil Procedure Code the Beerbhoom Court had jurisdiction to entertain the suit and pass a decree for sale, and had also power to execute its own decree. That the case of *Prem Chand Dey* v. *Mokhoda Debi* (2) was distinguishable from the present case, for in that case the jurisdiction of the Court passing the decree had ceased when the decree was sought to be executed.

---

* Appeal from Order, No. 124 of 1891, and Rule No. 693 of 1891, against the order of J. Whitmore, Esq., Judge of Beerbhoom, dated the 7th of April 1891.

(1) 14 C. 661. (2) 17 C. 699.

1891 JULY 10. — APPELLATE CIVIL. — 19 C. 13.

Judgments of the Court (TOTTENHAM and GHOSE, JJ.) were as follows:—

JUDGMENTS.

GHOSE, J.—This is an appeal against an order of the District Judge of Beerbhoom directing that a certain property comprised in a mortgage decree be sold in execution of the said decree.

The property in question is situate within the local limits of the District Court of Nya Doomka, but it is one of the two properties that were mortgaged to the decree-holders under one and the same mortgage bond, the other property being situate within the jurisdiction of the Beerbhoom Court. The suit in which the decree was obtained was instituted under s. 19 of the Civil Procedure Code in the Beerbhoom Court, and a decree was passed in May 1890 in terms of s. 88 of the Transfer of Property Act for sale of both the parcels of property comprised in the mortgage.

It has not been questioned before us, nor indeed could it be questioned, that the District Judge of Beerbhoom had jurisdiction to make the decree he did; but what has been contended is that he could not sell the property within the local limits of the Nya [15] Doomka Court, and that he was bound under s. 223 of the Civil Procedure Code to transfer the decree to that Court for sale of the property in question.

It seems to me, however, that if the Beerbhoom Court had authority to make the decree, it would have also authority to give effect to that decree by selling every parcel of the property comprised therein. Section 88 of the Transfer of Property Act provides that the Court should order that, in default of the mortgagor in paying the amount due to the mortgagee within the time appointed by the Court, the mortgaged property be sold, and that the proceeds of sale (after defraying the expenses of the sale) be paid into Court and applied in payment of what is due to the plaintiff, and that the balance, if any, be paid to the defendant. Now it seems to me that the Court is hardly in a position to give full effect to the provisions in this section, unless it has the power to sell the whole of the mortgaged property. The said provisions, I might here observe, are to the same effect as the form of a decree for sale given in the Civil Procedure Code, sch. IV, No. 128, which is applicable to the original side of the High Court, with this exception only, that there being no "Registrar or taxing officer" in the mofussil, as in the High Court, the direction as to the approbation of such an officer to the sale is omitted therein. This leads me to think that it was the intention of the Legislature to provide that the Court which makes a decree for sale should have authority over the sale itself. The proceedings in execution of a decree are, as has been so often said, but a continuation of the proceedings in the suit in which the decree is passed; and if the Court has jurisdiction to entertain the suit and make the decree, it seems to follow that it has jurisdiction to sell all and every parcel of property comprised in the decree, although one or other of the parcels may be beyond the local limits of its jurisdiction.

But it has been contended that under s. 223, cl. (*c*) of the Code of Civil Procedure, the Court which made the decree is bound to transfer it to the Court which has local jurisdiction over the property for the sale thereof. That section provides that the Court which made the decree may, on the application of the decree-holder, send it for execution to another Court if the decree directs the sale of property outside the local

limits of its **[16]** jurisdiction. This seems to be directory, and not mandatory. The section leaves it to the discretion of the Court, when the decree-holder makes the application to send the decree for execution to the other Court, that is to say, if it thinks it necessary to do so.

1891 JULY 10.

APPELLATE CIVIL.

19 C. 13.

In the case of *Maseyk* v. *Steel and Co.* (1) there were certain observations in the judgment delivered by me, which no doubt would seem to indicate that where the property to be sold is situate wholly outside the jurisdiction of the Court which made the decree, the proper procedure under s. 223 is to send the decree to the Court which has local jurisdiction for execution. But it will be observed that in that case the appeal was as regards the validity of the sale of a property partly situate within and partly outside the local jurisdiction of the Court which made the decree and sold the property (*viz.*, the Rajshahye Court), and it was contended, among other matters, by the counsel for the appellant that that Court had no jurisdiction to sell the property, or at any rate that portion of it which was situate outside its local limits and within the limits of the Nya Doomka Court. The observations I made on that occasion were meant for the purpose of meeting the argument that was then advanced ; and though in the course of my remarks I indicated what I considered to be the proper course to be followed in a case like this, I did not intend to hold that the Court would be *bound* to send the decree to the other Court if the property be wholly outside its own local limits ; and indeed it was not necessary for the decision of the case that this should be so laid down.

I am of opinion that the Beerbhoom Court had jurisdiction to make the order for sale, and that there is nothing in s. 223 to take away that jurisdiction.

The learned vakil for the appellant relied in the course of his argument upon the decision of a Full Bench of this Court in the case of *Prem Chand Dey* v. *Mokhoda Debi* (2) ; but that case has no real bearing upon the facts of the case now before us.

TOTTENHAM, J.—I concur in dismissing the appeal ; but I think it enough to say that I consider that the Judge who had the power **[17]** to pass the decree for sale of the property in question had the same power to carry out his decree by selling that property.

The appeal will be dismissed with costs.

A.F.M.A.R. *Appeal dismissed.*

---

19 C. 17.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

CHINTAMONI DUTT (*Plaintiff*) *v.* RASH BEHARI MONDUL (*Defendant*).*
[10th July, 1891.]

Transfer of tenure—Registration—Notice—Bengal Tenancy Act (*VIII of* 1885), s. 12.

After a recorded tenant has transferred his tenure to another person, and that transfer has been duly registered under the provisions of the Bengal Tenancy

---

* Appeal from Original Decree, No. 28 of 1890, against the decree of Brajendra Coomar Seal, Esq., Judge of Bankura, dated the 30th of October 1889.

(1) 14 C. 661. (2) 17 C. 699.

1891 JULY 10. — APPELLATE CIVIL. — 19 C. 17.

Act, he is no longer liable for the rent of the tenure, although the landlord may not have received actual notice of such transfer.

Kristo Bulluv Ghose v. *Kristo Lal Singh* (1) relied on.

[F., 12 C.W.N. 478 (480); R., 33 C. 279 (281) = 10 C.W.N. 272; 13 C.L.J. 613 = 16 C.W.N. 64 = 9 Ind. Cas. 1001 (1003); 4 C.W.N. 590 (593); 10 C.W.N. 270 (272); 163 P.L.R. 1901; D., 33 C. 580 (583).]

THIS was a suit to recover rent due to the plaintiff, in respect of an 8 annas share of mouzah Asanboni, from Kartick 1292 to Assin 1295. The defendant partly admitted liability, and deposited the rent due, with interest, up to the end of the year 1293. But regarding the rent for the years 1294, and 1295, the defendant pleaded that he was not liable, inasmuch as on the 22nd day of Chait 1293, he had transferred his tenure by a private deed of sale to one Kangali Charan Mandul; that the said deed had been duly registered, and at the time of registration he had deposited with the Sub-Registrar the landlord's fee for the mutation of names. The plaintiff urged that he was prepared to prove that he had no notice of the transfer.

The District Judge held that the deed of sale having been duly registered, it must be presumed that notice was issued to the plaintiff in due course. He further held, on the authority of *Kristo Bulluv Ghose* v. *Kristo Lal Singh* (1) that the sale being [18] complete, the defendant was not liable to pay rent for the years 1294 and 1295.

The defendant appealed to the High Court.

Dr. *Rash Behari Ghose* and Babu *Nalin Ranjan Chatterjee*, for the appellant.

Babu *Koruna Sindhu Mukerjee*, for the respondent.

The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

JUDGMENT.

The question raised in this appeal is whether, after the transfer of a tenure by the recorded tenant to another person, that transfer having been duly registered under the provisions of the Bengal Tenancy Act, the transferor is still liable for the rent of the tenure until the landlord has actually received notice of such transfer.

The suit was brought to recover the rent of several years— from 1292 to Assin 1295. The defendant pleaded that in the month of Chait 1293 he had transferred his tenure to another person, that he had had the transfer duly registered, and that he had deposited the rent due, with interest, up to the end of 1293, and he contended that he was not liable for any subsequent rent.

The lower appellate Court admitted the plea as valid; and declined to permit the landlord to call evidence to show that he had not actually received notice of the transfer. And in so ruling acted upon the authority of the case of *Kristo Bulluv Ghose* v. *Kristo Lal Singh* (1), in which, the law having been discussed, a Division Bench laid down that the transfer was complete when the registration took place.

The law itself provides that the registration shall not take place unless the transferor or transferee deposits the landlord's fee for the mutation of names in the landlord's books. It also provides that the registering officer shall upon registration forward this fee to the Collector, and that the Collector shall forward it with notice to the landlord.

(1) 16 C. 642.

1891 JULY 10. — APPELLATE CIVIL. — 19 C. 17.

The decision in *Kristo Bulluv Ghose* v. *Kristo Lal Singh* (1) lays down that the transferor is no longer liable for any rent, **[19]** accruing after his transfer is duly registered according to the provisions of the Bengal Tenancy Act. This decision has been apparently approved of by a recent Full Bench decision in *Mahomed Abbas Mondul* v. *Brojo Sundari Debia* (2). That decision is a direct authority in support of the lower Court's decision, and we are not prepared to dissent from it. The law seems pretty clear upon the subject; and although it might seem a case involving hardship to the landlord, that though he may not have received a notice, by some neglect on the part of the Registrar or of the Collector, he is still liable to pay the costs of the suit for rent subsequently brought against the wrong person. Although it certainly was the case before the Bengal Tenancy Act was passed that the Courts always held that the landlord is entitled to look to his recorded tenant for all rent until he receives due notice of the transfer, the present law, as explained by the decision in *Kristo Bulluv Ghose* v. *Kristo Lal Singh*, appears to have altered that state of things.

We think we are unable to give the appellant any relief, and that the appeal must be dismissed with costs.

A. F. M. A. R. *Appeal dismissed.*

---

19 C. 19.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

GUDRI KOER (*Plaintiff*) v. BHUBANESWARI COOMAR SINGH AND ANOTHER (*Defendants*).* [16th July, 1891.]

Deed of conditional sale—Interest after the date fixed for payment of principal and interest—Absence of agreement to pay such interest—Compensation for breach of contract—Limitation Act (XV of 1877), sch. II, art. 116.

Where there is no stipulation in a deed of conditional sale to pay interest after the day fixed for the repayment of principal and interest, a claim for interest after due date is a claim for compensation for breach of contract, and a suit for the recovery of such compensation must be brought within six years from the date of the breach.

[20] *Juggomohun Ghose* v. *Manick Chund* (3) referred to; *Mansad Ali* v. *Gulab Chand* (4), *Bhagwant Singh* v. *Daryao Singh* (5) approved of; *Bhugwan Lal* v. *Mohip Narain Singh* (6) and *Golam Abas* v. *Mohamed Jaffer* (7) followed.

[**Diss.**, 24 C. 699=1 C.W.N. 437 (442) (**F.B.**); **F.**, 6 C.P.L.R, 22 (23); 11 A.L.J. 829 (832)=35 A. 534 (536)=21 Ind.Cas. 253; **Rel on**, 8 C.P L.R. 95 (97); **Appr.**, 18 M. 257=2 M.L.J. 235; **R.**, 17 A. 581 (584)=15 A.W.N. 128 (**F.B.**); 18 M. 331 (338); 15 C.L J. 684=15 Ind.Cas. 911 (913); 17 C.L.J. 87 (92)=13 Ind.Cas. 148; **D.**, 22 B. 107 (109); 21 C. 274 (278); 28 P.R. 1892; 95 P.R. 1902=21 P. L.R. 1903.]

SUIT for foreclosure,

By a registered deed of conditional sale, dated 15th September 1881, (7th Assin 1289 F.S.,) Deo Coomar Singh, the father of the infant defendants, Bhubaneswari Coomar Singh and Rajrajeswari Coomar Singh,

---

* Appeal from Original Decree, No. 204 of 1890, against the decree of Baboo Nilmoni Das, Subordinate Judge of Sarun, dated 9th of June 1890.

(1) 16 C. 642. (2) 18 C. 360. (3) 7 M.I.A. 279.
(4) 10 A. 85. (5) 11 A. 416.
(6) Second Ap. No. 1292 of 1887, of 21st May 1888. (7) See 19 C. 23, Note, *infra*.

1891 JULY 16. — APPELLATE CIVIL. — 19 C. 19.

mortgaged certain shares in the properties specified in the schedule thereto annexed, to the plaintiff, Gudri Koer as security for the repayment of the sum of Rs. 5,000, with interest at the rate of one rupee per cent. per mensem, on 15th August 1882. There was no stipulation in the deed for payment of interest after the due date. The provision as to the repayment of the principal and interest was in these terms :—"Therefore I do ingenuously declare and give in writing that I shall liquidate the whole of the Rs. 5,000, the principal consideration money aforesaid, besides interest at 1 per cent. per mensem from the date of the execution of this deed, on the 15th August 1882 in cash in one lump at once to the aforesaid vendor, and take back this baibilwafa deed. In case I fail to pay up the principal amount besides interest on the prescribed date, and the prescribed time expires, in that case (the mortgage) of the whole of the aforesaid shares sold shall become foreclosed in favour of the said vendee, and there is not nor shall be any need for any declaration by me, the declarant." Deo Coomar Singh died without redeeming the mortgage, and leaving the infant defendants his heirs and representatives.

On 30th November 1888 the plaintiff instituted this suit against the defendants, in which he claimed payment of Rs. 5,000 as principal and also Rs. 4,325 as interest from 15th September 1881 to 30th November 1888, further interest during suit, besides the costs of the suit, and interest on all sums until realization, and, in default of payment, foreclosure and possession. The defence on behalf of the minors was that the stipulated date of payment was the 15th August 1882, and as the suit had been instituted [21] after the expiration of more than six years from that date the plaintiff's claim for interest subsequent to the 15th August 1882 was barred by limitation. It was further contended that the plaintiff was not entitled to subsequent interest, as there was no stipulation to that effect in the ikrarnamah baibilwafa.

The Subordinate Judge held that there was no express agreement in the deed of conditional sale that interest at the stipulated rate of 12 per cent. per annum was to continue to be payable even if the principal with interest remained unpaid on the 15th August 1882, the date fixed for payment, and that no such agreement could be implied in the absence of any words showing such an intention. He was of opinion that the plaintiff was entitled to interest after the due date of payment by way of damages for breach of the contract to pay, and that the rate stipulated in the deed was a fair and reasonable one in the district, and would be the proper measure of damages ; and that although "interest" in s. 86 of the Transfer of Property Act included damages which a Court of Justice might award the mortgagee for a breach by the mortgagor of the contract to pay on the due date, such damages did not become by operation of law a charge upon the mortgaged property until a decree for damages was passed by a competent Court, and that therefore art. 132 of sch. II of the Limitation Act did not apply. He held upon the authority of the cases of *Mansab Ali* v. *Gulab Chand* (1) and *Bhagwant Singh* v. *Daryao Singh* (2) that the plaintiff's claim for subsequent interest by way of damages was barred by art. 116 of the second schedule of the Limitation Act, inasmuch as the suit had been brought more than six years from the due date of payment, the 15th August 1882.

The Subordinate Judge, accordingly, gave the plaintiff a decree for Rs. 5,000, with interest at 12 per cent. per annum up to the 15th August

(1) 10 A. 85. (2) 11 A. 416.

1882 with costs, further interest at the same rate on the principal sum from the date of the suit until the date of the decree, and interest at 6 per cent. on all sums, including costs, from the date of decree until realization, and in default of payment that the defendants should be absolutely debarred of all right to redeem. He disallowed the plaintiff's claim for interest from the 15th August 1882 until the filing of the plaint.

[22] From this latter portion of the decree the plaintiff appealed to the High Court.

Dr. *Rash Behari Ghose* and Babu *Abinash Chunder Bannerjee*, for the appellant.

Moulvie *Mahomed Yusuf* and Babu *Saligram Singh*, for the respondents.

It was contended on behalf of the appellant that the Subordinate Judge was wrong in having disallowed interest from the 15th August 1882 until the filing of the plaint; that under Act XXXII of 1839 the plaintiff was entitled to interest from the due date of payment at the rate mentioned in the deed, which was a reasonable rate in the district, or at any other rate which the Court considered reasonable; that under s. 86 of the Transfer of Property Act such interest was part of the mortgage money, and a charge upon the mortgaged property, and that art. 132 of sch. II, Limitation Act, governed the case; that if, however, interest was not recoverable as interest, but as damages for breach of the contract to pay on the due date, then as the breach was a continuing one, art. 116 of sch. II did not apply, and the plaintiff's claim was in time.

Moulvie *Mahomed Yusuf*, on behalf of the respondents, contended that Act XXXII of 1839 had no application, since it related to contracts in writing to pay a certain sum on a certain date. After the due date the time for payment was uncertain, and so was the amount of interest, and therefore interest after the due date could not be allowed under that Act. That there must be an express stipulation to that effect in the deed. Interest after the due date could only be recovered by way of damages for breach of the contract to pay. That art. 116, sch. II of the Limitation Act provided six years' limitation for a suit for the recovery of such damages, and the period began to run from the date of the breach, which in the present case was the 15th August 1882, the date fixed for the payment of the mortgage money; and the lower Court was therefore right in disallowing this portion of the plaintiff's claim. He relied on the cases of *Mansab Ali* v. *Gulab Chand* (1), *Bhagwant Singh* v. *Daryao Singh* (2), and the unreported [23] case of *Bhugwan Lal* v. *Mohip Narain Singh* (3), and especially on the judgment of PIGOT, J., in *Golam Abas* v. *Mahomed Jaffer*—Sp. App. 723 of 1889, in which case both sides were duly represented (4). He further contended that such interest could not

---

(1) 10 A. 85. (2) 11 A. 416.

(3) Second Appeal No. 1292 of 1887, of 21st May 1888.

19 C. 23N.

(4) *2nd April* 1890.

Before Mr. Justice Pigot and Mr. Justice Beverley.

GOLAM ABAS *v.* MAHOMED JAFFER.

Moulvie *Mahomed Yusuf*, for the appellant.

Baboo *Rajendro Nath Bose*, for the respondent.

JUDGMENT.

PIGOT, J.—In this case, the question argued before us on this appeal, which was allowed to be argued, although not taken in the memorandum of appeal, was whether

1891 JULY 16. — APPELLATE CIVIL. — 19 C. 19.

be a charge on the property mortgaged under s. 86 of the Transfer of Property Act, since damages for breach of the contract to pay on a certain date could not be interest within the meaning of that section.

The judgment of the Court (MACPHERSON and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

In this suit, which is for foreclosure, the plaintiff claims interest at the rate stipulated in the deed from the date on which the money became payable up to the date on which the suit was brought; and the question is whether he is entitled to get interest for such period at the stipulated rate or at any lower rate. The deed of conditional sale was executed on the 15th September 1881. The principal money, with interest at the rate of one per cent. per mensem, was payable on the 15th August 1882, and the suit was [24] brought on the 30th November 1888. There is no stipulation in the deed to pay interest after the due date, and certainly no agreement to that effect can be implied from the terms of the deed. The Subordinate Judge has held that, under these circumstances, the suit having been brought more than six years from the date on which the money became due, the claim for interest from that time is barred by limitation.

It is argued that, under Act XXXII of 1839, the plaintiff is entitled to get interest from the due date at such rate as the Court may think fit to allow, and that under s. 86 of the Transfer of Property Act such interest is part of the mortgage money and becomes a charge on the property hypothecated. It certainly does not become a charge on the property hypothecated by the terms of the deed itself and we think it is unnecessary to consider whether, if the plaintiff's claim was allowed wholly or in part, it would be necessary to treat it as such a charge, because it has first to be determined whether the claim is in any way sustainable. The question

---

the interest claimed in the suit and allowed was properly allowed. The mortgage bond is one providing for the payment of the money secured by it in two instalments—one in Bhadro 1281 of Rs. 350, and the other in Bhadro 1282 of the residue, namely, Rs. 649. The bond provides thus :—'The entire amount of the debt thus amounts to Rs. 999, half of which is Rs. 449-8. I do therefore pledge and hypothecate my share in mouzah Sera, pergunnah Anda, and execute this bond to the effect that I shall pay the aforesaid amount of money, principal and interest, at the rate of one rupee per cent. per month.'

The cases of *Mansab Ali* v. *Gulab Chand* (1) and *Bhagwant Singh* v. *Daryao Singh*(2) are cited as authority for the proposition that when interest is not expressly made payable after the date fixed for the repayment of the mortgage-money, interest is not claimable, save as damages at such reasonable rates as the Court may direct. The case of *Gossain Luchmee Narain Pooree* v. *Tekait Het Narain Singh* (3) might have been also, but has not been, cited as authority for that proposition.

We think that the contention of the appellant is correct. We think that upon the terms of the mortgage bond interest is not expressly made payable after the date of the instalments but we think that as it is provided that the amount mentioned in the bond is to be paid by two instalments, principal and interest, the interest on the first instalment must be considered to be intended to run until the whole amount should be paid, that is to say, up to the date fixed for the second instalment. After that we think there is no agreement for the payment of interest, and interest would run at such rates as the Courts would deem reasonable ; but then that is only payable as damages, and, as was in the case of *Mansab Ali* v. *Gulab Chand* (1), there is not in the case of such damages that continued breach contemplated under art. 115 of 2nd schedule of the Limitation Act, and the result is that, as the suit was not brought within six years from the date of the undertaking to pay, the claim for it is barred. Therefore, as the result the decree must be modified by allowing interest at 12 per cent. per annum only up to Bhadro 1282.

[F. 19 C. 19 (23); R., 24 C. 699=1 C.W.N. 437; D., 21 C. 273 (278).]

(1) 10 A. 85. (2) 11 A. 416. (3) 18 W. R. 322.

whether it is sustainable depends upon the nature of the claim. If it is a claim for compensation for the breach of a [25] contract, then the contract being in writing and registered would fall under art. 116, sch. II of the Limitation Act, and unless there was a recurring cause of action, the time would run from the date on which the money became due. Great stress has been laid on the use of the word "interest" in the Act of 1839 and in the Transfer of Property Act, but we think that nothing much turns on this. In the case of *Juggomohun Ghose* v. *Manickchand* (1) their Lordships of the Privy Council, speaking of Act XXXII of 1839, say this:—"It seems to have been framed not simply on the principle of compensation to the creditor, but also on that of penalty to the debtor for not paying punctually at a time when he must have known the debt or sum, specific in amount, was to be paid." And again:—"The Act supposes a party to have been sued for breach of a contract for the payment, by virtue of a written instrument, of a sum certain at a certain time." This is a very clear indication that such a claim as this is one for compensation for the breach of a contract, and it has been held specifically to be so by the Allahabad High Court in the cases of *Mansab Ali* v. *Gulab Chand* (2) and *Bhagwan Singh* v. *Daryao Singh* (3). These decisions have been followed by this Court in two unreported cases, *viz.*, *Bhugwan Lal* v. *Mohip Narain Singh* (4) and *Golam Abas* v. *Mahomed Jaffer* (5). The matter is, therefore, concluded by authority, and we are certainly not prepared to take a different view from that expressed in those cases. It was also held in all those cases that there was no recurring cause of action, that the breach took place when the defendant failed to pay the money due in accordance with the terms of his contract, and that the time began to run from that date. The Subordinate Judge was, therefore, in our opinion right in holding that the claim in the present suit was barred by limitation.

It was further urged that the Subordinate Judge ought to have allowed the amendment of the plaint, and should have permitted the plaintiff to give evidence to show that the time granted was at the request of the defendant, and that there was an agreement [26] to pay interest subsequent to the due date. This is a matter on which the plaint is entirely silent. The plaintiff's pleader, when examined subsequent to the presentation of that petition, stated that there was no subsequent agreement in any way affecting the terms of the loan. Having regard to these circumstances and to the great delay in making the application for amendment of the plaint, we are not prepared to say that the Subordinate Judge was wrong. The appeal is therefore dismissed with costs.

C. D. P. *Appeal dismissed.*

(1) 7 M.I.A. 279. (2) 10 A. 85. (3) 11 A. 416.
(4) Second Appeal No. 1292 of 1887, of 21st May 1888.
(5) See 19 C. 23. Note, *supra*.

1891
JULY 28.

APPEL-
LATE
CIVIL.

19 C. 26.

19 C. 26.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

PREONATH KARAR (*Appellant*) *v.* SURJA COOMAR GOSWAMI AND OTHERS (*Respondents*).* [28th July, 1891.]

Administrator—Administrator not so described, sale by—Sale by administrators not qua *administrators, but as heirs—Government securities.*

Certain persons who were heirs of a deceased lady, and had also taken out administration to her estate, limited to certain Government securities, sold such Government securities to a *bona fide* purchaser under a written instrument in which the vendors were not described as administrators.

Held, that the failure to so describe themselves did not affect the sale inasmuch as they were entitled to sell either as heirs or administrators; and although as heirs they could sell no more than their own shares in such securities, yet the entire purchase-money having come to their hand, they, as administrators, were bound to administer the same as part of the assets of the estate, the question whether they did so or not, not being one which would affect the title of the purchaser.

West of England and South Wales District Bank v. *Murch* (1) and *Corser* v. *Cartwright* (2) followed in principle.

THIS was a suit brought by one Preonath Karar for the purpose of obtaining a declaration of right to a half share in certain Government promissory notes of the nominal value of Rs. 7,400. The Government promissory notes originally belonged to one Nilmadhub Goswami, who died unmarried. On his death his [27] adoptive mother, Kudumbini Debi, by inheritance became entitled to the said Government promissory notes for Rs. 7,400, and on her death the right to these notes was in one Jugomohun Goswami, her husband's uterine brother. Jugomohun died possessed of certain immoveable property, leaving him surviving two sons, Surja Coomar and Haro Coomar Goswami (defendants 1 and 2), a grandson by a deceased son, Hurish Chunder Goswami (defendant No. 3), and a widow, Saroda Sundari Debi (defendant No. 4), forming a joint Hindu family. In 1881 defendant No. 3 separated in mess from the rest of the family, and subsequently in 1884 the defendants 1 and 2 also came to a similar separation between themselves. No partition of these properties, however, took place between these parties. Jugomohun having died somewhat in debt, the family dwelling-house was sold, and in execution the rights and interest of the defendants 1 and 2 therein were purchased by one Indranarain Mukerjee, and on the 14th October 1885 a partition of the family dwelling house was come to between Saroda Sundari Debi (defendant No. 4), Indranarain Mukerjee, and Hurish Chunder (defendant No. 3), and under this partition a quarter share of the family dwelling-house was allotted to Saroda Sundari. No partition, however, was ever come to with regard to the moveable properties left by Jugomohun. In September 1885, however, previously to the partition of the family dwelling-house, a conveyance was executed by Saroda Sundari, her two sons and her grandson in respect of a certain property, the interest of the two sons in which had been sold and purchased by one Kedar Nath Lahiri, wherein the right of

---

* Appeal from Original Decree, No. 33 of 1890, against the decree of Babu Hemanga Chundra Bose, Subordinate Judge of Hooghly, dated 9th December 1889.

(1) L. R. 23 Ch. D. 138. (2) L. R. 7 H. L. 731.

Saroda Sundari, "as the mother of many sons," to hold for her life a 4-anna share of the "estate" left by Jugomohun was admitted. 1891 JULY 28.

APPEL-LATE CIVIL.

19 C. 26.

The Government promissory notes above referred to were lost during the lifetime of Kudumbini, and the defendants 1 and 2 after the death of their father, Jugomohun, in June 1882 applied to the Public Debt Office for the issue of duplicates in their names. The application was refused, as letters of administration had not been taken out to the estate of the last holder of the notes. Whereupon defendants 1 and 2 took out administration to the estate of Kudumbini, limited to these securities, and obtained registration of their names in the office of the Comptroller-General as payees, [28] and in November 1885 they sold under a written instrument the 16-anna share in these Government promissory notes to one Uma Churn Ghose (defendant No. 5), Hurish Chunder (defendant No. 3) having relinquished all right to his share therein in consideration of a sum of Rs. 375 paid to him by Uma Churn Ghose, and joining in the instrument conveying the notes. The written instrument purporting to pass these Government promissory notes made no mention of the fact that defendants 1 and 2 had taken out letters of administration to the estate of Kudumbini, and therefore merely on the face of it purported to be one made by defendants 1 and 2 in their capacity as heirs. Uma Churn Ghose on the 21st September 1887 entered into a contract for the sale of these Government notes to Messrs. Speed and Company of Calcutta (defendants No. 6) through Mr. R. Braunfeld, their trustee and manager (defendant No. 7), but it was not until the 12th January 1888 that defendant No. 7 completed this purchase by obtaining from Uma Churn a regular conveyance. Meanwhile on the 5th and 20th October 1887 Preonath Karar under registered instruments of those dates bought from defendants 3 and 4 an 8-anna share in these Government notes, and on the 23rd October 1887 gave notice to Mr. Braunfeld (defendant No. 7) of his purchase, and applied as such purchaser to the Public Debt Office to have his name registered as payee of these notes. This application was refused, and Preonath Karar was referred to the Civil Court.

Preonath Karar thereupon brought this present suit for the purposes above mentioned against the persons above named—the defendants 1 to 7. The suit was virtually alone defended by defendants 6 and 7, who alleged that they were purchasers in good faith and for valuable consideration.

The Subordinate Judge dismissed the suit, holding that a partition must be held to have been come to by virtue of which the two sons, the grandson, and the widow of Jugomohun were entitled each to one-fourth of his estate; and that Hurish Chunder having disclaimed any right in these notes, the plaintiff had alone acquired a right to a quarter share in these notes: but he was not entitled to succeed in this suit, inasmuch as Messrs. Speed and Company through Mr. Braunfeld were *bona fide* purchasers for valuable consideration.

[29] The plaintiff appealed to the High Court.

Dr. *Rash Behari Ghose* (with him Baboo *Shib Chunder Paulit*), for the appellant, contended—

1. That a partition has been found by the Subordinate Judge, by which the two sons and grandson and widow were entitled to a quarter each of the estate of Jugomohun.

2. That the administrators had no power to sell. That the deed of sale of 23rd November 1885 conveyed only the interest of Surja Coomar and Haro Coomar in the promissory notes, and not the whole of the notes.

1891 JULY 28. — APPELLATE CIVIL. — 19 C. 26.

3. That the deed not containing any reference to the letters of administration, the vendors could only sell in their character of heirs their own interests.

4. That there was no relinquishment of the whole of Hurish's share by his letter of disclaimer, but only of the interest on the notes.

5. That the defendants took with notice.

The Advocate-General (Sir *Charles, Paul*), Mr. *Braunfeld*, Baboo *Baikant Nath Das* and Baboo *Joygopal Ghose*, for the respondents.

The Advocate-General (Sir *Charles Paul*) contended that the Court merely found that there was a partition with the purchaser of the homestead only all the other properties having been sold, and that this therefore was no partition according to Hindu Law, as such a partition must be with the descendants: see *Mayne's Hindu Law*, 519.

That there was no possession and enjoyment by the widow—*Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1).

That the widow was only entitled to maintenance; that this was a personal right which she could not sell: see *Vyvastha Darpana*, 1059, and *Bhyrub Chunder Ghose* v. *Nubo Chunder Gooho* (2). That a stranger cannot sue to have a widow's maintenance declared on property in the hands of a third party.

That the existence of a widow is not enough notice: she must have her maintenance ascertained and charged on the property before she can follow the property—*Nistarini Dossee* v. *Mukhun* [30] *Loll Dutt* (3). *Bhuggobutty Dassi* v. *Konny Lall Mitter* (4), and *Sorolah Dassi* v. *Bhoobun Mohun Neoghy* (5), which show what kind of estate a Hindu widow is entitled to for her maintenance and on partition.

That the recital in the deed of 26th September 1885 (Kedar Nath Lahiri's)—"I, Saroda Sundari Debi, as the mother of many sons, being entitled to, &c.," could not be construed to extend to other properties, but must be limited to the property dealt with by that deed.

That the Court having found that defendant No. 6 was a *bona fide* purchaser without notice, his purchase could not be affected by the purchase of defendant No. 5. That Surja Coomar and Haro Coomar were administrators when they sold the property vested in them, and they could sell the whole absolutely. That under Act VI of 1889, s. 14, they need not obtain the consent of the Court, as s. 19 makes valid such sales.

That if the administrators had misapplied, they were personally liable under s. 146 of the Probate and Administration Act of 1881 : besides they have given a bond with sureties which was protection enough for the proper application of the moneys which came to their hands.

That the deed of 23rd November 1885 conveyed a good title to the purchaser Uma Churn Ghose, as the vendors were heirs as well as administrators, and therefore they could convey a valid title in either character; *West of England and South Wales District Bank* v. *Murch* (6) and *Coser* v. *Cartwright* (7).

Judgment of the Court (PETHERAM, C. J., and GHOSE, J.) was as follows:—

JUDGMENT.

This was a suit by one Preonath Karar for declaration of right to a moiety share of certain Government promissory notes of the value of

(1) 9 W.R. 61. (2) 5 W.R. 111. (3) 17 W.R. 432. (4) 17 W.R. 433 (note). (5) 15 C. 292. (6) L.R. 23 Ch. D. 138. (7) L.R. 7 H. L. 731.

Rs. 7,400. They belonged originally to Nilmadhub Gossain, and devolved on his death upon his mother, Kudumbini, under the law of inheritance; and on the death of the latter one Jugomohun Gossain became entitled to them as the next reversionary heir. Jugomohun left a widow, Saroda Sundari (defendant [31] No. 4), and two sons, Surja Coomar and Haro Coomar (defendants 1 and 2), and a grandson, Hurish Chunder (defendant No. 3), by a pre-deceased son. It appears on the evidence that Jugomohun was possessed of certain immoveable properties, and after his death the two-thirds share of his two sons, the defendants 1 and 2, in most of, if not in all, the properties, including the dwelling-house, was sold away at auction for their debts. The evidence further shows that the defendant No. 3 separated in mess from the defendants 1 and 2 in 1881, and subsequently the latter came to a similar separation between themselves in 1884. No partition of the properties, however, seems to have then taken place between these parties, but in a conveyance executed jointly by the widow Saroda Sundari, her two sons, and Hurish Chunder, her grandson, dated 26th September 1885, in respect of a certain property, in which the interest of the two sons had been sold and purchased by one Kedar Nath Lahiri, the right of Saroda Sundari "as the mother of many sons" to hold for her life a 4-anna share of "the estate" left by Jugomohun was admitted by the sons, as also by the grandson, then represented by his mother, Shureshury Dahee. And subsequently, in October 1885, there was an actual partition by metes and bounds between the widow, Hurish Chunder, and one Indranarain, who had purchased the interest of the two sons in respect to the dwelling-house.

Nothing in particular seems to have been then said as regards the Government promissory notes. They stood in the name of Kudumbini, and had been lost during her lifetime. After the death of Jugomohun, Surja Coomar and Haro Coomar alone applied to the Public Debt Office for issue of duplicates. It is admitted by the plaintiff in the plaint, and it may also be gathered from the evidence, that these two persons obtained letters of administration in respect of the promissory notes; and the Public Debt Office on the authority of the said letters registered the names of Surja Coomar and Haro Coomar as the payees, and subsequently that of one Uma Churn Ghose, who in November 1885 obtained a conveyance from those two individuals, of the notes; but before the duplicates could be issued, it was brought to the notice of the Comptroller General of Accounts that there was another person, Hurish Chunder, who was entitled to an interest in the said [32] notes. This person, however, subsequently (28th September 1886) wrote a letter to the Comptroller General, disclaiming all interest, and acquiescing in the duplicates being issued to Uma Churn; and it is proved on the evidence that this was done in consideration of Rs. 375, which Uma Churn paid to him, Hurish Chunder. We may therefore take it that there was a transfer by both the sons and grandson to Uma Churn.

On the 21st September 1887 Mr. Braunfeld, as representing Messrs. Speed and Company, entered into a contract with Uma Churn for the purpose of these promissory notes, and paid Rs. 800 as part consideration; but before a conveyance could be executed, the plaintiff Preonath obtained in the first instance a bill of sale (5th October 1887) from Hurish Chunder of a third share of the notes, and in the second place from Saroda Sundari (20th October 1887) of a 2 annas 13 gundahs share in these notes, she representing herself to be the owner of a 4-anna share as the widow of Jugomohun Gossain, and relinquishing to him (the plaintiff) the

1891 JULY 28. — APPELLATE CIVIL. — 19 C. 26

share of 1 anna 8 gundahs and odd already sold by Hurish in excess of his legitimate share. The plaintiff, on the 23rd October 1887, gave notice of his purpose to Mr. Braunfeld, who, however, on the 12th January 1888 completed his purchase by obtaining from Uma Churn a regular conveyance on payment of the balance of the consideration money that had been agreed upon.

The plaintiff subsequently applied to the Comptroller General to have his name registered as payee in respect of a moiety share, but that officer said that this could not be done unless he, the plaintiff, established his right in the Civil Court. Thereupon the plaintiff brought the present suit.

The Subordinate Judge has dismissed the suit. He is of opinion that by reason of the separation between the sons and grandson of Jugomohun, the partition of the dwelling-house between Hurish Chunder, Indranarain (purchaser) and the widow, and recognition of her share in the estate of Jugomohun by the purchaser Kedar Nath Lahiri, under the transaction of the 26th September 1885, she must be taken to be entitled to a share, and which is one-fourth, in the promissory notes, as part of that estate; and that, therefore, the plaintiff has acquired a valid right by his purchase from that lady; but that notwithstanding this, he, the plaintiff, could not [33] succeed as against the defendant No. 7, Mr. Braunfeld, because the property in the promissory notes passed to the latter on the 21st September 1887; that he purchased in good faith for a valuable consideration from the assignee of the defendants 1 and 2, who were the only persons that had obtained letters of administration, and that the only other person who was known to have any interest as an heir of Jugomohun, *viz.*, Hurish Chunder, had put in a disclaimer in the office of the Comptroller General of Accounts.

Against this decree the plaintiff has appealed to this Court.

The first question that we have been called upon to decide in this appeal is whether Saroda Sundari had any interest in the promissory notes, such as she could pass under a conveyance to the plaintiff.

The rights of a Hindu widow having several sons, such as Saroda Sundari is, have been considered in *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1), *Kedar Nath Coondoo Chowdhry* v. *Hemangini Dassi* (2), *Sorolah Dassee* v. *Bhoobun Mohan Neoghy* (3), and *Hemangini Dasi* v. *Kedar Nath Kundu Chowdhuri* (4). The result of these cases seems to be, so far as they bear upon the question now before us, that a Hindu widow having several sons is entitled to be maintained from the estate left by her husband so long as the sons remain undivided; and that if and when the sons come to a partition of the paternal estate, she is entitled for her life to a share equal to that of each of the sons; but that the share which she thus takes is not in right of her being a co-parcener, having any pre-existing interest in the estate, but in lieu of, or by way of provision for maintenance. If, therefore, it were necessary to decide in this case whether Saroda Sundari was entitled to a fourth share in the estate of Jugomohun, it would be necessary to consider whether there was a partition in law between the sons and grandson of Jugomohun, such as would entitle the widow, Saroda Sundari, to claim a share in her husband's estate. The Subordinate Judge does not seem to have addressed himself to this question, and we do not quite follow all the reasons upon which he held that Saroda Sundari was entitled to a share. But in the view that [34] we take, and which we

---

(1) 9 W. R. 61. (2) 13 C. 336. (3) 15 C. 292. (4) 16 I.A. 115.

shall presently express, of the rights that the defendant has acquired, we do not think it is necessary to express any opinion on the question.

1891
JULY 28.
—
APPELLATE
CIVIL.
—
19 C. 26.

As regards the conveyance executed by Hurish Chunder, we are of opinion that the plaintiff acquired no title under it, Hurish Chunder having already put in a disclaimer in the Comptroller General's office upon receipt of a valuable consideration from Uma Churn and acquiescing in the duplicates being issued to him. This was long before Hurish Chunder sold to the plaintiff, and it is obvious that that sale could not give him, the plaintiff, any title as against Uma Churn, or his assignee, Mr. Braunfeld.

Then, as regards the question, what is the title which Uma Churn acquired under his purchase from the defendants 1 and 2 in November 1885, the matter seems to stand thus—

The promissory notes, as already mentioned, stood in the name of Kudumbini, and the defendants 1 and 2 obtained letters of administration in respect thereto, and being administrators they had the power, with the consent of the Court, to dispose of them (Act V of 1881, s. 90). The consent of the Court was not, however, obtained to the sale which they made to Uma Churn; but this circumstance by itself would not make the sale void, as the defect of title has been cured by Act VI of 1889, s. 19, the operation of which section is retrospective, and there is no other fact that we know of in this case which would invalidate the sale. If the administrators have misapplied the estate of the deceased, or have by this transaction subjected it to loss or damage, they are liable to make good the loss or damage (s. 114, Act V of 1881), but there is no reason to hold that the sale in question is bad.

It has, however, been contended that the sale by the administrators was not *qua* administrators, but as heirs of Kudumbini, and therefore the sale does not bind Saroda Sundari or her assignee, the plaintiff. We are, however, of opinion that the fact that the conveyance does not describe the defendants 1 and 2 as administrators, but as heirs, does not affect the case, because either as administrators or as heirs they were entitled to sell, though no doubt as heirs they could not sell anything more than their **[35]** own shares. The purchase-money, however, came into their hands; and as administrators they would be bound to administer the same as part of the assets of the estate; but whether they do so or not, it does not affect the title of the purchaser. [See in this connection, *West of England and South Wales District Bank* v. *Murch* (1) and *Corser* v. *Cartwright* (2).]

We hold, therefore, that Uma Churn acquired a good title under his purchase; and it follows, therefore, that he was entitled to sell the notes to Mr. Braunfeld. No doubt, before Mr. Braunfeld obtained his conveyance, the plaintiff gave him notice of his purchase, but this was *after* he (Mr. Braunfeld) had entered into a contract for the purchase with Uma Churn, and paid a portion of the purchase-money.

Upon these grounds we are of opinion that the plaintiff is not entitled to succeed in this case; the result being that the appeal will be dismissed with costs.

T. A. P. *Appeal dismissed.*

---

(1) L.R. 23 Ch. D. 138. (2) L.R. 7 H.L. 731.

1891
AUG. 25.

ORIGINAL
CRIMINAL.

19 C. 35.

19 C. 35.

ORIGINAL CRIMINAL.

Before Sir W. Comer Petheram, Kt., Chief Justice.

QUEEN-EMPRESS *v.* JOGENDRA CHUNDER BOSE AND OTHERS.* [25th August, 1891.]

Disaffection and disapprobation—Penal Code (Act XLV of 1860), *ss.* 124-A, 500—*Defamation.*

The terms ' disaffection ' and disapprobation ' explained, and s. 124-A referred to, and explained to the Jury.

[F., 32 M. 3=9 Cr. L.J. 108=1 Ind. Cas. 22= 5 M.L.T. 1 ; 15 O.C. 45=15 Ind. Cas. 189 ; R., 20 A. 55 (60) ; 32 M. 384=9 Cr. L.J. 456=2 Ind. Cas. 33=5 M.L.T. 393 ; 10 Bom. L.R. 848=8 Cr. L.J. 281 (311); 11 Cr. L.J. 667=8 Ind. Cas. 531.]

JOGENDRA CHUNDER BOSE, Kristo Chunder Banerjee, Brojo Raj Banerjee, and Arunodoy Roy were committed for trial at the Calcutta Sessions by the Officiating Chief Presidency Magistrate as the Proprietor, Editor, Manager, and Printer of the *Bangobasi*, a weekly vernacular newspaper, having a large mofussil circulation and having its office at No. 34-1, Colootollah Street.

The accused were charged under s. 124-A and 500 of the Penal Code, with attempting to excite feelings of disaffection to the Government established by law in British India, and with **[36]** defaming the Government of India by publishing certain articles on the 28th of March, the 16th of May, and the 6th of June 1891. The charges under s. 500 were, however, during the course of the argument at the trial, struck out.

The articles in respect of which the above charges were framed were five in number, and may be shortly summarised as follows:—

"*Our Condition.*"

"The English ruler is our lord and master, and can interfere with our religion and usages by brute force and European civilization. The Hindu is powerless to resist; but he is superior to your nation in good morals, in gentle conduct, and in good education. Hindu civilization and the Hindu religion are in danger of being destroyed."

"*The Revealed form of the English Ruler.*"

"The Englishman stands revealed in his true colours. He has the rifle and bayonet, and slanders the Hindu from the might of the gun. How are we to conciliate him? We cannot expect mercy or justice from him. Our chief fear is that religion will be destroyed, but the Hindu religion will nevertheless remain unshaken."

"*For the uncivilised, undisguised policy is good.*"

"We suffer from the ravages of famine, from inundations, from the oppressive delays of the law courts, from accidents on steamers and railways. All these misfortunes have become more prevalent with the extension of English rule in India; but our rulers do not attempt to remove these troubles or to ameliorate our condition. All their compassion is expended in removing the imaginary grievances of girl-wives, and in interfering with our customs. We should freely vent our real grievances."

" *The most important and the first idea of the uncivilised Hindu.*" 1891

"We are unable to rebel, but we are not of those who say it would be improper to do so if we could. We have been conquered by brute force, but we are superior to the English in ethics and morality, in which we have nothing to learn from them. You may crush the body, but you cannot affect the mind. Others like [37] Aurungzebe and Kalapahar have tried before you and failed. You should not try and suppress girl-marriage because you won at Plassey and Assaye. It is error and presumption on your part to attempt to reform our morals."

AUG. 25.

ORIGINAL CRIMINAL.

19 C. 35.

" *What is the end to be?*"

" The outlook is a gloomy one. In 50 years death is certain, as food has quadrupled in price in the last 30 years. The land is fertile, yet a mountain could be constructed from the bones of those who perished in the Orissa famine alone. Parents have devoured their children. Famines must result from high prices, and the recent riot at Benares is to be attributed to this cause. Education renders people unfit to earn their living by manual labour. The cause of all this is the drain put upon the country by the British Government which will never cease until the country is completely exhausted."

Other articles were referred to at the trial written subsequently to the above dates, and up to within a week of the initiation of the proceedings. These articles were sought to be used in the character of fresh evidence to show animus on the part of the accused.

The Officiating Standing Counsel (Mr. *Pugh*), Mr. *Woodroffe*, Mr. *Evans* and Mr. *Dunne*, appeared for the Crown.

Mr. *Jackson*, Mr. *N. N. Ghose*, Mr. *Graham* and Mr. *Sinha* appeared for the accused.

Mr. *Pugh* in opening the case for the prosecution at great length, first dealt with the topics referred to in the articles, which have been noticed briefly for the purposes of the present report. And in connection with the liberty of the Press, pointed out that it had only been interfered with for three years since Lord Metcalfe's time (1835), that is to say, in 1857, and from 1878 to 1881, and continued as follows :—If the Press are at liberty to hold up the Government of a country to public execration as being destroyers and persecutors of the people, as having a settled design to destroy the religion of the people, and as being the cause of famines and other calamities, it would be impossible for any Government to exist. That amounts to exciting feelings of disloyalty and disaffection, which [38] has found vent in riots at Calcutta, Benares, and elsewhere. I would refer to the remarks of Baron Deasy in the case of *Reg.* v. *Pigott* (1) in which it was pointed out that the Government had a right to protect itself by bringing the newspaper before a Jury. If newspapers attempt to excite feelings of sedition and no redress can be obtained from Juries, then some stringent measures curtailing the liberty of the Press, as had been done in 1878, would have to be adopted. The case of Ireland is analogous to the case here, and *Reg.* v. *Pigott* (1) is therefore a case in point. In these articles no attempt at a reasonable discussion of the Age of Consent Bill is to be found. There is nothing but vituperation and invective. In one of the articles it is stated that rebellion was not possible, and the intention here is to bring the people into this frame of

(1) 11 Cox. Cr. Ca. 60 (61).

1891 AUG. 25. — ORIGINAL CRIMINAL. — 19 C. 35.

mind:—"We would rebel if we could," which is inconsistent with loyalty to Government. The intention of the articles in referring to famines and high prices and charging the Government with persecuting the Hindu religion is to make the people discontented and dissatisfied. These writings must be measured with reference to the circumstances of a country where there is always danger of riots. It is always dangerous to attempt to excite the religious feelings of the people, and where the Government is compared to the Emperor Aurungzebe, one of the most persistent persecutors of the Hindu religion, and to Kalapahar, whose name was held in the greatest abhorrence by Hindus, surely the public peace is imperilled. Again, the articles are directed to inflame the prejudices of people of the lower classes by appealing to their superstitious feelings. With this object the British Government were compared to revolting characters in the Hindu mythology.

[Mr. *Pugh* then proceeded to read and comment on the articles at length, and in addressing the Court upon the history and construction of s. 124-A continued as follows]:—

Section 124-A was framed by the Indian Law Commissioners in 1837, the enfranchisement of the Press having taken place in 1835. In 1839 it was proposed to insert the section in the draft Penal Code. The section was, however, unaccountably omitted from the Indian Penal Code in 1860. In 1870 the present section **[39]** became law, and from that time to this there has been no prosecution under the section. Practically the offence before the Jury is the attempting to excite, by words intended to be read, feelings of disaffection to the Government, the *Explanation* to the section is intended to cover every sort of lawful criticism of the measures of the Government. Merely to excite disapprobation is not an offence, but the disapprobation must be compatible with a disposition to support the authority of the Government against unlawful attempts to subvert or resist that authority. It is impossible to say that these articles are consistent with such a disposition to render obedience to and to support the Government. The term 'disaffection' is a wide one, and does not necessarily point to a direct incitement to rebellion or any particular form of force. The word is used in the State trials for seditious libel before the Commonwealth, and in Ludlow's *Memoirs* as applicable to persons discontented with the Government, who did not show their discontent by overt acts. The meaning is "to be or cause to be without affection, attachment, friendship, regard, love, or goodwill; to dislike, to have discontent, to dissatisfy, to discompose."—*Metropolitan Encyclopædia*, 1845.

In the present case the Jury must go upon s. 124-A. The law of England is even stricter than the section, and it is laid down in Sir J. Stephen's *History of the Criminal Law* (1) that the law of France and Germany, not to speak of that of Russia, is severer than that of England. A seditious intention by the law of England is an intention not merely to bring into disrepute or excite disaffection against the Government or the Constitution of the United Kingdom, but to raise discontent or dissatisfaction between different classes of Her Majesty's subjects. In India, apparently, it is not an offence to incite class against class, and s. 124-A has nothing to do with this subject. The case of *Reg.* v. *Burns and others* (2) will be relied upon to show that there must be some direct appeal to arms, but the question in that case was whether there had been any incitement to one class to use force against another class. That case, therefore,

(1) Chap. 24, Vol. II. p. 395.

(2) 16 Cox. Cr. Ca. 355.

1891 AUG. 25. — ORIGINAL CRIMINAL — 19 C. 35.

and others of the same kind have no application to the present. Then [40] the discussions which took place in the Council with reference to this section and with reference to the Vernacular Press Acts should not be taken into consideration in order to arrive at the meaning and construction of the section. With regard to the meaning of 'attempt,' the Jury will have to look to the words which the writer of these articles has used to express his intention, and to the surrounding circumstances. Stephen's *Digest of the Criminal Law*, arts. 91—94. In the case of *Reg.* v. *Burdett* (1) Mr. Justice Best lays down that it is for the Jury to collect the intention from the paper itself, unless it is explained by the mode of publication or by any other circumstances. The Jury were to see whether the words used were likely at that period to excite dissatisfaction and irritation, and if they were likely to induce sedition, the intention must be presumed to be to excite what the act was likely to produce. [The remarks of Holroyd, J., at p. 135 of the report were also referred to.] The present case is covered by the case of *Reg.* v. *O'Connell* (2), which was held to be a case of conspiracy, because the objects were unlawful. In the case of *Reg.* v. *Sullivan* (3), the duty of the Jury is correctly laid down by Fitzgerald, J., when he charged the Jury that they should deal with the articles in a fair and liberal spirit, not picking out an objectionable sentence here or a strong word there, or giving undue importance to inflated and turbid language, but looking at the real intention and spirit of the articles (4).

Witnesses were then called as to the publication of the articles by the accused, after which Mr. *Evans* summed up in detail the evidence for the prosecution.

PETHERAM, C.J.—I shall direct the Jury as to the meaning of the section.

Mr. *Jackson*.—I submit that it is for the Jury to decide with regard both to law and fact.

PETHERAM, C.J.—It will be my duty to direct the Jury on the construction of the section.

[41] Mr. *Jackson*.—There is no case to go to a Jury under s. 124-A. The offence under that section really consists in writing a seditious libel, and the publishing it or causing it to be published is no offence under the Penal Code. The prosecution admit that they have been unable to discover who is the writer of these articles. The only person liable is the composer of the articles. If s. 124-A be read by the side of s. 499, it will be seen that no mention is made of publication in the former section, and its omission must have been intentional, as the framers of the law had already the defamation section before them. In England under Lord Campbell's Act the publication of the libel itself had to be proved, and a person is not criminally responsible for the acts of his agents—*Reg.* v. *Halbrook and others* (5).

PETHERAM, C.J.—It appears to me perfectly clear that there is a case to go to the Jury. The question turns upon the meaning of s. 124-A, and Mr. Jackson's contention is that only the speaker of the words or the composer of the sentences is liable under the section. I do not think that contention is borne out by the words of the section. The offence is attempting to excite disaffection by words intended to be read, and I think that whoever the composer or the writer might be, by whomsoever the writing

---

(1) 4 B. & Ald. 95 (131). (2) 11 Cl. & F. 155. (3) 11 Cox Cr. Ca. 44.
(4) 11 Cox. Cr. Ca. 59. (5) L.R. 3 Q.B.D. 60.

1891 AUG. 25. — ORIGINAL CRIMINAL. — 19 C. 35.

or the printing was composed, the person who used them for that purpose within the opinion of the Jury was guilty of an offence under s. 124-A.

Mr. *Jackson.*—I would ask to have the point reserved under s. 25 of the Charter.

PETHERAM, C.J., declined to reserve the point.

[Mr. *Jackson*, in proceeding to address the Jury, referred to the case of *Reg.* v. *Sullivan* (1), for the purpose of showing that both the law and the facts were for the consideration of the Jury, it being for them to determine the whole question of law and fact, whether this was a seditious libel or not. He referred to the history of the Press in India, and proceeded to call the attention of the Jury to the interpretation which the section had received **[42]** from Sir James Stephen and others. And on this point continued] :—

Originally the section was s. 113 of Macaulay's Penal Code, but was for some reason omitted from the Code itself. Sir J. Stephen, when the matter came to be considered in the year 1870, referred to Sir Barnes Peacock, who, on looking at his notes, said he thought the section had been omitted by mistake, but had no positive recollection (vide *Gazette of India*, August 6th, 1870, Supp. Vol. 1019, 1311). There was on that occasion a discussion as to s. 113, and Sir J. Barnes Peacock proposed a section which was thought to be too severe, and no corresponding section was enacted. Sir J. Stephen in introducing the present section explained what the law of England then was, and stated that he proposed that s. 124-A should be passed into law, because if there were no provision in the law of India, the offence would fall under the common law of England, and would be more severely punishable; and he most distinctly asserted that there must be an intention to resist by force or an attempt to excite resistance by force before the offence could be brought under the present section. The peculiarity of the law of treason in England is that it considers every thought of the heart criminal, which is to be punished as soon as it is manifested by any overt act, but the clause as it stands insists on a distinction between disaffection and disapprobation. A person may freely say what he pleases about any Government measure or any public man as long as it is consistent with a disposition to render obedience to the lawful authority of Government. In connection with this subject Sir J. Stephen has clearly said that the freedom of the press would not be curtailed so long as the principle above laid down was adhered to. Sir J. Stephen has pointed out that articles far more violent than the ones which have been made the subject of this prosecution had appeared in the English newspapers in India and had passed unnoticed. [Mr. *Jackson* then referred to LORD HOBHOUSE'S minutes of the 18th May 1875 and the 10th August 1876 in connection with the discussions on the Vernacular Press Act, and also referred to Lord Lytton's and Sir A. Arbuthnot's speeches in Council, adopting these as part of his argument to show the view which those authorities then took as to the scope and **[43]** meaning of the present section—vide *Gazette of India*, Supp. Vol., 1878, pp. 457 to 481.] The interpretation then put upon the section by those competent to do so must be taken as the right interpretation. The Jury have a right to take into account the opinion of such men as Sir J. Stephen, and up to the year 1878 there was but one opinion as to the meaning of the section. When the Vernacular Press Act was repealed

(1) 11 Cox. Cr. Ca. 52.

in the year 1882, it was again expressly laid down that the freedom of the native press was to be interfered with only on very special occasions —*Gazette of India*, Supp. Vol., 1882, p. 90.

[Mr. *Jackson* then went through the articles in great detail, and argued that they contained no direct incitement to rebellion or the use of force, and did not exceed the bounds of legitimate criticism, when allowance was made for the difference between European and native methods of thought and the conservative character of the paper. He also referred to the arguments for and against the Age of Consent Bill.]

PETHERAM, C.J., charged the Jury as follows:—

The four accused are charged with an offence under s. 124-A of the Penal Code, and inasmuch as the offence in question is treated and defined by that section, I have thought it desirable that you should have the section itself in your hands whilst I explained the law to you, and also whilst it was being discussed by Mr. *Jackson*. There are really two questions for you to consider. First, you must clearly understand what it is that has been made into an offence by the section, and when you understand that, you have to consider whether the evidence before you proves that such an offence has been committed by the prisoners. The section is divided into two parts, and is as follows:—" Whoever, by word, either spoken or intended to be read, or by signs, or by visible, representation, or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which a fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine."

" *Explanation.*—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience **[44]** to the lawful authority of the Government, and to support the lawful authority of the Government, against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation is not an offence within this clause."

Mr. *Jackson* contended that the words "disaffection" and "disapprobation" were synonymous words, and had one and the same meaning. If that reasoning were sound, it would be impossible for any person to be convicted under the section, as every class of writing would be within the explanation. But you, gentlemen of the Jury, are thoroughly acquainted with the English language, and must know that there is a very wide difference between the meaning of the two words disaffection and disapprobation. Whenever the prefix, 'dis' is added to a word, the word formed conveys an idea the opposite to that conveyed by the word without the prefix. Disaffection means a feeling contrary to affection, in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a man's sentiments or action and yet to like him. The meaning of the two words is so distinct that I feel it hardly necessary to tell you that the contention of Mr. *Jackson* cannot be sustained. If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by

1891 AUG. 25. — ORIGINAL CRIMINAL. — 19 C. 35.

his words or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feeling. The second question for you gentlemen of the Jury, then, will be whether, upon the evidence before you, you think that the articles circulated by the prisoners were calculated to create such feelings in the minds of [45] their readers, and if so, whether they intended to create such feeling by their circulation.

Having taken this explanation of the section from me, it now rests with you to decide whether the accused by the words of the articles which were intended to be read have been guilty of an attempt to excite disaffection against the Government. You will have to bear in mind the class of paper which is being prosecuted and the class of people among whom it circulated, taking into consideration the articles which have been made the subject of the indictment and the others which have been put in during the course of the trial. Those articles are not addressed to the lowest or most ignorant mass of the people. You will see from the article referring to jute that they were not addressed to the cultivating classes. They are addressed to people of the respectable middle class who can read and understand their meaning—more or less the same class as the writers. You will have to consider, not only the intent of the person who wrote and disseminated the articles among the class named, but the probable effect of the language indulged in. Then you will have to consider the relations between the Government and the people, and having considered the peculiar position of the Government, and the consequence to it of any well-organized disaffection, you will have to decide whether there is an attempt or not to disseminate matter with the intention of exciting the feelings of the people till they become disaffected. British India is part of the British Empire, and is governed like other parts of the Empire by persons to whom the power is delegated for that purpose. There is a great difference between dealing with Government in that sense and dealing with any particular administration. Were these articles intended to excite feelings of enmity against the Government, or, on the other hand, were they merely expressing, though in strong language, disapprobation of certain Government measures? You will bear in mind that the question you have to decide has reference to the intention; and, in fact, the crime consists of the intention, for a man might lawfully do the act without the intention. The evidence of the intent can only be gathered from the articles. The ultimate object of the writer may be one thing, but if, in attaining that object, he uses as the means the exciting of disaffection against the Government, [46] then he would be guilty under s. 124-A. If you think that these people, with the object of procuring the repeal of the Age of Consent Act, or of increasing the sale of their paper, disseminated these articles intending to excite feelings of enmity, you will be bound to find a verdict of guilty. As to the evidence of intent, the articles are the only evidence. The charges are based on the five articles which are the subject of the indictment. Other articles have been quite properly put in during the progress of the trial, but no charges are laid in connection with the latter. They were put in, some by the prosecution and some by the defence, to prove that their view of the intent of the articles charged was indicated in the others. These articles have been read and re-read to you gentlemen so frequently that I do not consider it necessary

to discuss them in detail again, I will simply touch on their bearing on the case, and as to whether they disclose an intent to cause disaffection or disapprobation only.

[His Lordship then proceeded to refer to the articles and afterwards continued—]

It will be for you to come to a decision on the tone of these articles. You must not look to single sentences or isolated expressions, but take the articles as a whole, and give them a full, free, and generous consideration as Lord Fitzgerald has said; and even allowing the accused the benefit of a doubt, you will have to say whether the articles are fair comments and merely expressions of disapprobation, or whether they disclose an attempt to excite enmity against the Government.

In leaving the matter to your consideration, gentlemen of the Jury, I would ask you, and ask you earnestly, to dismiss from your minds all questions of prejudice, and look at this matter in as impartial a spirit as possible. The only question is that of the intent; you have nothing to do with the policy of the Government in instituting this prosecution, or the policy of the Government in passing the Consent Act, or what has been called the Gagging Act; you have nothing to do beyond dealing with the evidence in this case; and if you allow anything else to influence you in your decision upon the question before you, you will be failing in your duty.

[47] Your opinion should not be influenced by the opinions of any person, however eminent. The opinions of many great men have been quoted to you, and you have been requested to accept those opinions as your own in arriving at a correct decision in this case. I would repeat that you are not to accept the opinion of any one, be he ever so eminent; if you do so, you would not be doing your duty; you are to judge of this case, and give your verdict only on the evidence in the case. The only question for you to decide is, were the articles intended, and were they likely, to cause disaffection. The defence urge that the articles only expressed disapprobation of Government measures: the prosecution say they were deliberate attempts to incite the people to disaffection. I have now dealt with the whole matter, and having told you what is the law to guide you, I now ask you to consider your verdict on the evidence before you.

The Jury then retired to consider their verdict. On their return the Clerk of the Crown asked them if they were agreed upon their verdict.

The Foreman of the Jury stated that the Jury were not agreed, and that there was no chance of their returning an unanimous verdict. Upon which His Lordship said that he would not take any verdict that was not unanimous in this case.

The Jury were then discharged, the case being ordered to remain as a remanet for the next Sessions, the accused being enlarged on bail.

Attorney for the prosecution: The Government Solicitor, Mr. *R. L. Upton.*

Attorney for the accused: Baboo *Kally Nath Mitter.*

A. A. C.

1891
JUNE 29.

APPELLATE CIVIL.

19 C. 48.

19 C. 48.

[48] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

KASHI CHUNDRA DEB (*Petitioner*) *v.* GOPI KRISHNA DEB AND OTHERS (*Intervenors*).*
[26th and 29th June, 1891.]

Limitation Act (XV of 1877), *art.* 178—*Revocation of probate, application for—Intervenor, right of, to uphold probate and support will—Mortgagees, right of, to uphold probate and support will.*

Applications for probate, or letters, or certificates of administration do not fall within the provisions of art. 178 of the Limitation Act.

Mortgagees of the estate of a deceased person have an interest in such estate entitling them to intervene and be heard in opposition to an application made to withdraw probate.

[F., 10 Ind. Cas. 130=20 P. R. 1912=141 P.LR. 1911; R., 11 C.P.L.R. 141 (142).]

THIS was an application made by one Kashi Chundra Thakoor on the 9th May 1890 for revocation of probate of the will of one Shibjoy Wazeer, deceased, which probate had been granted on the 1st August 1878 to one Gopi Krishna Thakoor, the sole executor and manager of the testator's estates under the said will.

Shibjoy Wazeer died on the 29th September 1875, having made his alleged will on the 26th September of the same year, and leaving him surviving three sons, a grandson (the petitioner in this case), and two daughters.

Gopi Krishna in his character as executor mortgaged and otherwise dealt with the estate of the testator; and this application was opposed by the mortgagees of the testator's estate.

The petitioner contended that the mortgagees had no such interest in the estate as would admit of their opposing the revocation asked for.

The District Judge overruled this objection and allowed the mortgagees to appear and cross-examine the witnesses produced on either side, but refused to allow them to enter into matters with regard to the genuineness of their alleged claims, stating that they were to be allowed only to protect themselves from fraud.

[49] The mortgagees contended that the application was barred by limitation, and alleged that there was collusion between Kashi Chundra and Gopi Krishna with the object of defrauding them.

On the point as to whether collusion existed the District Judge found that there were strong grounds for suspecting collusion, and that Gopi Nath had declined to appear in support of his own case, and that the witnesses to the will had been kept back, but stated that there was no direct evidence of such collusion, and therefore in accordance with the case of *Raj Narain* v. *Rowshun Mull* (1), which laid down that collusion must be specially proved, held that the existence of collusion had not been sufficiently proved, whilst on the facts he found adversely to the will.

On the question of limitation, Kashi Chundra alleged that he became aware of the existence of the probate when he became of age in Bysack

* Appeal from Original Decree, No. 20 of 1891 against the decree of S. J. Douglas, Esq., Judge of Tipperah, dated the 13th of December 1890.

(1) 22 W. R. 124.

1295, and on this point the District Judge found that there was no satisfactory evidence of the date of Kashi Chundra's birth, and that he (Kashi Chundra) had failed to show that the application had been made within the three years allowed by art. 178 of the Limitation Act, and he therefore held that the application was barred.

1891 JUNE 29. APPELLATE CIVIL. 19 C. 48.

Kashi Chundra appealed to the High Court, and the intervenors filed cross objections.

Mr. *Woodroffe*, Mr. *Evans*, Dr. *Rash Behari Ghose*, Babu *Hari Mohun Chuckerbutty*, and Babu *Debendra Nath Banerjee*, for the appellant.

The Advocate-General (Sir *Charles Paul*), Mr. *Jackson*, Mr. *Avetoom*, Babu *Tara Kishore Chowdhry*, Babu *Gobind Chunder Das*, Babu *Golap Chunder Sircar*, and Maulvi *Sirajul Islam*, for the opposing parties, the respondent.

A preliminary question, namely, one of limitation, was first argued.

Mr. *Woodroffe*.—Application for probate do not fall within the provisions of art. 178 of sch. II of the Limitation Act; *Ishan Chunder Roy, In re* (1), *Janaki* v. *Kesavalu* (2), [50] *Queen-Empress* v. *Ajudia Singh* (3), *Baimanekbai* v. *Manekji Kavasji* (4), *Govind Chunder Goswami* v. *Rungunmoney* (5). The finding of the Judge on this point is therefore erroneous.

The Advocate-General (Sir *Charles Paul*), for the intervenors.

The application is barred; such applications are numbered and tried as suits under the Civil Procedure Code. *See* s. 261, Succession Act, and ss. 55 and 83 of the Probate and Administration Act.

On this preliminary point the Court (PIGOT and BANERJEE, JJ.) on the 26th June decided as follows:—

In this case an application has been made for revocation of probate of the will of Shibjoy Wazeer, the deceased. The District Judge has found upon matters of facts brought before him adversely to the will; but he has held that the application is barred, inasmuch as art. 178 of the Limitation Act, in his judgment, applies to the case. We are of opinion that the matter is concluded by authority, and concluded by concurrent authority of so high a character that it is unnecessary, and would be perhaps hardly seemly, to do more than to follow it without discussion.

The cases of *In the matter of Ishan Chunder Roy* (1), *Janaki* v. *Kesavalu* (2), *Queen-Empress* v. *Ajudia Singh* (3), and *Baimanekbai* v. *Manekji Kavasji* (4), a decision of Sir Michael Westropp, are decisive as to the proposition that applications for probate or letters or certificates of administration do not fall within the provisions of art. 178, sch. II.

We therefore determine the question of limitation in favour of the appellant. The decision appealed from must therefore, so far as it dismisses the application on the ground of limitation, be set aside.

The cross-objections were then heard.

Mr. *Jackson* on the same side, on the question of the intervenors' *locus standi*.—A mortgagee of the estate of a deceased has an interest in such estate entitling him to resist an application to withdraw probate; *Komolochun Dutt* v. *Nilruttun Mundle* (6), *In re Bhobosoonduri* [51] *Dabee*, *Nobin Chunder Sil* v. *Bhobosoonduri Dabee* (7), *Surbomongola Dassi* v. *Shashibooshun Biswas* (8).

---

(1) 6 C. 707. (2) 8 M. 207. (3) 10 A. 350.
(4) 7 B. 214. (5) 6 C. 60. (6) 4 C. 360.
(7) 6 C. 460. (8) 10 C. 413.

1891 JUNE 29. — APPELLATE CIVIL. — 19 C. 48.

[MR. JUSTICE PIGOT.—There are two English cases on this point directly in your favour, *viz.*, *Cross* v. *Cross* (1) and *Lindsey* v. *Lindsey* (2).

Mr. *Evans*, for Kashi Chundra, the appellant.—In *Nilmoni Singh Deo* v. *Umanath Mookerjee* (3) the Privy Council merely assumed for the purposes of that case that a purchaser from an heir could oppose or apply to have probate revoked; creditors have no *locus standi* to uphold probate.

JUDGMENT.

On the 29th June the judgment of the Court (PIGOT and BANERJEE, JJ.) was delivered by

PIGOT, J.—Having already decided the preliminary question of limitation in favour of the appellant, we have since heard the arguments upon the objection preferred by the intervenors. And upon an examination of the record it appears to us quite clear that the learned Judge below has erred in not affording the intervenors an opportunity of being heard upon this case.

It was contended that they were creditors, and that persons in their position were not entitled to appear and support the will. A decision of the Privy Council, in which the subject was touched upon, was cited; but we held on Friday last, having regard to the authorities in this Court, not overruled by their Lordships of the Privy Council, that persons who are purchasers of interests under the will, from the executor, have a right to intervene. Two cases, not cited at the Bar, but mentioned by us this morning, are in point, being cases in the Probate Court in England, in which the present Lord Penzance and Sir James Hannen have laid down the same principle; the one is the case of a purchaser, and the other of a mortgagee. The first is *Cross* v. *Cross* (1), and the other is *Lindsey* v. *Lindsey* (2). Nor do we think that the case cited in *Lindsey* v. *Lindsey*, namely, *Depit and Chapot* v. *Delerieleuse* (4), [52] is an authority against that proposition, as in *Lindsey* v. *Lindsey*, the case of *Cross* v. *Cross* is relied on. We therefore hold it to be clear that the intervenors had a right to support the will in this case, had a right to be heard, had a right to procure the attendance of witnesses, and appear in the full sense of the term in which a party could appear to support a will. We consider it so none the less, under the circumstances such as are described by the learned Judge at p. 82 of the Paper-book, which are in these words:—" Gopi Krishna has all along declined to appear and give evidence in support of his own case. Gagon Chandra Dhar, a most important witness, has been kept back, and in every way Gopi Krishna has been very remiss in the way he has had his case conducted."

We think, therefore, that we ought not to decide upon the case as it stands before us; although, perhaps, there may be sufficient material to enable us to form a pretty clear opinion upon it. But we think that under the circumstances the intervenors are entitled to have an opportunity of being heard; and the case must therefore go back to the learned Judge to enable them to obtain that hearing which they claimed and were not allowed. They are entitled to call such witnesses as they desire to adduce.

We direct that the case shall go back to the lower Court for trial, in accordance with the directions contained in this order.

---

(1) 12 W.R. (Eng.), 694=3 Sw. & Tr. 292.
(2) 21 W. R. (Eng.). 272.
(3) 10 C. 19 (27)=10 I. A. 80.
(4) 2 Sw. & Tr. 131.

We think the costs of this appeal ought to abide the result. We remit, and not remand, the case to the lower Court. The costs in this appeal to be in the discretion of the lower Court when it decides the case.

T. A. P. *Case remanded.*

---

19 C. 52.

CRIMINAL REVISION.

Before Mr. Justice Beverley and Mr. Justice Ameer Ali.

IN THE MATTER OF THE COMPLAINT OF H. H. THE NIZAM OF HYDERABAD *v.* A. M. JACOB.* [28th September, 1891.]

Criminal Procedure Code (Act X of 1882), *s.* 94—*Summons to produce document or thing.*

A complaint having been preferred against an accused for criminal breach of trust with reference (amongst other items) to a sum of Rs. 1,77,131-1-2, **[53]** which sum was, in an enquiry held by the Chief Presidency Magistrate, proved to have been paid to the accused in seventeen notes of rupees ten thousand each (the numbers of which were identified) and the remainder in small notes and cash; the accused in cross-examination, for his own purposes, proved that fifteen of these notes were still in his possession; whereupon an application was made, under s. 94 of the Code, for a summons on the accused, directing the production of these notes. This application was refused. Subsequently the accused, through a third person, cashed five of these notes, whereupon a second application was made, under s. 94, by the prosecution for the production of the notes or their proceeds as against accused and such third person. The Magistrate granted summonses on the accused and on such third person for the production of ten notes, but declined to grant a summons for such third person for the proceeds of the five notes cashed. The accused produced five of these notes which were in his possession or power; the third person, however, stating that he had in his power five of the notes mentioned in the summons, claimed a lien on the same, and the Magistrate thereupon refused to make any order on him. The Magistrate (a rule having been obtained against him, calling on him to show cause why his order should not be set aside, and why the notes or the proceeds thereof in the hands of the third person should not be produced) stated in his explanatory letter that he entertained doubts as to his power to compel such third person to produce the five notes, inasmuch as a lien had been claimed on them, and that he was of opinion that the proceeds of the notes cashed, not being specific objects, did not come within the purview of s. 94. *Held*, that the Magistrate's order must be set aside.

[R., 13 Cr.L.J. 493=15 Ind. Cas. 493; 13 Cr.L.J. 764=16 C.W.N. 1078=17 Ind. Cas. 76; 17 C.W.N. 1209=14 Cr.L J. 405 (406)=20 Ind. Cas. 229 (230).]

THIS was a rule obtained by the prosecution calling upon the Chief Presidency Magistrate to show cause why an order made by him refusing to direct the production in his Court of certain currency notes or the proceeds thereof should not be set aside, and why an order should not be made for their production.

The facts were as follows:—

The case before the Chief Presidency Magistrate was one of alleged criminal breach of trust with respect to a certain sum of money stated by the prosecution to have been entrusted to the accused by the Nizam of Hyderabad. A portion of this sum, *viz*, Rs. 1,77,131-1-2, was proved by one of the witnesses for the prosecution to have been paid by the Bank of Bengal to the accused in the shape of seventeen notes for ten thousand rupees, and some small notes and cash. The accused had, prior to the completion of the examination of this witness, voluntarily produced at the Bank

* Criminal Rule, No. 466 of 1891, against an order of A. P. Handley, Esq., Chief Presidency Magistrate of Calcutta, dated 19th September 1891.

1891 SEP. 28. — CRIMINAL REVISION. — 19 C. 52.

of Bengal to this witness, who was a teller in the Bank, fifteen out of these identical ten thousand-rupee notes, [54] and had asked him to mark and identify them as being in his (the accused's) possession on the 17th September 1891, and subsequently to such identification the fact that these notes were in the possession of the accused, was brought out by his counsel on cross-examination.

Thereupon the prosecution applied to the Magistrate for a summons, under s. 94 of the Code of Criminal Procedure, on the accused directing the production of these fifteen notes or their proceeds. This application was opposed and refused. On the following morning advertisements were inserted by the prosecution in the daily papers, warning the public against cashing or dealing with these notes. Such advertisement being in the opinion of the accused unjustifiable, he caused five of the above-mentioned notes to be cashed at the Currency Office through Mr. Burder, an attorney of the High Court of Judicature at Bombay; whereupon the prosecution made a fresh application to the Magistrate for the issue of summonses, under s. 94, on the accused and Mr. Burder, the application against the accused being for the production of the proceeds of the five notes cashed through Mr. Burder and of the remainder of the fifteen notes; and against Mr. Burder for the production of such of the fifteen notes or the proceeds thereof as were in his possession or power. This application was opposed, but the Magistrate eventually directed summonses to issue on the accused and Mr. Burder for the production of the ten notes which remained uncashed, refusing to issue any summons with reference to the five notes which had been cashed.

The accused, who was on bail, attended and undertook to produce through his attorney, in obedience to the summons, five of the ten thousand rupee notes above referred to; and this was subsequently done, whilst Mr. Burder attended and put in the following written statement: "I have five notes for Rs. 10,000 each, the numbers of which, I believe, are some of the numbers mentioned in the summons. I am unable to say which. The notes are not in my possession, and therefore I cannot produce them. They are in my power. I claim a property in them, and I object to the Court depriving me of their possession."

The Magistrate, notwithstanding objection taken, thereupon directed Mr. Burder to be sworn, and himself examined him on his statement, recording the following evidence—"I am a solicitor, [55] I have five of these notes. I am called on to produce in my power. I claim a lien on them in respect of my costs incurred, and to be incurred. I received these notes some time previous to the application made by Mr. Woodroffe. Before Mr. Woodroffe commenced the application I did not know he was going to make it."—[At the instance of counsel for the prosecution, Mr. Burder was asked whether he was aware that these notes formed the subject-matter of the charge.] "I have heard all the evidence in this case. I decline to answer further."

On this evidence the Magistrate declined to make any order on Mr. Burder, the actual words of the only written order on the record being "No order made on Mr. Burder. Accused appears and undertakes to produce the remaining five notes on Monday, 21st."

The prosecution thereupon applied to the High Court for a rule calling upon the Magistrate to show cause why his order refusing to direct the production in his Court of the ten currency notes or the proceeds thereof should not be set aside, and why an order should not be made for their production.

1891
SEP. 28.
CRIMINAL REVISION.
19 C. 52.

The Advocate-General (Sir *Charles Paul*), in applying for the rule, referred to ss. 410 and 411 of the Penal Code, and alleged an undertaking by counsel for the accused to keep the notes intact until the end of the trial; referring also to s. 517 of the Code of Criminal Procedure, and stating that it would be idle to enact s. 517 if before the conclusion of the trial no substratum, on which the order under s. 517 would operate, could be made use of: s. 94 of the Code was that substratum; and further contended that the Magistrate had shown that it was desirable to have the notes in Court by insisting on the production of the five notes already produced; that the error made by the Magistrate was in taking Mr. Burder's written statement as an answer to the summons; that lien was not sufficient answer, and referred to the cases of *Empress* v. *Joggessur Mochi* (1) and *Ex parte Madavji Dharramsi* (2).

The Court (BEVERLEY and AMEER ALI, JJ.) granted a rule *nisi* in the terms set forth above, allowing counsel for the accused to appear on the hearing. At the hearing of this rule an affidavit in support [56] thereof was filed, setting out the facts and alleging that at the time the Magistrate refused to grant a summons on the accused on the first application, counsel for the accused had undertaken or given the Magistrate to understand that the accused did not intend to touch the said notes, but would preserve them intact until the end of the trial. This allegation was denied on affidavit by the defence, the deponent in such affidavit stating that he 'distinctly alleged that no undertaking of any kind whatever was made by the accused, or by counsel on his behalf, with reference to the notes, but that to the best of his recollection what passed on the occasion referred to was that Mr. Inverarity, after opposing the application, added that the accused was anxious, if he could possibly do so, to keep the notes till the end of the trial.' The Magistrate's letter of explanation was also placed on the record, in which he, amongst other things, stated that he entertained doubts whether he had power to compel the production of the five notes in Mr. Burder's possession, inasmuch as he had claimed a *bona fide* lien for costs incurred and to be incurred; and that as regards the five notes which had been cashed, he was of opinion that the proceeds, not being specific objects, did not fall within the section, and that the Nizam was sufficiently secured, inasmuch as the diamond and Rs. 50,000 had been impounded.

Mr. *Ghose* (with him Mr. *Pearson*), to show cause.—There is no precedent for a private prosecutor coming up on revision in an interlocutory proceeding of this sort during the pendency of an enquiry before the Magistrate. More especially should the Court be reluctant to interfere where, as in this case, the Magistrate has issued a summons instead of issuing a writ of attachment. The Magistrate has no power to make an order for production unless the document or thing called for is necessary or desirable for the purposes of the trial or other proceeding. The prosecution have given all their evidence on that part of the case touching on these notes, and there is no allegation in their affidavit as to the notes or their proceeds being necessary for any purpose whatever in the trial. The applications in the Magistrate's Court were both made on the ground that the notes were stolen property. Such an allegation is absurd, seeing that the enquiry before the Magistrate is still pending. Section 517 of the Code [57] does not apply until the conclusion of a trial, and has no application; therefore all the English cases under s. 100 of 24 and 25 Vic., c. 96, and 7

(1) 3 C. 379. (2) 12 B.H.C. 217.

1891 SEP. 28. — CRIMINAL REVISION. — 19 C. 52.

and 8 Geo. IV, c. 29, s. 57, on which s. 517 of the Code is based, are beside the point; they are all cases of restitution of property *after conviction.* Moreover, s. 94 of the Code applies only to the production of documents and things necessary or desirable *as evidence*, and can have no application—at all events to an accused person. That the section applies to evidence only is clear from the section of the older Codes. The heading to s. 365 of Act X of 1872 is "of securing documentary evidence;" the marginal note to Act X of 1875, s. 86, is "Procedure for obtaining production of documents as evidence." The marginal note to s. 144 of Act IV of 1877 is "of securing documentary evidence;" the marginal note to s. 94 of the present Act is "Summons to produce document or other thing;" and the objects and reasons for this Act state that little or no alteration from the former law was intended to be made in this chapter. It could never have been intended that s. 94 should be used for the purpose of bringing property into Court with a view to its being subsequently disposed of under s. 517. Moreover, in this case the Magistrate will not try the case himself, but will, if necessary, commit to the Sessions, and he cannot make an order under s. 94 for the production of anything, with the object of the High Court possibly hereafter passing an order as to the property under s. 517. The real object of the prosecution in making this application is to obtain an "attachment before judgment," which is a process entirely unknown to the criminal law, with the further object of crippling the accused in his defence. The case of *Empress* v. *Joggessur Mochi* (1) was one of restoration after conviction, and has no application. I submit the Magistrate could not, apart from the reasons for his order as shown by his explanation, have made the order he is now called upon to make.

The Advocate-General (Sir *Charles Paul*) (with him Mr. *Woodroffe*,) in support of the rule.—In the ordinary course of criminal justice the duty of the police is to catch the thief and to find stolen property. The system under which these duties are performed is by [58] means of the Criminal Codes and the common law. The Procedure Code provides a procedure under which possession may be obtained of stolen property; part of the property stolen has been obtained in this case, but not all of it, as should have been the case if the law had been carried out. It is clear that under s. 96 of the Code a search warrant might have been issued for the notes. The production of these notes is necessary for the purposes of evidence; they are the best evidence that the money was paid to the accused. If s. 94 applied with reference to the diamond and with reference to the Rs. 50,000 impounded by the Magistrate, there is no reason why the section should not be made applicable to the remaining notes or their proceeds. I refer to *Rex* v. *Rooney* (2) and *Rex* v. *Burgiss* (3) as authorities for the production of the notes or their proceeds.

Mr. *Ghose*, in reply.—The matter is governed by the Criminal Procedure Code, and the English cases cited are cases in which money was found on an accused person by the police at the time of his apprehension.

The following order was delivered by the Court (BEVERLEY and AMEER ALI, JJ.) :—

ORDER.

BEVERLEY, J.—This was a rule obtained by the Advocate-General in the case of His Highness the Nizam of Hyderabad v. Alexandar Malcolm Jacob, *now under enquiry by the Chief Presidency Magistrate*,

(1) 3 C. 379. (2) 7 C. & P. 515. (3) 7 C. & P. 488.

1891 SEP. 28. — CRIMINAL REVISION. — 19 C. 52.

calling upon the Magistrate to show cause why a certain order of his, by which he refused to direct the production in his Court of certain currency notes, &c., should not be set aside, and why an order should not be now made for their production. [His Lordship here stated the facts out of which the application arose.] It appears that on the 17th instant it was elicited from a witness in cross-examination that fifteen out of these seventeen notes had been produced by Jacob and his solicitor at the Bank that very morning for identification, for what purpose is not very clear nor very material. Upon this fact coming out in evidence, *viz.*, that Jacob still had in his possession fifteen of the notes for Rs. 10,000 which were paid to him on the 27th July, an application was made to the Magistrate for an order for their production in Court, under s. 94 of the **[59]** Code. The application was opposed by Mr. Inverarity, who appeared as counsel for Jacob, and who is said to have "given the Magistrate to understand that Jacob did not intend to touch the said notes, but to preserve them intact to the end of the trial." The Magistrate accordingly refused the application. Mr. Geddes, in his affidavit, puts the matter somewhat differently, alleging that Mr. Inverarity stated "that Jacob was anxious, if he possibly could do so, to keep the notes till the end of the trial." Whatever were the exact words used, we think upon the materials before us that they were intended to be understood by the Magistrate, and were understood by him, as an implied undertaking that the notes would not be dealt with during the pendency of these proceedings and that it was in consequence of this implied undertaking that the Magistrate made no order regarding the notes on the 17th instant.

On the morning of the 19th the prosecution received intimation that five of the above notes had been cashed at the Currency Office that morning by Mr. Burder of Bombay, and a fresh application was accordingly made to the Magistrate for an order, under s. 94, upon Jacob and Mr. Burder for the production of the said fifteen notes or their proceeds. An order was thereupon made for the production of the ten notes that had not been already cashed; but upon Mr. Burder appearing and objecting that he had a lien upon five of the notes, and declining to give them up, the Magistrate refused to make any order respecting them. The other five notes were apparently produced through Mr. Geddes, and are now, we understand, in the Magistrate's Court. The matter before us, therefore, has reference (1) to the five notes still held by Mr. Burder, and (2) to the proceeds of the five notes cashed by him on the 19th.

The Magistrate has written a letter explaining his action in the matter, and we have also heard Mr. Monmohun Ghose on behalf of Jacob. In his explanation the Magistrate states that as regards the five notes in Burder's possession he entertained doubts as to whether he had the power to compel their production, inasmuch as it appeared to him that Burder had a *bona fide* lien upon them for costs already incurred and to be incurred; and as regards the five notes that had been cashed, the Magistrate is of opinion that the proceeds, not being specific objects, do not fall within the terms **[60]** of the section. The concluding portion of the Magistrate's letter is wholly outside the question now before us. It is not a question of the adequate protection of the Nizam's interests in the event of a conviction, but of the power and expediency of having brought into Court the subject-matter in respect of which Jacob is charged with criminal breach of trust; and we may add the Magistrate has to a certain extent admitted the power and expediency by insisting on the production of five notes

1891 SEP. 28. — CRIMINAL REVISION. — 19 C. 52.

through Mr. Geddes. Mr. Ghose has contended before us that the Magistrate had no power whatever to make any order for the production of the notes under s. 94; that that section has reference only to the production of documents or things required for purposes of evidence, and that it was never intended that it should be used for the purpose of bringing property into Court with a view to its being subsequently disposed of by an order under s. 517 of the Code. Mr. Ghose further questioned the power of this Court to interfere with the Magistrate's order and challenged the other side to point out a single reported case in which this Court had ever interfered.

As regards this last point, we may at once say that s. 435 of the Code gives this Court ample power to interfere, should it see fit to do so, in any case where a Magistrate has either refused to exercise a discretion vested in him by law, or has exercised that discretion in an improper manner, or on improper grounds. That no precedent is to be found in the books may be, because up to this no case had occurred of sufficient importance to warrant the parties in invoking the interference of this Court. It seems to us that even accepting Mr. Ghose's argument, it was open to the Magistrate to require the production of these notes for evidentiary purposes. The possession of the identical notes which were paid by the Bank on presentation of the cheque for Rs. 1,77,131-1-2 would be good evidence that Jacob received the proceeds of that cheque. It seems to be assumed that the production of the notes was required either in order to cripple Jacob's resources, or with a view to some order in the future under s. 517 or, as Mr. Ghose puts it, by way of attachment before judgment. We see no sufficient ground for this assumption upon the materials before us.

Putting aside, however, the question of evidence, we are of opinion that every Court is entitled to have before it, **[61]** and to retain during the pendency of the proceedings, any property which forms the subject of a charge pending before it, as Patterson, J., said in *Rex* v. *O'Donnell* (1) :—"Generally speaking, it is not right that a man's money should be taken away from him, unless it is connected in some way with the property stolen. If it is connected with the robbery, it is quite proper that it should be taken." So in *Rex* v. *Burgiss* (2), where the prisoner was charged with having altered and cashed a forged promissory note for £26, and 28 sovereigns were found upon him, Littledale, J., said :—"I have conferred with my brother Patterson, who says that if there is reasonable ground to suppose that these sovereigns are the proceeds of notes obtained by either of the alleged forgeries, they ought not to be given up. I think in the present case that it is not unreasonable to suppose that the £26 was part of the money obtained, and I think I cannot order that to be given back. The surplus must be restored." A similar order was made in *Rex* v. *Rooney* (3). Those were cases in which the money found in the possession of the accused could not be identified. In the present case these notes can be, and are, identified as having been paid to Jacob on the 27th July. We are of opinion, therefore, that they were connected with the subject-matter of the charge, and that the Magistrate was entitled and bound to compel their production. As regards Mr. Burder's objection that he had a lien on five of the notes, that in our opinion was no sufficient reason for the non-production of the notes. That was a matter to be dealt with subsequently,

(1) 7 C. & P. 138. (2) 7 C. & P. 488. (3) 7 C. & P. 515.

1891 SEP. 28. — CRIMINAL REVISION. — 19 C. 52.

under s. 517 of the Code. The cases of *Empress* v. *Jogessur Mochi* (1) and *Ex parte Madavji Dharramsi* (2) are instances in which an order has been made upon third parties to produce the subject-matter of the charge, irrespective of any order which might be made afterwards as to the disposal of the property. We are of opinion that Mr. Burder should now be required to produce the five notes which he admits are in his power.

Similarly, as regards the proceeds of the five notes that have been cashed, we are of opinion, upon the authorities cited, that if **[62]** these proceeds can be reasonably connected with the subject-matter of the charge, the Magistrate has power to order their production in Court. And in expressing this opinion we must not be understood to dissent in any way from the principles laid down in the case of *Empress* v. *Joggessur Mochi* (1). That case decided a point wholly different from that now before us. That was a reference in respect of an order made under the section of the Code then in force, corresponding to s. 517 of the present Code, and it had reference to the ultimate disposal of the property. That question is not now before us. We think, therefore, that the order of the Presidency Magistrate must be set aside, and we set it aside accordingly, and direct him to proceed according to law, having regard to the observation we have made.

AMEER ALI, J.—I entirely agree with the judgment of my learned colleague ; but as the question raised for our decision is one of some importance, I wish to add a few observations. The learned Chief Magistrate, in refusing to make an order on Mr. Burder seems to have acted on two grounds : (1) that Mr. Burder claimed a lien over five of the notes ; and (2) that, as regards the notes into which he had converted the five others received by him from Jacob, it was unnecessary to make any order, for the Nizam was sufficiently secured, and he (the Magistrate) might possibly, in case Mr. Burder had converted them again, have to engage in a large collateral enquiry. This represents to my mind the sum and substance of the explanation submitted by the Magistrate. Neither of these considerations, however, touches the real question at issue. Mr. Jacob is charged with criminal breach of trust in respect of a large sum of money. Part of this money, it is stated, came into his hands in the shape of fifteen notes of Rs. 10,000 each, ten of which he made over to Mr. Burder. No claim of lien on the part of Mr. Burder can affect that character of those notes as the proceeds of an offence. For the purposes of this decision upon the alleged facts they are as much the proceeds of an offence as if the cheque which Jacob received from Kilburn and Company had been actually handed to him by the owner of the money. The case for the prosecution is that the twenty-three lakhs were placed under Jacob's disposal for a specified purpose, the right in the money was never **[63]** parted with absolutely ; that the cheque which he received represented the Nizam's money, and in cashing it and converting the proceeds thereof to his own use he committed the offence of criminal breach of trust. Upon that case the notes received by him would be the proceeds of the offence. Suppose a cheque payable to bearer is entrusted to a servant, and he, after receiving payment from the Bank, absconds. The notes, however, are deposited by him with a third person. Can it be contended that those notes are not the proceeds of an offence, as much a part of the *corpus delicti* as if they had been actually stolen from the master's box? Suppose a cheque is sent to a person with a direction to apply it to a certain purpose. Instead of so doing he cashes it and appropriates the

(1) 3 C. 379.

(2) 12 B.H.C. 217.

1891
SEP. 28.
— —
CRIMINAL
REVISION.
——
19 C. 52.

money to his own use, as happened in the case of *Reg* v. *Cronmire* (1). Can it be said that the money received by him was not the proceeds of an offence, and if he had deposited it with a third person and it could reasonably be connected with the cashing of the cheque, that the Court is debarred from calling for its production for purposes of the enquiry? Or take another case. A horse is stolen by A and placed by him in a livery stable. The livery stable-keeper receives it *bona fide* and claims a lien for its keep. Would that change the character of the stolen property or prevent the Magistrate from requiring its production? In the case of *The Queen* v. *De Banks* (2), Banks was convicted of larceny as a bailee in respect of a sum of money received by him for the price of a mare entrusted to him for sale, the money was the subject-matter of the larceny; and even if he had deposited it with a third person it would not have altered the character of the property in respect of which the offence was charged. Nor would the mere fact of Mr. Burder converting some of the notes into others of smaller value and holding them for himself or the accused affect the question. The reasons therefore assigned by the learned Magistrate do not seem to be valid, nor was any attempt made to support his order upon grounds on which he had based it. As a matter of fact, Mr. Ghose, who was heard for the accused, as well as generally on the case, impugned the reason given by the Magistrate as erroneous. Mr. Ghose took up a higher ground altogether. He contended that the **[64]** Magistrate had absolutely no power to call either upon the accused or upon his bailee for the production of anything alleged to be connected with the offence. In the course of the argument, however, he modified this somewhat startling proposition, and admitted that under the section the Magistrate can call for documents or other things, though only for purposes of evidence in a pending proceeding. Now, the words of s. 94 are very large, and it seems advisedly so. It runs thus: "Whenever any Court or, in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police-station, considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, enquiry or trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it at the time and place stated in the summons or order." Having regard to the words of this section, it seems to me a Magistrate has the power of calling upon any person to produce any document or "thing" in that person's possession or power, which has any connection with the offence which happens to be under investigation or enquiry. Of course he cannot call for anything and everything from anybody and everybody. The thing called for must have some relation to, or connection with, the subject-matter of the investigation or enquiry, or throw some light on the proceeding, or supply some link in the chain of evidence. It may be that the thing called for may turn out to be wholly irrelevant to the enquiry; but so long as it is considered to be necessary or desirable for the purposes of the enquiry, the power is there. Any other view of the scope and object of this section will paralyse the administration of criminal justice, and render many enquiries into alleged offences wholly infructuous, for once the subject-matter of an offence has changed hands or has changed shape, the investigation must come to an end. In the present case the notes in

(1) 54 L.T. 580. (2) L.R. 13 Q.B.D. 29.

Mr. Burder's hands, if connected with the cheque which Jacob received and which he admittedly cashed, would seem to have an important bearing on the matter under enquiry before the Magistrate; and their production would no doubt [65] be desirable for the purposes of that enquiry. I have refrained from expressing any opinion on the question whether the order under s. 94, Criminal Procedure Code, can be made with a view to or in anticipation of a proceeding under s. 517, as it is unnecessary to discuss it for the purposes of this case. But I must not be supposed to assent to the proposition that a proceeding under s. 517 is wholly independent of, or unconnected with, the enquiry or proceeding referred to in s. 94. On the whole, I think that the learned Chief Magistrate in refusing to entertain the application under s. 94 of the Code acted upon an erroneous view of the law, and I concur in reversing his order.

1891 SEP. 28. — CRIMINAL REVISION. — 19 C. 52.

T. A. P. *Rule absolute.*

Attorney for His Highness the Nizam : Messrs. *Sanderson & Co.*
Attorney for the accused : Messrs. *Morgan & Co.*

---

19 C. 65 (P.C.) = 18 I.A. 132 = 15 Ind. Jur. 471 & 617 = 6 Sar. P.C.J. 66.

PRIVY COUNCIL.

PRESENT :

Lord Hannen, Sir R. Couch and Mr. Shand.

[*On appeal from the High Court at Calcutta.*]

BAMASUNDARI DEBI (*Plaintiff*) *v.* TARASUNDARI DEBI AND ANOTHER (*Defendants*). [23rd and 24th June and 19th July, 1891.]

Probate—Act V of 1881—*Signatures, appearance of*—Fac simile *by photography.*

The High Court considering it to have been proved by the evidence that the alleged testator was incapable, by reason of illness, of signing the will as firmly as it purported to be signed, found that the signatures were not genuine, and reversed the decree of the first Court which had granted probate.

On appeal there was no view of the signatures, neither party having applied to have the originals transmitted, or to have photographs taken of them. But their Lordships found that the evidence did not warrant the conclusion that on the day on which the will purported to have been executed, the testator, physically and mentally, was unable to execute it; but that there was sufficient evidence to establish the genuineness of the will and the capacity of the testator to make it, and that the evidence for the [66] defence was not sufficient to destroy the petitioner's case on either of these points.

[R., 27 B. 626 (639); Rat. Unrep. Cr. Cas. 779 (781).]

APPEAL from a decree (23rd January 1888) of the High Court reversing a decree (30th August 1886) of the District Judge of Maimensingh.

These proceedings, under the Probate and Administration Act (V of 1881, s. 83), in which the petitioner for probate was plaintiff, raised the question of the genuineness of a will, dated 3rd January 1886, purporting to have been executed by Dwarkanath Chakerbati, who died on the 5th of that month. The will was brought into Court on the 26th April 1886 by Gourmohun Chakerbati, the testator's real father, who was by the will appointed manager of the estate during the minority of the testator's son.

1891 JULY 19. — PRIVY COUNCIL. — 19 C. 65 (P.C.) = 18 I.A. 132 = 15 Ind. Jur. 471 & 617 = 6 Sar. P.C.J. 66.

After the decree of the High Court in the present suit, and after this appeal had been filed, Gourmohun withdrew from the prosecution of it. On his so doing, the present appellant, Bamasundari Debi, the testator's eldest widow, was, by order of Her Majesty in Council of the 28th November 1889, permitted to continue the appeal on behalf of the minor son of the testator.

The application of Bamasundari to be allowed to carry on the appeal is reported [*Gourmohun Chakerbati* v. *Tarasundari Debi* (1)] in the preceding volume of these reports.

The respondent Tarasundari, the youngest of the wives of Dwarkanath Chakerbati filed objections on the 28th May 1886, to the grant of probate, acting on behalf of her infant son Jogendra Nath, and on his death, which occurred on the 13th September 1887, while an appeal on his behalf was pending in the High Court, she presented that appeal on her own behalf as his mother and heiress.

The other respondent, Raj Mohun Roy, as her brother and mukhtar, on the same day entered a *caveat* against the grant of probate; and thus was made a defendant, under ss. 73 and 83 of the Act V of 1881, but had no personal interest in the result of the suit.

Dwarkanath was the natural born son of the above-mentioned Gourmohun, but had been adopted by one Kalikumar Chakerbati, from whom he inherited a share of zemindari lands in the Maimensingh district, the annual value of which was, at the time of his **[67]** death, above Rs. 10,000. Four or five years before his death there had been a partition, and one of Dwarkanath's co-sharers upon division was the Prosonokumar mentioned in the judgments printed below, delivered by the Chief Justice and by their Lordships. This same co-sharer had disputed Dwarkanath's adoption, and having become the purchaser from the respondent, Tarasundari, of a portion of the estate of her deceased husband, was said to be interested in establishing an intestacy.

Dwarkanath at the time of his death had three wives, the eldest of whom was this appellant Bamasundari, the mother of an infant daughter: *secondly*, another wife who was childless and had taken no part in the present litigation: *thirdly*, Tarasundari, the respondent, who at her husband's death had a son Jogendranath: this son had, however, died during the suit, as above stated.

Gourmohun, the natural father of Dwarkanath, had managed the estate of the latter as his dewan, during his lifetime, and had received from him in January 1885 a lease for ten years of the greater part of the estate at a rent of Rs. 10,500.

According to the terms of the alleged will, Dwarkanath, after reciting that he had a daughter by his first and a son by his third wife, each of six months' old, and that his illness made it proper to provide for the future, directed that on his death his son should inherit his whole estate, and during his minority the testator's natural father, Gourmohun, should be guardian of the minor and manager of the estate, and on Gourmohun's death the testator's grand-uncle, Rajchunder, and on his death the testator's ammuktar, Goluck Chunder Bhuttacharji, and on his death the testator's eldest wife, this appellant Bamasundari, and on her death his second wife, and on her death his third wife, the respondent Tarasundari, should succeed to the office of guardian and manager, and "on his son arriving at majority should render account to him."

(1) 17 C. 693.

1891
JULY 19.

PRIVY COUNCIL.

19 C. 65 (P.C.) = 18 I.A. 132 = 15 Ind. Jur. 471 & 617 = 6 Sar. P.C.J. 66.

By the second paragraph he provided for the possibility of other sons being born to him.

By the third paragraph he provided that in case of his son dying a minor and without issue, his eldest wife should adopt a son, and in the event of his dying a minor and without issue, his second wife should adopt, and if that son should die in the like way, his [68] third wife should adopt a son, and if that son should die in the like manner, then his wives should each in the same order adopt three sons, and he stated that he had executed, for the purpose of those adoptions, deeds of permission in favour of his wives.

By the fourth paragraph he made all the successive managers responsible to the sons to be adopted on their respectively coming of age.

By the fifth paragraph he provided equal monthly maintenances of Rs. 30 for each of his wives.

And by the sixth and following paragraphs he provided for the marriage expenses of his daughter and for other details.

The facts preceding and attending the alleged execution of the will, on the 3rd January 1886, are stated in their Lordships' judgment.

The officiating Judge of the district, giving credit to the evidence as to the execution and attestation of the will, decreed probate. This was reversed on appeal by a Bench (PETHERAM, C.J., and TOTTENHAM, J.) of the High Court. The judgment of the Chief Justice, after saying that there was nothing on the face of the will to indicate that it did not carry out the intention which the testator had formed in having it prepared, and after a general statement of the facts, continued thus :—

"Now comes a fact which the Judge in his judgment has taken no notice of whatever, and that is the character of the signatures. The will itself is signed in six or seven different places, and the other document is also signed in several places; and when those signatures are examined, they are, to all appearances, those of a vigorous man. They are perfectly clear and even, being all alike, and are like the signatures of one man, and apparently are the signatures of a man in the perfect enjoyment of his health. This is the first fact which the Judge does not appear to have noticed, and it is a fact which seems to us of very great importance.

"As I said just now, only some of the attesting witnesses to the will were called and among others who were not called was Kali Chunder Acharji, the doctor who was the family attendant of this person, and who usually attended him when he required medical attendance, and who also attended him during his last [69] illness. He is not called. It is true that some excuses are made to account for his not being called, and it is sought to be shown that various steps were taken to compel his attendance, and several attempts made to serve him ; but in the way this is presented to us, so far as I can see, it amounts to nothing at all. No witnesses are examined as to the service. So far as we can see, this may have been a real transaction or it may have been a sham transaction. So far as we can deal with the matter of this doctor, all we can know upon the subject is that he was the doctor who attended the testator from the beginning of his illness, that he did sign his name as a witness to the will, and that he is not produced by the propounder of the will.

"In addition to that, it appears that he was attended by two other doctors. Neither of their names appear as a witness to the will; but they are both called, and they say that the access of the fever began on the Sunday morning, and that during the whole of the Sunday the testator was not in a condition to make a will at all · that he was not a in condition

1891 JULY 19. — PRIVY COUNCIL. — 19 C. 65 (P.C.) = 18 I.A. 132 = 15 Ind. Jur. 471 & 617 = 6 Sar. P.C.J. 66.

to know what he was doing, and was so weak that it seems to us impossible that their story can be true, if these signatures were attached by the testator to the will; and further, it appears to us that their testimony, if it is untrue, must be wilfully untrue, and untrue with the intention of deceiving, because they state, postively, the condition he was in, and they contradict point-blank the evidence of the witnesses on the other side, who state that the time at which the illness became aggravated was not then, but subsequently.

"That being the state of things, it was for the Judge who tried the case, as it is for us now, to consider which set of these witnesses is telling the truth. As I said just now, it is evident upon this evidence that either one side or the other must be telling falsehoods intentionally, and the witness against the will, on whose evidence the matter, in our opinion, to a great extent rests, is a person called Tara Nath Bal. He is the medical man of the best position. He was called in the last thing, and he speaks to the last few days of this man; and if he is telling the truth, it is clear to our minds that this man was not in a condition to make the will on the Sunday at all, and certainly not in a condition to sign it with the degree of vigour shown by these signatures."

[70] "We are asked to support the judgment of the Judge, and to support the will in this case, on the assumption that all these witnesses are the creatures of a person called Prosunno; that Prosunno had some spite against this man; that since his death, he, Prosunno, has gained some interest in his estate, which renders it necessary for his ends that this will should not be upheld, and that therefore Prosunno has bribed, or in some way influenced, all these witnesses to induce them to come here and tell falsehoods in Prosunno's interest, and, indeed, there are indications in the cross-examination of the witnesses that they are under the influence of Prosunno, but nothing more; and if it were that the Judge, upon the view of the witnesses, and upon their cross-examination, had come to the conclusion and had said so, that they were the creatures of Prosunno, that they were telling falsehoods and were telling a concocted story got up in the interests of Prosunno, and that they were telling it in his interests alone, the difficulties in the case would have been greatly increased. But instead of doing that, the Judge accepts the evidence of Tara Nath Bal in a hesitating way; he declines to say that he believes it to be untrue, but he endeavours to reconcile it with the case of the other side. As I said just now, his evidence is, in our opinion, absolutely irreconcilable with the case of the other side; and unless we are prepared to go beyond the learned Judge and say that, in our opinion, the evidence of Tara Nath Bal and that of Lalit Chunder Biswas, the other doctor, is a fabrication and is untrue, we do not see our way to come to the same conclusion which the learned Judge has arrived at; and when, in addition to that, we have the fact that the other doctor who attended the testator, and whose name was attached to this will as an attesting witness, is not produced by the propounder of the will, we think that the presumption in favour of the truth of that evidence is so great that it is impossible for us to say that the learned Judge is right in the conclusion which he arrived at as to the truth of the will; and when added to that, we have the other fact, which has influenced my mind, and, I may say, has influenced Mr. Justice Tottenham's mind, that is to say, the character of the signatures, we are unable to believe that these witnesses were telling untruths, and that the testator, on the Sunday, at the time when he is said to have signed the will, was in a **[71]** physical condition to attach

so many signatures in such a vigorous way as they appear to have been attached to these documents.

"In the result, we think that, accepting the statement of this testator's condition, which is given by the propounder of the will in his own cross-examination, and accepting the statement of his condition which is given by the only medical witnesses who have been called, and whose evidence is apparently believed by the learned Judge, we think it impossible to come to the conclusion that the signatures attached to the will are the signatures of the deceased; and consequently we think that this appeal must be decreed, and the probate of the will must be refused.

"We have been pressed to have the other witnesses to the will examined; but speaking for myself, I think such a course would be peculiarly dangerous, and so dangerous that, so far as I am concerned, I would not be a party to it. On going through the record carefully, I am not at all convinced that the case has been honestly fought on either side; and having regard to that fact and to the fact that the parties have thought fit to leave the matter where it is left, I do not think it would be in the interests of justice that we should interfere to have a further enquiry."

The appeal was accordingly decreed, with costs in both courts.

On this appeal—

Mr. *R. V. Doyne*, for the appellant, argued that the first Court had rightly found due execution proved, and that the High Court had attached too much weight to the argument which it derived from the firmness of the signatures—a matter not brought forward, apparently, in the first Court. Too much, also, had been attributed to the plaintiff's not having obtained the evidence of Kali Chunder Acharji.

Mr. *T. H. Cowie*, Q.C., and Mr. *J. H. A. Branson*. for the respondents, relied on the evidence that the deceased had not been in his last hours and at the time capable of executing the will.

Mr. *R. V. Doyne*, replied.

JUDGMENT.

Their Lordships' judgment was afterwards (July 19th) delivered by

MR. SHAND.—The question to be decided in this appeal is whether a will alleged to have been executed by the deceased Dwarkanath [72] Chakerbati, bearing date the 3rd January 1886, two days before the death of the alleged testator, is genuine or a forgery. The District Judge of Maimensingh, who tried the case, pronounced in favour of the will, but on appeal his decision was reversed by the High Court at Fort William in Bengal, who rejected the application for probate of the will.

The alleged will was registered five days after the date it bears. The petition for probate was presented by the father of the alleged testator, who was appointed executor. The document is in all respects formal, and purports to have been signed, not only by the deceased, but by the witnesses said to have been present when it was executed; and the application for probate was accompanied by a declaration by two of these persons in the ordinary form, testifying that they were present, and saw the testator sign the will. The defence stated was that the deceased never executed any will, and that the will propounded was fictitious and false and fraudulently got up, and in the course of the inquiry much evidence was given as to the state of the deceased, who, at the time when the deed is said to have been executed, was admittedly suffering from the serious illness of which he died, the defenders having under their general

1891 JULY 19. — PRIVY COUNCIL. — 19 C. 65 (P C.) = 18 I.A. 132 = 15 Ind. Jur. 471 & 617 = 6 Sar. P.C J. 66.

defence maintained and endeavoured to prove that the deceased was in such a state of mental and physical incapacity as to be unfit to make a will on the date when he is alleged to have done so.

The will is one which not only complies with all requisites of formality, but which seems to be in all respects reasonable in its provisions, and such as might naturally be expected to be made having regard to the deceased's circumstances and family relations. The deceased had three wives. By the eldest he had a daughter, and by the youngest a son, and both of these children were only six months old. There is no evidence in the case which would lead to the inference that he had any decided predilection or affection for one of his wives in preference to the others. His estate, which he seems to have acquired from his adoptive father, was of considerable value and required management, and in point of fact it had been managed for some time by his natural father, either as manager only, or in virtue of an ijara which was in force at the time of his illness. If he died intestate, the right to [73] this estate would devolve on his infant son, and on his decease (which in point of fact occurred before the appeal was heard in the High Court) would go to his mother as his heir, and during the son's long minority, if he survived, the management would fall into the hands of strangers. His mother was herself in minority and incapable of taking the management. In these circumstances the alleged will, while it gives the deceased's estate to his son, should he survive minority, provides for its administration in the first instance by continuing the management in the hands of the deceased's father, failing whom other two persons,— first a grand-uncle, and failing him the deceased's usual man of business is named. In the event of the son's death while still in minority, the will provides that each of the wives of the deceased, beginning with the eldest, should have the power of adopting a son who should, provided he survived the period of minority, succeed to the estates in their order; and the will further provides for the marriage expenses of his daughter "in suitable proportion to the income and disbursements" of the estate.

The genuineness of the will having been challenged, the petitioner, the father of the deceased, and six other witnesses were examined in support of it. Five of these had signed as testamentary witnesses to the document, and all of them deposed that they were present and saw it executed. It is common ground that, unless the deceased desired to die intestate, it was obviously necessary that he should make a will, for he had been suffering from serious illness and was in a dangerous condition. The facts affirmed by the petitioner's witnesses were that, some days before the will was executed, the deceased requested his father to send for his ordinary man of business, Goluck Bhuttacharji, who lived at some distance away, who came on the Thursday; that Goluck Bhuttacharji had interviews with the deceased after his arrival at the deceased's house, and at a time when there is no doubt the deceased was quite capable of giving instructions for the preparation of his will, as well as with the father of the deceased, to whom his son had explained the provisions he desired to be made; that thereafter Goluck Bhuttacharji dictated the draft to Rojoni Kant Das, the person living in the house, who usually wrote such papers as the deceased required to be written; that on the Saturday this draft [74] was read over to the deceased in his bed, when he approved of it; and that on the following day, Sunday, between 1 and 2 o'clock in the day, the will was signed in the presence of the testamentary witnesses, after it had been read over, when at the same time the deceased executed an *anumati patra* to enable

1891 JULY 19.

PRIVY COUNCIL.

19 C. 65 (P.C.) = 18 I. A. 132 = 15 Ind. Jur. 471 & 617 = 6 Sar. P.C.J 66.

his wives to adopt sons who should succeed to the estates in their order, in the event of his infant son dying in minority. The writer of the will, who declared that he saw it signed by the deceased, and the other witnesses, some of whom were, according to the evidence, expressly called in to see it executed, agree in the material facts to which they speak, and there is really nothing in their evidence which could justify or support the inference that there was any want of capacity on the part of the deceased, mental or physical, to understand and execute the will. They concur in their account of the serious nature of the illness of the deceased, and in describing him as being in a weak condition, but they do not support the defence that the deceased was not able fully to understand the act he was performing; and they concur in saying that he sat up in his bed which was on the floor, leaning against the pillows which were propped up, and so signed the document. It is clear that with this testimony, and keeping in view the fact that nothing can be said against the reasonable nature of the provisions of the will (which is always a material element in such questions, from its bearing on the probabilities of the case), it would require a strong case in defence to lead to the result of holding that the will had been forged. The Judge who saw and heard the witnesses seems to have remarked nothing in their demeanour to induce him to think they were not speaking the truth, or to lead him to the conclusion that they were combined in a conspiracy fraudulently to set up a false deed. Taking the view now presented of the evidence adduced by the petitioner, the District Judge properly observes that " the burden is on the defendants to prove that the Court ought to refuse probate either on account of the incapacity of the testator at the time of alleged execution, or on any other ground," and on careful examination of the evidence for the defence he came to the conclusion that this onus had not been discharged.

In the High Court this decision was reversed, substantially on the ground that it had been shown, in the opinion of the two [75] learned Judges by whom the case was determined, that, on the day when the will was alleged to have been executed, the deceased was incapable mentally and physically of performing such an act. The Chief Justice put the issue in this way,—" The question upon which the truth of this will turns is really, had the testator become so weakened by the fever that he was incapable of signing the will in the way it is signed." In the judgment of the Court he observed that there was a fact of which the judge of first instance had taken no notice whatever, "and that is the character of the signatures." The Chief Justice goes on to observe that the will is signed in six or seven places, and the other document is also signed in several places, and having examined these signatures he expresses the opinion of himself and Mr. Justice Tottenham that they are to all appearances those of a vigorous man, being perfectly clear and even and all alike, and this circumstance, it is explained, has greatly influenced the judgment. The opinion is, however, also expressed that the evidence of the medical man called for the defence has shown that, during the whole of the Sunday on which the will is said to have been executed, " the testator was not in a condition to make a will at all, that he was not in a condition to know what he was doing ;" while in a subsequent passage the Chief Justice observes,—" It is clear to our minds that this man was not in a condition to make the will on the Sunday at all, and certainly not in a condition to sign it with the degree of vigour shown by these signatures."

1891 JULY 19. — PRIVY COUNCIL. — 19 C. 65 (P.C.) = 18 I.A. 132 = 15 Ind. Jur. 471 & 617 = 5 Sar. P.C.J. 66.

It is scarcely necessary to observe that if their Lordships, after the consideration of the evidence and of the argument submitted to them on the present appeal, had come to the conclusion that the proof adduced by the defendants or the proof as a whole led to the inference that the deceased was incapable mentally or physically of executing the will "in the way it is signed," they would agree with the appellate Court in their judgment, reversing that of the District Judge and refusing probate. But their Lordships are unable to adopt that view.

Neither the will in dispute, nor the *anumati patra* which is alleged to have been executed at the same time, have been transmitted with the documents in the appeal to this country. [76] Neither of the parties seem to have applied to have this done, or to have photographs of the signatures taken and transmitted. In these circumstances, in dealing with the appeal, their Lordships will assume—subject to the observation, which they think of much importance, that there is an entire absence of any question or answer in the evidence bearing on the nature of the handwriting of the signatures, a circumstance which clearly explains why the learned District Judge did not refer to the subject—that as these signatures are written on the will they present an appearance of uniformity and of firmness, and their Lordships will immediately deal with the question whether this should affect the judgment to be given in the case. But in the first instance it seems to be desirable to ascertain how far it has been shown that the deceased was incapable mentally of performing with intelligence the act of making a will, for if the deceased wanted the requisite mental capacity this would form a clear ground against granting probate as prayed for.

The important witness on this point is unquestionably Tara Nath Bal the doctor, who was called in during the latter part of Dwarkanath Chakerbati's illness, and who was examined for the defence. He has been treated by the District Judge and the Court of appeal as a witness entitled to credit, though the former makes the observation that his intimate connection with Prosunno Babu, who appears not to have been on very good terms with the deceased, and who has a pecuniary interest in the case, favours the presumption of a certain amount of bias on his part. Prosunno Babu appears to have had such interviews with most of the witnesses for the defence, immediately before their examination as led to the suspicion that they were being schooled as to the evidence they should give, and his connection with Tara Nath Bal certainly seems to warrant the inference that this witness would not give a more favourable account of the condition, mental and physical, of the deceased than the facts warranted. He went to attend the deceased five days before his death. Speaking of the first two of these days he states that his patient did not seem to be unconscious. On the second day he says, he "could not particularly perceive unconsciousness," although at intervals his patient may have spoken one or two incoherent words. He subsequently says [77] that the serious illness began on Sunday morning, but that "on Sunday up to evening he did not talk incoherently," while in a subsequent passage of his evidence, in a conversation on the Sunday with Raj Chunder, or Gourmohun, or Goluck Bhattacharji, when he says the making of a will was spoken of, he states, "I may have said that instead of doing this to-day it may be done to-morrow as well."

Their Lordships cannot regard the evidence of this witness as warranting the conclusion on which, to a great extent, the judgment of the High

1891
JULY 19.
——
PRIVY
COUNCIL.
——
19 C. 65
(P.C.) =
18 I.A. 132 =
15 Ind. Jur.
471 & 617 =
6 Sar. P.C.J.
66.

Court is founded, that on the Sunday when the will is said to have been executed the deceased was incapable, either mentally or physically, of executing the will. The witness Lalit Chunder Biswas, who was for a time, during the earlier part of the deceased's illness, present as medical attendant, but who says he visited the deceased, apparently as a friend, till he died, gives some what stronger evidence, but his statement seem to be exaggerated in material respects when tested by the other evidence in the case. The evidence of Tara Nath Bal is in its terms qualified throughout and in their Lordships' opinion results in this, that although the deceased was in a weak condition, and his "condition commenced to be worse" on the Sunday, he was nevertheless capable throughout that day of understanding and executing the will in dispute.

Again, in regard to the ability of the deceased to write the signatures firmly, it does not appear to their Lordships that there is evidence to lead to the conclusion that he was unable to do so. The witness Tara Nath Bal states that on Sunday the patient could sit resting against a pillow, and the witnesses for the petitioner all say that it was in this attitude that the will was signed, while more than one of them states that the deceased rested his left hand on the pillow, holding the document in that hand and signing with his right hand. According to the evidence he had himself suggested that he would delay signing it till after taking food, and he did so; and, in the performance of so deliberate and solemn an act as signing his will, he would naturally make an effort such as might enable him, although in a weak state, to write his signatures with firmness. In the High Court it was observed that the District Judge had taken no notice of the character of the signatures. But [78] to their Lordships this circumstance seems to be fully accounted for by the fact that the point does not seem to have been made the subject of examination in the evidence, or of observation in the argument, so far as appears. The petitioner himself gives the strongest evidence, perhaps almost the only evidence, which indirectly gives some support to the view that the deceased might be unable to write with a firm hand, when he says the deceased was latterly unable to feed himself; but neither this evidence, nor that of the witnesses generally, would in the opinion of their Lordships warrant the conclusion that on the Sunday in question the deceased was unable, on so important an occasion, to write his signatures, and, by an effort, to do so firmly.

It would no doubt have been more satisfactory in the determination of the case if the testamentary witness, the doctor, Kali Chunder Acharji, and indeed also the mokhtar Goluck Bhuttacharji, who, though not present at the signing of the will, had prepared the draft, had been examined as witnesses. There is some evidence that the petitioner did endeavour to secure the attendance of Kali Chunder Acharji, and if it be the case that his evidence could have been obtained, and it would have been unfavourable to the will, the defendants might have examined him. As the case on the proof stands, the petitioner, in the opinion of their Lordships, adduced sufficient evidence to establish the genuineness of the will, and the capacity of the testator to make it, and the evidence for the defence was not sufficient to destroy the petitioner's case on either of these points.

On the whole, their Lordships will humbly advise Her Majesty to reverse the judgment of the High Court, and to affirm the judgment of

1891 JULY 19. — PRIVY COUNCIL. — 19 C. 65 (P.C.) = 18 I.A. 132 = 15 Ind. Jur. 471 & 617 = 6 Sar. P.C.J. 66.

the District Judge, with costs in the High Court. The respondents must bear the costs of this appeal.

C. B. *Appeal allowed.*

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents: Messrs. *Sanderson, Holland, and Adkin.*

---

19 C. 79.

[79] APPELLATE CRIMINAL.

Before Mr. Justice Beverley and Mr. Justice Ameer Ali.

BADAL AURAT AND ANOTHER (*Appellants*) *v.* QUEEN-EMPRESS (*Respondent.*)* [21st September, 1891.]

Bigamy—Mahomedan Law—Marriage of Minor—Repudiation of marriage by minor on attaining puberty—Assent of the wife after puberty—Penal Code (Act XLV of 1860), s. 494.

B, a Mahomedan girl, whose father was dead, was alleged to have been given in marriage by her mother to *J* some years before she attained puberty. Prior to her attaining puberty *J* was sentenced to a term of imprisonment for theft. While he was in jail, *B*, after she had attained puberty, contracted a marriage with *P*. The marriage with *J* was never consummated. On *J* being released from jail, he proceeded to prosecute *B* and *P* for bigamy and abetment of bigamy, and also charged *P* with adultery. It appeared that before taking proceedings *J* requested *B* to return to him, but she refused to do so. The marriage between *B* and *J* was sought to be proved by the evidence of *J*, *B's* mother, and two witnesses who were said to have been present. *B* and *P* were both convicted.

Held on appeal that the evidence of the marriage between *B* and *J* was insufficient to justify a conviction in the absence of proof that a Mollah was present at the ceremony, or that the *sigha* required to be recited at the marriage of minors was recited, or the *akd* performed.

Held further, that assuming *B* to have been given in marriage to *J* when a mere child by her mother, she had the option of either ratifying or repudiating such marriage on attaining puberty. Under the *Shiah* law such a marriage is of no effect until it has been ratified by the minor, and under the *Sunni* law it is effective till cancelled by the minor. Under both schools of law the minor has the absolute power, on attaining puberty, to ratify or cancel unauthorised marriage, though under the *Sunni* law ratification is presumed if the girl remain silent after attaining puberty and allows the marriage to be consummated.

Held on the facts of the case that the circumstances afforded sufficient indication, even assuming the girl to be governed by the *Sunni* law, that she never ratified the marriage.

Held also, that a judicial order was not necessary to effect the cancellation of the marriage.

[F., 11 Cr. L.J. 664 = 8 Ind. Cas. 494 = 33 P.W.R. 1910 (Cr); R., 31 C. 849 (857) = 8 C.W. N. 705; L.B.R. (1893—1900), 607 (610); D., 10 C.W.N. 982 (984).]

THE facts of this case were as follows:—The first accused, Badal Aurat, was married to Joy Lal Shaik, the complainant, when she [80] was about five years old by her mother Atar Bewah, her father being then dead. Joy Lal, Atar Bewah, and Badal all appeared to have lived together in the same house after the marriage till Joy Lal contracted a *nikah* marriage with another woman and set up a separate *bari* of his own. Badal some time after went to this *bari* for a time, and then returned to

* Criminal Appeal, No. 670 of 1891, against the order passed by F. E. Pargiter, Esq., Sessions Judge of Rajshahye, dated the 28th of July 1891.

her mother, but the marriage was not apparently consummated, as Badal had not then attained puberty.

Atar Bewah, when Badal was living with her, contracted a *nikah* marriage with one Shabaz, who was an old convict, and about five years before the institution of the case against Badal, Shabaz and Joy Lal were convicted and each sentenced to $4\frac{1}{2}$ years' rigorous imprisonment for theft. While Joy Lal was in jail, Badal attained her puberty, and in June 1890 her mother was alleged to have given her in *nikah* marriage to the second accused, Poran Shaik, and she went and lived with him in his village as his wife. Joy Lal, after being released from jail in September 1890, attempted to get Badal to go and live with him, but she refused to do so, and he thereupon instituted proceedings against Badal and Poran Shaik, which resulted in their being committed for trial to the Sessions Court on charges as against Badal of bigamy and as against Poran Shaik of abetment of bigamy and adultery.

The case was tried by the Sessions Judge and assessors, and resulted in the conviction of both accused on the charges preferred against them, and their being sentenced respectively to three and six months' rigorous imprisonment.

The Sessions Judge found that the marriage between Badal and Joy Lal had been clearly proved, and that it was in fact not disputed by either accused. Badal, however, denied that she had contracted a *nikah* with Poran, although he admitted it and pleaded ignorance of the existence of Joy Lal, and alleged that Badal had told him she was a widow. The Sessions Judge, however, found the *nikah* between the two accused to have been proved, and that they had lived together for several months as man and wife. Upon the question of law raised in the case, the material portion of the judgment of the lower Court was as follows :—

"The offence of bigamy is fully proved, and the only doubt which the assessors had at one time was whether the marriage with **[81]** Joy Lal was valid, since consummation did not take place, and Badal had not expressly assented to it, but those conditions are not required by the *Sunni* law, and Badal never repudiated the marriage with Joy Lal. [See Mr. Ameer Ali's *Mahomedan Law, Newab Mulka Jehan Sahiba* v. *Mahomed Ushkurree Khan* (1) and *The Empress* v. *Abdool Kurreem* (2).]"

Against the conviction and sentence both accused now appealed to the High Court.

No one appeared for either side at the hearing of the appeal.

JUDGMENT.

The judgment of the Court (AMEER ALI and BEVERLEY, JJ.) was delivered by

AMEER ALI, J.—In this case the first prisoner has been convicted under s. 494 of the Indian Penal Code and the second under s. $\frac{494}{114}$ and they have been sentenced to three months' and six months' rigorous imprisonment respectively. The facts of the case are shortly these :—The girl Badal, when only five years old, is alleged to have been given in marriage by her mother, Atar, to the complainant. Before the girl had attained puberty, the complainant was sentenced to imprisonment for a term of four years and six months, and whilst he was in jail the girl attained puberty and married the second prisoner. The Judge and assessors find that the second prisoner was aware of the first marriage with the

(1) L. R. I. A. Sup. Vol. 192 (197). (2) 4 C. 10.

1891 Sep. 21. — Appellate Criminal. — 19 C. 79.

complainant, and they have accordingly convicted the two accused as mentioned above.

This is not a case involving a question as to the legitimacy of a child or the validity of a marriage contracted by two adult persons where a legal union may be presumed from continued relationship or otherwise. This is a prosecution for a criminal offence, and we have to examine the evidence carefully regarding the alleged marriage of the girl to the prosecutor.

Now, with the exception of the statement of Joy Lal that he married the girl, and of Atar that she gave her daughter to him in marriage, and of two witnesses, who say that they were present at the time, there is no evidence to establish the fact of the first marriage. Had there been a legal marriage, a Mollah would have been present, with the necessary witnesses and *vakils*, to read the [82] *sigha*. No Mollah has been called, nor is it suggested that any Mollah was present. There is no evidence that any of the ceremonies usual at a Mahomedan marriage in this country were ever performed. It is well known that the *sigha* (formula) recited at the marriage of minors is different from that recited at the marriage of adults. There is no evidence that any *sigha* was in fact recited on the occasion, or the *akd* performed, without which there can be no marriage. It is possible that the girl was betrothed to the complainant by her mother, as is frequently the case among the lower class of Mahomedans, and sometimes even among respectable people. But I am by no means satisfied that there was any valid marriage. In prosecutions for bigamy it has been invariably held by this Court that, where proof of either marriage is unsatisfactory, there ought to be no conviction. In the case of *Empress* v. *Lutfunnissa and others* (1) tried on the 3rd August 1887 in the High Court before Macpherson, J., where the evidence regarding the first marriage was as unsatisfactory as in the present case, the learned Judge directed the jury to return a verdict of not guilty. In another case Wilson, J., took the same course.

This view is sufficient to dispose of the case; but as prosecutions of this character are not infrequent among the lower classes of Mahomedans, it may be as well to dispose of one other question. The girl is said to have been married to the complainant when a mere child by her mother. Under the Mahomedan law, when a child is given in marriage by any person other than the father or grandfather, he or she has the option of either ratifying it or repudiating it on attaining puberty (Radd-ul-muhtar, vol. II, Egypt, Edition. p. 500, and the Sharaya-ul-Islam, p. 309). This is called the *Khyar-ül-bulugh*, or option of puberty. Under the Shiah law such a marriage is of no effect, and produces no legal consequences until it has been ratified by the minor upon his or her attaining majority. The Shafees agree with the Shiahs in this view. There is no evidence in this case to show to which sect the girl belongs.

Assuming, however, that she is a Hanafi Sunni, how would the matter stand? The only difference between the Sunni and the [83] Shiah law on the question of option of puperty is that whereas according to the latter school a marriage contracted for a minor by a person other than the father or grandfather is wholly ineffective until it is ratified by the minor on attaining puberty, according to the (Hanafi) Sunni school it continues effective until it is cancelled by the minor. Both schools give to the minor an absolute power either to ratify or to cancel the unauthorized marriage.

(1) Unrep. (Case No. 3 ; 5th Sessions of 1887).

The (Hanafi) Sunni law presumes ratification when the girl after attaining the age of puberty has remained silent and has allowed the husband to consummate the marriage.

1891 SEP. 21. — APPELLATE CRIMINAL. — 19 C. 79.

In the present case the man to whom the girl is said to have been married was in jail when she attained puberty. It was not necessary for her, therefore, to signify her assent or dissent. Afrer attaining puberty she entered into a contract of marriage with the second accused. This is sufficient indication in my opinion that she never ratified the unauthorized marriage, which was never consummated.

The only question that remains to be considered is whether a judicial order was necessary to effectuate the cancellation. The Fatawa-i-Alamgiri says such an order is necessary, but the Radd-ul-muhtar (vol. II, p. 502) explains it by saying that a judicial declaration is not needed for imparting validity to an act which the parties have the power to do, but to provide judicial evidence in order to prevent disputes. No time, however, is limited for seeking the assistance of the Kazi—Fatawa-i-Alamgiri, I, p. 267 (Egypt edition). Besides it has been held by Mahomedan lawyers that in a claim for restitution of conjugal rights the defendant may plead the exercise of "the right of option," and if it is established the Kazi may grant the declaration in that proceeding. It seems to me that this principle would apply equally to a proceeding like the present, where a conviction can take place only if it is found conclusively that the former marriage was still binding and effective.

For all these reasons, without going into the question whether the enforced absence of the alleged husband for four years, admittedly without making any provision for the wife's maintenance, justified her or not in contracting a second marriage, I think that this conviction ought to be set aside.

[84] BEVERLEY, J.—I concur with my learned colleague in setting aside the convictions in this case on the ground, *first*, that there is no sufficient legal evidence of the first marriage, and, *secondly*, that under the circumstances of this case—the girl having been betrothed in marriage by her mother before she attained puberty, that marriage having never been consummated, and the husband being in jail at the time the girl attained puberty—it was open to her to repudiate the betrothal and contract a valid marriage with another person.

The conviction of the appellants is accordingly set aside and they will be released.

H. T. H. *Appeal allowed and conviction quashed.*

1891
JULY 28.

APPELLATE CIVIL.

19 C. 84.

19 C. 84.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

MATANGINI DASI AND ANOTHER (*Plaintiffs*) *v.* JOGENDRA CHUNDER MULLICK AND OTHERS (*Defendants*).*
[28th July, 1891.]

Hindu law—Husband and Wife—Cruelty—Maintenance.

A Hindu wife is justified in leaving her husband's protection, and is entitled to separate maintenance from his income, when he habitually treats her with cruelty and such violence as to create the most serious apprehension for her personal safety. *Sitanath Mookerjee* v. *Haimabutiy Dabee* (1) referred to.

[R., 4 C.W.N. 488 (489).]

THIS was a suit for maintenance brought by the plaintiff, Matangini Dasi, on behalf of herself and her minor son. Ratneswar Mullick, against her husband, Jogendra Chunder Mullick (defendant No. 1), on the ground that his cruelty and misconduct endangered her life and compelled her to seek refuge in her father's house, accompanied by her minor son. She claimed Rs. 50 per mensem as maintenance for herself and her son, and Rs. 25 per mensem for her son's education. She also claimed Rs. 450 as maintenance at the rate of Rs. 75 per mensem for the six months [85] previous to the institution of the suit. The defendants Nos. 2 and 3 were made parties to the suit, because they, as executors of the will of the late Junmejoy Mullick, had taken out probate, and the maintenance was payable out of the estate in their hands. The plaintiff was married to the defendant No. 1 when she was a child, and their son, Ratneswar Mullick, was about 12 years and eight months old at the date of the institution of the suit.

The defence shortly was that the plaintiff was bound to return to her husband, who was willing to support and maintain her in his house so long as she behaved as a Hindu wife. But that as she refused to live with him, she was not entitled to separate maintenance ; that the plaintiff was not entitled to sue on behalf of her son without a certificate under Act XL of 1858 ; and that the son ought to be brought back to his father's house. The Subordinate Judge found that the husband (defendant No. 1) was ready and willing to support and maintain his wife provided she returned to him and behaved properly; that he had been a profligate youth, was given to debauchery, and had treated his wife, the plaintiff, most shamefully; that he had assaulted her violently not once or twice, but at least a dozen times, and characterized his last assault on her "as a most cruel, heartless and cowardly one." He also found that the plaintiff was partly to blame for the constant bickerings during her married life, and was of opinion that if she had only controlled her temper a little and treated her husband with more kindness, her married life might have been happier. He was of opinion that violent treatment by itself did not justify the plaintiff's refusal to live with her husband; that such refusal must be based upon a reasonable apprehension of personal health or safety as would be required by an English Court in a similar case; and that as she

---

* Appeal from Original Decree, No. 41 of 1890, against the decree of Babu Dwarka Nath Bhuttacharji, Subordinate Judge of Midnapore, dated the 18th of September 1889.

(1) 24 W. R. 377.

1891 JULY 28. — APPELLATE CIVIL. — 19 C. 84.

had failed to prove that she lived in fear of her health or safety, she was bound to return to her husband and was not entitled to separate maintenance. He also held that no reason had been made out why the minor son, Ratneswar, should not live with his father, and as he was more than 13 years old he was bound to live with him. He thought that the plaintiff was not entitled to sue on behalf of her minor son without a certificate under Act XL of 1858; but as she had obtained permission to sue from his predecessor in office, he considered such [86] permission sufficient under s. 3 of that Act in accordance with the ruling in *Durga Churn Shaha* v. *Nilmoney Dass* (1). In the result the Subordinate Judge dismissed the plaintiff's claim for past and future maintenance, but as she had been acting as the *de facto* guardian of her minor son, and had been maintaining him, he gave her a decree for Rs. 150 at the rate of Rs. 15 for the minor's maintenance for six months previous to the suit and Rs. 10 for his educational expenses.

The plaintiffs appealed to the High Court and defendant No. 1 filed a cross-appeal against the decree for Rs. 150.

Mr. *Allen*, Babu *Tarak Nath Palit*, Babu *Jogesh Chunder Dey* and Babu *Debender Nath Ghose*, for the appellants.

Dr. *Rash Behary Ghose*, Babu *Ashutosh Mookerjee* and Bubu *Golap Chunder Sircar*, for the respondents.

Mr. *Allen*: Colebrooke in his Digest of Hindu law mentions some of the circumstances under which the Hindu Law allows a wife to leave the protection of her husband and to claim maintenance from him For instance:—She can enforce her right to maintenance whenever it is denied, and this right is not affected by her supersession (Colebrooke's Dig., Vol. II, Bk. IV, ch. 4, s. 2, v. 74). If she be forsaken without fault, she may compel her husband "to pay the third part of his wealth, or, if poor, to provide a maintenance for her" (Colebrooke's Dig., Vol. II, Bk. IV, ch. 1, s. 2, v. 72). And she may forsake her husband "if he be an abandoned sinner or an heretical mendicant, or impotent or degraded or afflicted with phthisis, or if he have been long absent in a foreign country" (Colebrooke's Dig., Vol. IV, ch. IV, s. 2, v. 151). In *Lalla Gobind Pershad* v. *Dowlut Butee* (2), when a Hindu husband kept a Mahomedan mistress, and by such conduct rendered it impossible for his wife to live with him any longer consistently with her self-respect and religious feelings, and she lived apart and chastely, the Court held that she was entitled to maintenance. A Hindu wife is also entitled to maintenance when her husband habitually treats her with cruelty. Indian Statute Law recognizes the right of the wife, whatever be her caste, creed or religion, to live apart from her husband and to claim maintenance when she has been [87] habitually treated by him with cruelty (Criminal Procedure Code, s. 488). See also the observations of Garth, C.J., in *Sitanath Mookerjee* v. *Himabutty Dabee* (3) as to what is meant by cruelty. To constitute cruelty in English law, there must be actual violence of such a character as to endanger personal health or safety, or there must be the reasonable apprehension of it. *Milford* v. *Milford* (4). The leading case on the subject is *Evans* v. *Evans* (5). There what is legal cruelty such as would entitle a wife to a judicial separation, or, to a divorce when coupled with adultery, is fully discussed, and the law laid down by Sir William Scott. Cruelty in the sense in which the Court holds it proved as a

(1) 10 C. 134. (2) 14 W.R. 451. (3) 24 W. R. 377.
(4) L.R. 1 P. & M. 295=36 L.J. P. &. M. 30, affirmed=37 L.J. P. & M. 77.
(5) 1 Hagg. (Eccl.) 35.

1891 JULY 28. — APPELLATE CIVIL. — 19 C. 84.

ground for separation or divorce lies in the cumulative ill-conduct which the history of the married life discloses. This aggregate is made up of those acts of personal violence or degrading conduct which are spoken of in the books as "acts of cruelty," palliated or inflamed, as the case may be, by the respective language, demeanour, and bearing of the parties, and the whole considered in connexion with the general treatment which the party complaining may have received. *Power* v. *Power* (1). It has been held that where there is one gross act of cruelty, if there is a reasonable apprehension of further acts of the same kind, the Court will grant relief. *Reeves* v. *Reeves* (2). Cruelty in this country (as laid down by case-law applicable to Hindus) does not materially differ from cruelty within the meaning of English law. If any difference exists, it is in favour of the wife, not the husband. On the question of cruelty, in *Buzloor Ruheem* v. *Shumsoonnissa Begum* (3), their Lordships of the Privy Council say at p. 611: "The Mahomedan law on a question of what is legal cruelty between man and wife would probably not differ materially from our own." This question of cruelty has also been fully discussed by Melvill, J., in *Yamunabai* v. *Narayan Moreshvar Pendse* (4). His Lordship says: "As the [88] Judicial Committee say of the Mahomedan law, so we would say of the Hindu law, that, on a question of what is legal cruelty between man and wife, it would probably not differ materially from our own. Any difference there might be would be in the direction of greater strictness, not of greater laxity—at least in regard to the treatment of the wife by the husband. A Hindu wife cannot, any more than an English wife, claim a divorce on account of merely her husband's inconstancy; but she may demand a separate maintenance if her husband ill-treat her on account of a favourite wife or mistress." And further on he says: "In a suit between Hindus we consider that the only safe and practical criterion of cruelty is that contained in the definition which guides the English Courts, namely, that there must be actual violence of such a character as to endanger personal health or safety, or there must be the reasonable apprehension of it." In *Sitanath Mookerjee* v. *Haimabutty Dabee* (5) maintenance was refused on the ground that the husband was willing to support his wife, and it had not been proved that he was guilty of acts of cruelty which would have justified her in leaving his protection.

The lower Court has found that the respondent, the husband, was a profligate youth and is given to debauchery; that he has treated his wife with cruelty; and that his last assault upon her was a most cruel, heartless and cowardly one. I therefore submit she is entitled to separate maintenance.

Dr. *Rash Behary Ghose* on behalf of the respondent. The determination of an action of this description requires very careful consideration of the Hindu law, as well as strict proof of the facts to which that law is to be applied. Such a case cannot be decided simply on the principles which guide the English Courts in suits for divorce and judicial separation, or according to what is called "equity and good conscience." Circumstances which would entitle a wife to judicial separation in the English Matrimonial Courts would not necessarily entitle her to a decree for separate maintenance in an Indian Court. I refer to the observations of the Judicial Committee of the Privy Council at pp. 610—615 in the

(1) 34 L.J. P. & M. 137 = 4 Sw. & Tr. 173. (2) 32 L.J.P. & M. 178.
(3) 11 M.I.A. 551. (4) 1 B. 164. (5) 24 W. R. 377.

case of *Buzloor Ruheem* v. *Shumsoonnissa Begum* (1), and also to those of the High Courts in *Jogendronundini* [89] *Dossee* v. *Hurry Doss Ghose* (2), and in *Binda* v. *Kaunsilia* (3). As to the Hindu Law regarding the position of a wife, the reciprocal rights and duties of the husband and wife, and the circumstances which might justify a separation, I cite the following authorities :—

Menu, Chap. VIII, ss. 299, 300; Chap. IX, ss. 77, 81 and 83; Colebrooke's Digest, Bk. 4, Chap. I, ss. 56, 63, 64, 66, 70 and 75; Dr. Bannerjee's Tagore Law Lectures on Marriage and Stridhan, pp. 119 and 151; 1 Strange's Hindu Law, pp. 47, 48; and 1 Norton's Leading Cases, p. 38. I submit that although it is true that the respondent has ill-treated his wife, she herself is also to blame for much of the unhappiness of her married life, and since he is willing to support and maintain her in his house in a manner befitting her position as a Hindu wife, provided she behaves properly, and, as she has refused to live with him, she is not entitled to the relief sought.

The judgment of the Court (TOTTENHAM and GHOSE, JJ.) was as follows :—

JUDGMENT.

This was a suit for maintenance brought against the defendant No. 1 by his wife and his minor son, upon the ground that his cruelty and other misconduct had put her in fear of her life and driven her to take refuge with her son at her own father's house. She claimed maintenance for herself and son at the rate of Rs. 50 per mensem, and Rs. 25 per mensem was claimed for the son's education. There was a further claim for maintenance for the six months before suit.

The defendants 2 and 3 were made parties to the suit because they are executors appointed under the will of Junmejoy Mullick, late father of defendant No. 1, and the maintenance is claimed from the estate.

The lower Court held that the plaintiffs had made out no sufficient case for a decree for separate maintenance for the future; but gave a decree for Rs. 150 in respect of the maintenance and education of the son for the six months previous to the suit. The plaintiffs having appealed, the defendant No. 1 has filed a cross appeal against the decree for these Rs. 150.

[90] The facts alleged and proved against the husband-defendant are so discreditable to him that we are astonished at his not having settled his wife's claim out of Court, rather than have his conduct exposed and condemned publicly in the Courts of Justice. And after hearing the appeal we have abstained for some time from delivering judgment, as there was some hope that even at the last moment the defendant would offer the plaintiff such reasonable terms as she might accept, and so escape the disgrace of a decree of this Court being passed against him in such a suit. We are, however, compelled to proceed to judgment.

The plaintiff No. 1 has for many years been the wife of the defendant No. 1, and their son must now be about 15 years of age, for in the plaint filed on the 6th of April 1889 he is described as then being 12 years and eight months old. In her moral conduct she has been, as far as we can judge, irreproachable; though she has, it appears, sometimes allowed her temper to get the better of her under the provocation which her husband's habitual ill-treatment of her offered.

---

(1) 11 M.I.A. 551=8 W.R. P.C. 3. (2) 5 C. 500 (505). (3) 13 A. 126 (155, 160).

1891 JULY 28. — APPELLATE CIVIL. — 19 C. 84.

The findings of fact of the Subordinate Judge are not disputed by the respondent; and his last assault upon his wife is properly characterised by the Court as a most cruel, heartless and cowardly one. The husband has also been proved to be a profligate youth, addicted to drink, and one who "behaves most shamefully by his wife," to use the words of the Subordinate Judge; still he does not think she was justified in leaving her husband's house. He thinks that, notwithstanding all that has happened, notwithstanding the violence committed a dozen times or so, and notwithstanding the last most brutal assault, still there is no reasonable apprehension of personal safety or health; and that consequently she is bound to return to her husband and is not entitled to separate maintenance.

It would be a matter of very great regret to us to be compelled by Hindu Law, or by any other consideration, to endorse this judgment. The Hindu Law, while it enjoins upon the wife the duty of attendance on, obedience to, and veneration for, the husband, inculcates that the husband must honour the wife and treat her with affection and courtesy. The husband is no doubt entitled to restrain the liberty of the wife, and she is bound to refrain from going to any place where her husband forbids her [91] to go; and the sages mention only certain cases where the wife may forsake the husband (see Colebrooke's Digest, Vol. II, Book IV, Chap. I, s. 2, and Chap. IV, s. 2). But it is nowhere laid down that the wife is bound to live with a husband who habitually treats her with cruelty, and so ill-treats her as to endanger her personal safety: and in this connection we may refer to s. 488 of the Code of Criminal Procedure as showing what the Legislature considered to be the correct law on the subject, as also to the observations of Garth, C.J., in *Sita Nath Mookerjee* v. *Haimabutty Dabee* (1). We think it amply established in this case that the defendant's violence towards his wife has been such as to create the most serious apprehension for her safety should she continue in his power: and under these circumstances we hold that she is fully justified in leaving her husband and is entitled to be maintained from his income. We reverse the decree of the lower Court so far as it dismisses Matangini's suit, and direct that she receive maintenance at the rate of Rs. 32 per mensem from the income enjoyed by the defendant No. 1 under his father's will. She is entitled to recover at the above rate from Ashin to Falgoon 1296 (Amli) and for the remainder of her husband's life. And she will get her costs in both Courts.

As regards the cross-appeal, the lower Court was, we think, in error in making any decree in respect of the maintenance and education of the defendant's son; but as the learned pleader did not press the appeal, we do not consider it necessary to make any order upon it.

C. D. P. *Appeal allowed.*

---

(1) 24 W. R. 377.

19 C. 91.

1891 AUG. 28. — APPELLATE CIVIL. — 19 C. 91.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

KIRPAL NARAIN TEWARI (*Defendant No.* 2) *v.* SUKURMONI (WIDOW OF BHUPAL) AND ANOTHER (*Plaintiff and Defendant No.* 1).* [28th August, 1891.]

Hindu Law—Dayabagha—Inheritance—Sudra Caste—Illegitimate son—Bengal Act II of 1869, s. 26.

According to the Bengal School of Hindu Law, the son of a Sudra by a kept woman or continuous concubine does not inherit his father's estate.

[92] *Narain Dhara* v. *Rakhal Gain* (1) followed. *Inderun Volungypooly Taver* v. *Ramasawmy Pandia Talaver* (2) explained. *Rahi* v. *Gobind Valad Teja* (3), *Sadu* v. *Baiza and Genu* (4), *Datti Parisi Nayadu* v. *Datti Bangaru Nayadu* (5), *Krishnayyan* v. *Muttusami* (6), *Sarasuti* v. *Mannu* (7), and *Hargobind Kuari* v. *Dharam Singh* (8), explained and distinguished.

A Bhuinhari register, prepared under Bengal Act II of 1869, is not conclusive evidence of the title of the person recorded therein.

[R., 22 C. 112 (122) ; 28 C. 194 (202, 203) ; 34 M. 68=5 Ind. Cas. 919=20 M.L.J. 350=7 M. L. T. 161=(1910) M.W.N. 138 ; 16 C.L.J. 335=17 C.W.N. 442 (445)=17 Ind. Cas. 276 ; 6 C. P. L. R. 144 (146).]

THIS was a suit for declaration of title and for possession with mesne profits.

One Sheodyal Sahu died possessed of a certain mocurruree property, mouzah Jhari in pergunnah Khokhra, and leaving him surviving two sons, Nund Lal Sahu (who died previous to this suit), and Bhupal Sahu (plaintiff No. 1) by a lawfully married wife, and a third son, Doma Sahu (defendant No. 1), who was born of a concubine.

The plaintiffs alleged that at the time of the death of Sheodyal, Bhupal (plaintiff No. 1) and his eldest brother, Nund Lal Sahu, were minors, and that the defendant Doma Sahu both during their minority and for some time after they had attained majority looked after and managed their ancestral property, mouzah Jhari, as their karpardaz, and that he also cultivated the ryoti lands in the mouzah ; that from 1921 to 1925 mouzah Jhari was let out in ticca by Nund Lal to Gopi Sahu, the father of plaintiff No. 2, who remained in possession until the expiration of the term of his ticca ; that after the death of Nund Lal the plaintiff Bhupal was in sole possession of the entire mouzah, and on 2nd September 1881 he granted a bhugutbandha lease of the entire mouzah to plaintiff No. 2 and his uncle Ganga Sahu for a period of 13 years from 1938 to 1950, and put them into possession; that plaintiff No. 2 sued some of the tenants for arrears of rent for the years 1941 and 1942 ; that the defendant Doma Sahu intervened alleging that he had a half share in the mouzah, and that he had given it in mocurruree to defendant No. 2; that on appeal the suit was dismissed, and the plaintiffs were thus dispossessed of a half share in [93] the mouzah. They also alleged that Doma Sahu was the illegitimate son of Sheodyal by a kept woman ; that he had no right to any share in

* Appeal from Appellate Decree, No. 1140 of 1890, against the decree of F. Cowley, Esq., Judicial Commissioner of Chota Nagpore, dated the 1st of May 1890, affirming the decree of Moulvi Hamid-uddin, Munsif of Ranchi, dated the 29th of September 1888.

(1) 1 C. 1. (2) 13 M.I.A. 141=3 B.L.R. P.C. 1=12 W.R.P.C. 41.
(3) 1 B. 97. (4) 4 B. 37. (5) 4 M.H.C. 204.
(6) 7 M. 407. (7) 2 A. 134. (8) 6 A. 329.

1891 Aug. 28. — Appellate Civil. — 19 C. 91.

the mouzah, and never was in possession of any portion thereof other than the ryoti lands. They further alleged that the mocurruree pottah of the 15th December 1885 (8th Aughran Sudi 1942) executed by Doma Sahu of his half share in the mouzah in favour of defendant No. 2 was collusive and fraudulent, and submitted that it should be set aside. The plaintiffs accordingly prayed for a declaration that Doma Sahu was illegitimate, and therefore not entitled to any share in the mouzah; that the mocurruree pottah of 15th December 1885 was collusive and fraudulent, and therefore invalid, and for a declaration of their title to the half share in the mouzah claimed by the defendants, and for possession with mesne profits.

The defendant Doma Sahu denied the plaintiff's allegation as to possession and dispossession. He alleged that neither the plaintiff Bhupal nor his ticcadar were in possession of the disputed share of the mouzah within 12 years prior to the institution of the suit; that he was a legitimate son of Sheodyal, who died leaving him surviving three sons, of whom Nund Lal was the eldest, he the second, and Bhupal the youngest; that after the death of Sheodyal, Nund Lal, the plaintiff Bhupal, and he were in joint possession of the mouzah; that after the death of Nund Lal the mouzah was divided equally by private partition between Bhupal and himself, and that he had let out his half share in mocurruree to one Kirpal Narain Tewari, defendant No. 2, who was in possession of it, and that the mocurruree pottah of 15th December 1885 was not collusive and fraudulent. Defendant No. 2 corroborated the allegations and statements of Doma Sahu.

An authenticated copy of a bhuinhari register, dated 1874, and a copy of a bhuinhari map, dated June 1875, were filed. In the register the plaintiff Bhupal Sahu and the defendant Doma Sahu were recorded as the mocurrureedars of mouzah Jhari. The bhuinhari map was signed by the defendant Doma alone, and from it it appeared that Doma Sahu was the mocurrureedar of the whole of mouzah Jhari, and that all the majhahas lands belonged to him.

[94] The Munsif found that Nund Lal and Doma were of about the same age; that contrary to the custom of Chota Nagpore, the name of the youngest brother Bhupal and not that of the elder brother Doma was entered as jagirdar of Jhari in the zemindari sherista of the superior landlord, and that Bhupal only paid rent; that although Doma claimed to be in possession of a half share under a private partition for more than 12 years, he never paid any rent, nor the road and public works cesses in respect of his half share to the superior landlord; that suits for arrears of rent were always brought against Bhupal, and the decrees obtained in such suits were satisfied either by Bhupal or his ticcadars; that the entire mouzah was let out in ticca by Nund Lal from 1291 to 1295 and that the ticcadar was in possession; that in 1881 Bhupal granted a bhugutbandha lease of the mouzah to plaintiff No. 2 and to his uncle Gunga Sahu; and that although both the ticcas were granted by registered deeds, Doma Sahu at no time raised any objection. He was of opinion that the bhuinhari register and map did not help the defendant's case, and that Doma while acting as the karpardaz of Bhupal had collusively signed the bhuinhari map describing him as mocurrureedar of the mouzah, and that Bhupal, who was lame and a cripple, was not aware of Doma's collusive transactions in the bhuinhari department. The Munsif came to the conclusion that the plaintiffs were in possession of the disputed share of the mouzah, and that Doma was never in possession of it. He found that Doma was an illegitimate son of Sheodyal, and that the mocurruree pottah of the

15th December 1885 was collusive and fraudulent, and brought into existence with a view to defeat the plaintiffs' claim.

He held further that the suit was not barred and decreed the plaintiffs' claim.

The Judicial Commissioner of Chota Nagpore upheld the findings and decision of the Munsif, and dismissed the defendant's appeal.

The defendant Kirpal Narain Tewari appealed to the High Court.

Babu *Golap Chunder Sircar*, for the appellant.

Babu *Ram Churn Mitter*, for the respondents.

[95] Babu *Golap Chunder Sircar*.—The Courts below have dealt with this case as if the onus was on the defendant Doma Sahu to prove his legitimacy. It is just the other way. It is almost impossible for a man to prove his legitimacy at the age of 55 years, and the evidence adduced by the plaintiffs and relied on by the Judicial Commissioner does not amount to legal proof of Doma's illegitimacy. There is no evidence that Doma was illegitimate or that his mother was not married to the plaintiff's father. Marriage between different sections of the Sudra caste is valid. *Narain Dhara* v. *Rakhal Gain* (1), *Upoma Kuchain* v. *Bholaram Dhubi* (2); the latter case overrules the former one.

There is no prohibition to be found in the Sanskrit books against intermarriages between different sub-divisions of the Sudra caste, Tagore Lectures, 1888, p. 95; *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (3). That in practice such marriages are obsolete is no argument for the proposition that they are invalid. The presumption of law is that marriage is valid and the issue legitimate. This presumption is referred to by Mitter, J., in *Narain Dhara* v. *Rakhal Gain* (1), where his Lordship says that where there is continued cohabitation, the presumption is in favour of a valid marriage, and therefore of legitimacy of the issue. Such marriages are not repugnant to the class among whom widow marriages in the Segai form take place. In frontier districts less rigour prevails. The case of *Narain Dhara* v. *Rakhal Gain* (1) was remanded by Mitter, J., to ascertain if there was any custom. An extract from the bhuinhari register of the Special Commissioner prepared under the Chota Nagpore Tenures Act (Bengal Act II of 1869) is filed. It shows that the mocurruree was recorded in the names of plaintiff No. 1 and defendant No. 1. The preamble of the Act shows its objects. The register is prepared under the provisions of s. 5, and has to be confirmed under s. 25, and s. 26 makes the register prepared under the Act after it has been confirmed conclusive evidence of the matters recorded in it. The register therefore is conclusive evidence of the title of Doma as a co-sharer in the mocurruree, and not merely that Bhupal and he were in possession of the lands at the time it was made.

[96] These facts are consistent with my contention that Doma was legitimate. The onus therefore was on the plaintiff Bhupal to prove Doma's illegitimacy, and not having given any evidence, except that his mother belonged to another caste, which is not admitted by Doma, the suit ought to fail on that ground. Even admitting Doma's illegitimacy, yet as such he was entitled to a half share according to Hindu Law. Dayabagha (Colebrooke's, Ch. IX, paras. 29 to 31). In all these passages "unmarried" means "not married by the father." The Allahabad, Madras, and Bombay High Courts have held that a son by a female slave must be taken to mean a son by a kept woman or continuous concubine, since slavery

(1) 1 C. 1. (2) 15 C. 708. (3) 13 M.I.A. 141.

1891 AUG. 28. — APPELLATE CIVIL. — 19 C. 91.

has been abolished in India. See *Rahi* v. *Govind Valad Teja* (1); *Sadu* v. *Baiza and Genu* (2); *Pandaiya Telaver* v. *Puli Telaver* (3); *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (4); *Datti Parisi Nayadu* v. *Datti Bangaru Nayadu* (5); *Krishnayyan* v. *Muttusami* (6); *Sarasuti* v. *Mannu* (7); *Hargobind Kuari* v. *Dharam Singh* (8); *Johendro Bhuputi* v. *Nittyanund Man Singh* (9). Mitakshara, Part II, Ch. 1, s. 12, para. 2, makes para. 29, Chap. IX of the Dayabagha clear. Colebrooke (Bk. 5, Ch. II, v. 175) takes "the daughter's son," to be "a legitimate daughter's son," Dayatattwa, Ch. II, para. 40 (Golap Chandra Sircar's translation). Colebrooke's translation of para. 29 of Ch. IX of the Dayabagha is perfectly correct, if the reading contained in the Original Sanskrit edition of the Dayabagha with six commentaries by Pundit Bharat Chunder Siromani under the auspices of the late Babu Prosonno Coomar Tagore be correct. This reading is also found in the editions of 1813 and 1829 published under the authority of Government. Mr. Justice Mitter's copy must have contained a different reading; otherwise he would not have come to the conclusion to which he did in the case of *Narain Dhara* v. *Rakhal Gain* (10) that Colebrooke's translation was incorrect, and that the right translation was. "But the son of a **[97]** Sudra by an unmarried female slave, &c., may share equally with other sons, by consent of the father, &c." The result of the authorities is that "unmarried" means "not married by the father," and not "that the woman should be a maiden." The views taken by the other High Courts are in accord with Colebrooke's translation. This question is discussed in *Rahi* v. *Govind Valad Teja* (1). Mayne gives a summary of all the cases in para. 504 of his book on Hindu Law and Usage. I therefore submit that the passage includes any concubine besides female slave or any other unmarried woman. The author of the Dayabagha is supported by Menu's text. Although Doma's mother might not have been a slave, but, as already stated in the plaint, she was a concubine or a kept woman, Doma would be still entitled to succeed. My third point is: Doma's name being registered in the register under the Chota Nagpore Act, he must have been legitimate. The register acts as an estoppel. If this Court disagrees with the finding of the lower Court on the question of legitimacy, then it cannot accept the other findings. In the absence of evidence, no judicial notice can be taken of custom. Doma was a defendant in possession; therefore there could be no limitation against him, and the plaintiff must succeed by the strength of his own title. If he was legitimate, the plaintiff's suit must be dismissed. If he was illegitimate, then the question is what share he was entitled to; and bearing in mind he was registered as owner, he was entitled to a half share. To sum up—

1*stly*—There is no evidence that Doma was illegitimate; therefore effect must be given to the presumption that he was legitimate.

2*ndly*—If he was illegitimate, then he was entitled to a half share, and being recorded as owner, the question cannot be raised after this lapse of time.

Babu *Ram Churn Mitter*.—I do not admit any marriage. The question of onus does not arise in this case. Thirteen witnesses have

(1) 1 B. 97. (2) 4 B. 37. (3) 1 M.H.C. 478.
(4) 13 M. I. A. 141=12 W. R. P. C. 41=3 B.L.R. P. C. 1.
(5) 4 M. H. C. 204. (6) 7 M. 407. (7) 2 A. 134.
(8) 6 A. 329. (9) 11 C. 702, affirmed=18 C. 151. (10) 1 C. 1.

stated that Doma was illegitimate. Their evidence is good evidence as of reputation under the Evidence Act. All the cases cited on the other side are irrelevant, as it has never been stated or admitted that there was a marriage.

[98] In *Narain Dhara* v. *Rakhal Gain* (1), Mitter, J., says that the presumption of marriage does not arise from continued cohabitation, when the parties are of different castes. See also *Melaram Nudial* v. *Thanooram Bamun* (2). In Mr. Justice Banerjee's Tagore Lectures on Marriage and Stridhan, pp. 73—78, it is stated that marriage between different castes is absolutely forbidden. There is a valid finding of fact that there was no marriage. Then as to the question if Doma was illegitimate, whether he would be entitled to any share. The question was not raised in the Courts below, and no issue was framed. Had such a question been raised and an issue framed, my client might have shown that marriage with a Rajwarni would not be valid and would not entitle issue of such a marriage to succeed. In *Dutti Parisi Nayudu* v. *Datti Bangaru Nayudu* (3) it is stated that the words " or other unmarried woman " were introduced by the author of the Dayabagha. At to the register, it is a register of service tenure, and does not act as an estoppel. I refer to the preamble and ss. 5, 25 and 26 of the Chota Nagpore Act.

Babu *Golab Chunder Sircar* in reply.—The case of *Melaram Nudial* v. *Thanooram Bamun* (2) related to marriage between different castes, and not between different sections of the same caste. Mr. Justice Banerjee in his lectures merely states that marriages do not take place between different sub-divisions of the same caste, but he does not say they are forbidden.

The judgment of the Court (TOTTENHAM and GHOSE, JJ.) was as follows :—

JUDGMENT.

One Sheodyal Sahu died many years ago, leaving two sons by a lawfully married wife, *viz.*, Nund Lal Sahu (now dead) and Bhupal Sahu, the plaintiff No. 1, and a third son, Doma Sahu, the defendant No. 1, who, it is alleged, was born of a concubine. He owned a certain *mocurruree* property, mouzah Jhari, and it was a dispute which took place between the parties in 1887 as regards the possession of the said property that led to the institution of this suit.

The main question which was discussed between the parties in the Courts below was whether Doma Sahu was a legitimate son [99] of Sheodyal, the plaintiffs contending that he was not, while the defendant asserted that he was. There was no contention raised in either of the lower Courts that, supposing Doma Sahu was illegitimate, he was entitled to a share of the estate left by Sheodyal. That contention, however, has been raised before us and argued at some length.

Both the Courts below have found as a fact that Doma Sahu was not the legitimate son of Sheodyal, and that Nund Lal and Bhupal were in possession of the *mocurruree* property for many years since the death of Sheodyal, and that Doma held the position of a *karpardaz* in the family. They have accordingly decreed the suit.

It has been contended before us by the learned vakeel for the appellant that in holding that Doma was not the legitimate son of Sheodyal, the Court below threw the *onus* of proof upon the defendant rather than upon the plaintiff, and that the evidence on the part of the

(1) 1 C. 1. (2) 9 W.R. 552. (3) 4 M.H.C. 204 (269).

1891 AUG. 28. — APPELLATE CIVIL. — 19 C. 91.

plaintiff relied upon by the Judicial Commissioner does not amount to any legal proof of the illegitimacy of Doma.

We are, however, of opinion that the decision of the lower appellate Court is based upon the whole evidence in the case, and that no question of *onus* of proof arises in this appeal. And as regards the evidence as to illegitimacy, we think that the facts mentioned in the judgments of the Courts below do raise a *prima facie* case for the plaintiff that Doma Sahu could not have been the legitimate son of Sheodyal Sahu ; and this *prima facie* case the defendant was bound to rebut by proving that there was a marriage between his mother and Sheodyal, or, at least, that she was treated during Sheodyal's lifetime as a lawfully married wife. The lower appellate Court has found as a fact, as has already been mentioned, upon the whole evidence that Doma was not a legitimate son of Sheodyal, and we see no reason to hold that in this it has committed any error in law.

The vakeel for the appellant referred us in the course of his argument to an office copy of the bhuinhari register of the year 1874, prepared by the revenue authorities under Ben. Act II of 1869; and it was contended that the entry in that register was conclusive evidence of the title of Doma Sahu as a co-sharer **[100]** in the *mocurruree*. This register is headed " Register of mouzah Jhari. Names of the proprietors, mocurrureedars, Doma Sahu and Bhupal Sahu." And in the body of the register a certain quantity of land is recorded as " majhahas " land in the possession of Doma Sahu and Bhupal Sahu. On referring to the preamble of the Act and the definitions, we find that " majhahas " are lands reserved for the use of the proprietors and at their absolute disposal, and include tenures known as " bhetkheta," which are ordinarily assigned as remuneration to villagers who work for the proprietor or his assigns on the majhahas land. The preamble further shows that the object of the Act was to record the tenures mentioned therein, *viz.*, bhuinhari (tenures held by persons claiming to be descendants of the original founders of the villages in which such lands are situate), bhetkheta and majhahas and other tenures, consisting of lands set apart as remuneration for services to be performed by the holders thereof, as also to prepare a register of the rights and liabilities of the holders of such tenures. And s. 26 of the Act provides that every register prepared under the Act after publication of the confirmation thereof in the *Calcutta Gazette* " shall be conclusive evidence of all matters recorded in such register in pursuance of this Act ; and from and after such publication of the confirmation of the register relating to any village, no evidence shall be received that any lands in such village not mentioned in such register are of bhuinhari or of majhahas tenure." It seems to us that so far as the register records that certain lands are "majhahas " and that Bhupal and Doma were then in possession of the lands, it is conclusive. But the register is not conclusive evidence of the title of Doma as a *mocurrureedar* of the village in which those lands are situate. It may no doubt be regarded as evidence, and indeed it has been considered by the Courts below as such.

We next turn to the contention raised before us that, supposing Doma Sahu to be an illegitimate son of Sheodyal, he is entitled under the law of inheritance to a share in the property in dispute ; his father (Sheodyal) having belonged to the Sudra class and his mother having been, according to the plaintiff's own case, a concubine in the keeping of Sheodyal. The parties are governed by the Dayabagha school of law ; and

1891 Aug. 28. — Appellate Civil. — 19 C. 91.

the learned vakeel for the [101] appellant has referred us, principally, to Dayabagha, ch. IX, verses 29 to 31 (as translated by Mr. Colebrooke), the decision of the Privy Council in the case of *Inderun Valungypooly Taver* v. *Ramaswamy Talaver* (1); as also to certain cases decided by the Bombay, Madras, and Allahabad High Courts as to the rights of an illegitimate son of a *Sudra* under the Hindu law of inheritance.

In Colebrooke's "Dayabagha," verse 29 (ch. IX) has been translated thus;—

"But the son of a Sudra, by a female slave or other unmarried Sudra woman, may share equally with other sons, by consent of the father. Thus Menu says:—'A son begotten by a man of the servile class on his female slave, or on the female slave of his slave, may take a share of the heritage, if permitted: thus is the law established."

Verse 30 runs as follows:– "Without such consent, he shall take half a share; as Yajnyawalcya directs:—'Even a son begotten by a Sudra on a female slave may take a share by the choice of the father; but if the father be dead, the brethren should make him partake of half a share'."

And verse 31 has been rendered by Mr. Colebrooke as follows:—

"Begotten on an unmarried woman, and having no brother, he may take the whole property, provided there be not a daughter's son. So Yajnyawalcya ordains:—'One who has no brothers may inherit the whole property for want of daughter's sons.' But if there be a daughter's son, he shall share equally with him: for no special provision occurs; and it is fit that the allotment should be equal, since the one though born of an unmarried woman is son of the owner; and the other, though sprung from a married woman, is only his daughter's son."

If the two verses 29 and 31 have been corr ectlyrendered by Mr. Colebrooke, the appellant's contention would seem to be correct. But the correctness of the translation was questioned before a Division Bench of this Court (Markby and Mitter, JJ.) in the case of *Narain Dhara* v. *Rhakhal Gain* (2); and Mitter, J., after referring to the original text, was of opinion that there was a [102] slight inaccuracy in Colebrooke, and that the verses in question should be rendered as follows:—*Verse* 29.—"But the son of a Sudra by an unmarried female slave, &c., may share "equally with other sons by consent of the father," and so on. *Verse* 31.—"Having no other brothers begotten on a married woman, (he) may take the whole property, provided there be no daughter's son," and so on. And the learned Judges in that case held that it was only a certain description of illegitimate sons of a Sudra by an unmarried woman that is entitled to succeed, *viz.*, the illegitimate sons by a female slave or a female slave of his slave.

The learned vakeel for the appellant has contended before us that the rendering by Mitter, J., of the two verses is not correct.

We observe that the translation as given by Mitter, J., of verse 29 was accepted as correct by Dr. (now Mr. Justice) Bannerjee in the Tagore Lecture on "Hindu Law of Marriage and Stridhan." (p. 167); and after conferring with him as to the rendering of both the verses 29 and 31, we are unable to differ from Mitter, J., in what he held to be the correct meaning of those verses. Verse 29, if *literally* rendered, may perhaps be translated in a slightly different way; but it would not make any difference in the real meaning.

---

(1) 13 M.I.A. 141.   (2) 1 C. 1.

1891 AUG. 28. — APPELLATE CIVIL. — 19 C. 91.

The said verse is a commentary upon a text of Menu, which is that "a son begotten by a man of the servile class on his female slave, or on the female slave of his slave, may take a share, &c." And it is difficult to believe that the author of the Dayabagha, while commenting upon that text, should have intended to go much beyond it, and to include the son of a *Sudra* by *any* unmarried woman, whether a female slave or not, as entitled to take a share. We observe that the author of the *Mitakshara* speaks only of the son of a Sudra by a female slave as entitled to inherit (Part II, chap. I, S. XII), and Kulluker Bhutta, while commenting upon the said text of Menu, observes as follows:—" The son of a Sudra by a female made a captive or slave under a standard or the like, or by a female slave belonging to his male slave if permitted by his father, shares equally with the sons by his wedded wife, that is, he obtains a share equal (to that of one of those sons); that is the settled rule of the Shastra" (see Shama Churn's Vyavastha-Darpana, new edition, p. 24). And it is noteworthy that the text [103] of Yajnayawalcya recited in verse 30 of the Dayabagha mentions only the case of a son begotten on a female slave.

There may be, we think, a special reason why Menu and other sages in ancient times declared that sons of a Sudra by female slaves should take a share in the paternal estate; that reason being that in those days, when slavery existed in India, a slave occupied the position of a member of the family; he, like the wife and son, was incapable of owning any property; and whatever he earned belonged to the master—(*See* Tagore Law Lectures by Babu Krishna Komal Bhuttacharjee, and the *slokas* from Menu, quoted therein, pp, 3—5). But the like reason would not exist in the case of a concubine, who is not a slave-girl; her position is wholly different indeed. There were, we may here observe, in ancient times 15 descriptions of slaves. We mean 15 different ways in which a person might become a slave to another (*see* Shama Churn's Vyavastha-Darpana, new edition, p. 27, and Macnaughten's Hindu Law, Vol. II, p. 273); and it would be necessary to show, when a right of succession is claimed by an illegitimate son, that he was born of a female slave of one or other of those descriptions.

We do not think it necessary to pursue the matter any further, it having been fully discussed in the case of *Narain Dhara* v. *Rakhal Gain* (1). And as regards the decision of the Judicial Committee in the case of *Inderun Valungypooly Taver* v. *Ramasawmy Talaver* (2), which was a case from Madras, we need only say that we agree generally in the observations of Mitter, J., in *Narain Dhara's* case in holding that the Privy Council did not intend to lay it down broadly that an illegitimate son of a Sudra is in *all* cases entitled to inherit.

As to the cases decided by the High Courts of the other Presidencies the two leading cases are *Rahi* v. *Govind Valad Teja* (3) and *Sadu* v. *Baiza and Genu* (4). These two cases at the first blush may appear to support the view of the appellant; but on examination it will be found that it is not so. In the first-mentioned case it was laid down, as observed by Westropp, C. J., in the case of *Sadu* v. *Baiza and Genu* (4), that in that Presidency " among *Sudras* [104] the illegitimate offspring of a kept woman or continuous concubine are on the same level as to inheritance as the *dasiputra* or son of a female slave by a Sudra." In the latter case it would appear that there was no question whatever, rather it was admitted

(1) 1 C. 1. (2) 13 M.I.A. 141. (3) 1 B. 97. (4) 4 B. 37.

(see p. 47) that the illegitimate son Sadu would take a share in the inheritance upon the father's death. And Mr. Justice Haridas observed in one portion of his judgment that "among Sudras, contrary to the rule obtaining among the regenerate classes, a son begotten on a female slave (dasiputra) inherits his father's property; and in this Presidency a Sudra's son by a concubine is treated as a *dasiputra*:" and in the paragraph immediately preceding that in which this passage occurs, it is stated that when the father (Manji) died, his family consisted of his two widows, a daughter, a legitimate son, and the illegitimate son, the plaintiff in the cause. The only real question, therefore, that the Court had then to consider was whether the legitimate and illegetimate sons having jointly succeeded to the estate of the father, the latter, upon the death of the former, was entitled to take the whole estate by survivorship. And it was held that he was so entitled. This case, and so far as the decision upon the said question was concerned, we may here observe, was quoted with approval by a Division Bench of this Court, and by the Privy Council in the case of *Jogendro Bhuputi* v. *Nittiyanund Man Singh* (1), where the question raised was also one of survivorship, and where the illegitimate son who claimed the property was born of a female slave.

The case of *Pandaiya Telaver* v. *Puli Telaver* (2) cited before us from the Madras High Court Reports is, we believe, the same case which went up afterwards to the Privy Council (13 Moo. I.A.) and which has already been noticed; and the cases of *Datti Parisi Nayudu* v. *Datti Bangaru Nayadu* (3) and *Krishnayyan* v. *Muttusami* (4) proceed upon the interpretation which the learned Judges put upon the word "Dasi" which they understood to include a woman kept as a continuous concubine. As regards the cases decided by the Allahabad High Court, *Sarasuti* v. *Mannu* (5) **[105]** and *Hargobind Kuari* v. *Dharam Singh* (6), they follow the Bombay and Madras cases, and proceed upon the theory that "the illegitimate offspring of a kept woman or continuous concubine amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra."

We do not, however, feel so pressed by the decisions in the other Presidencies as to differ from what was laid down for Bengal by this Court in the case of *Narain Dhara* v. *Rakhal Gain*; and following that case we hold that the defendant Doma Sahu acquired no title in the estate of Sheodyal.

The result is that this appeal must be dismissed with costs.

C. D. P. *Appeal dismissed.*

(1) 11 C. p. 702; on appeal 18 C. 151. (2) 1 M.H.C. 478 (3) 4 M.H.C. 204.
(4) 7 M. 407. (5) 2 A. 134. (6) 6 A. 329.

1891
Nov. 9.
APPEL-
LATE
CRIMINAL.
19 C. 105.

19 C. 105.

APPELLATE CRIMINAL.

Before Mr. Justice Beverley and Mr. Justice Ameer Ali.

FERASAT AND OTHERS (*Appellants*) *v.* QUEEN-EMPRESS (*Respondent*).*
[9th November, 1891.]

Cumulaitve Sentences—Rioting—Distinct offences—Separate conviction for rioting and causing hurt and grievous hurt—Penal Code (*Act* XLV *of* 1860), *ss.* 71, 148, 152, 332 *and* 333.

Eight persons, who were charged with a number of others, were tried on various charges consisting of rioting armed with deadly weapons (s. 148, Penal Code), assaulting or obstructing a public servant when suppressing a riot (s. 152), and voluntarily causing hurt and grievous hurt to deter a public servant from his duty (ss. 332 and 333). The common object set out in the charge was "to resist the execution of a decree obtained by Suresh Chunder Deb against Shaik Ali Yar in the Court of the Second Subordinate Judge of Alipore, dated 30th April 1891, and also by means of criminal force or show of criminal force to overawe the members of the police force in the execution of their lawful powers as police officers," and it was held that resistance to the police was one of the component parts of the offence of rioting charged. At the trial in the Court of Session all eight accused were convicted of the offence charged under [106] s. 148, and each was sentenced to the maximum punishment allowed under that section, viz., three years' rigorous imprisonment.

Seven out of the eight were convicted of offences under s. 152, and sentenced each to an additional term of two years' rigorous imprisonment for those offences.

Two out of the seven accused were further convicted of offences under s. 332 of the Penal Code, the hurt therein charged being caused to police officers engaged in suppressing the riot, and each sentenced to a further additional term of two years' rigorous imprisonment for that offence.

The eighth accused, who was not convicted of an offence under s, 152 was convicted of an offence under s. 333, the grievous hurt being similarly caused to a police officer, and for that offence was sentenced to five years' rigorous imprisonment in addition to the sentence of three years passed on him under s. 148.

It was contended on appeal—

(1) That the sentences passed under s. 152 in addition to those under s. 148 were illegal.

(2) That separate sentences under s. 152 and ss. 332 and 333 were illegal.

(3) That the cumulative sentences under ss. 148 and ss. 332 and 333 were illegal in so far as they exceeded the maximum sentence provided for either of the offences.

Held, as regards (1), that as resistance to the police was one of the component parts of the offence of rioting of which the accused were convicted and sentenced to the maximum punishment provided by s. 148, and having regard to the provisions of s. 71 the additional sentences under s. 152 were illegal.

Held, further, that s. 155 contemplates an assault or obstruction to some particular public servant, and that as the charge against the accused as framed was merely to the effect that they assaulted and obstructed *members of the police force* in the discharge of their duties, etc., the conviction under that section could not be upheld.

Held, as regards (2), that separate sentences under s. 152 and ss. 332 and 333 were illegal, as the hurt inflicted on the police officers, was the violence used toward them which constituted the essence of the offence under s. 152.

Held, as regards (3) that the separate sentences passed under s. 148 and ss. 332 and 333 were not illegal, there being nothing in s. 71 of the Penal Code which limits the amount of punishment that may be imposed for those offences.

[Rel. upon, 40 C. 511=14 Cr. L.J. 66=18 Ind. Cas. 402.]

---

* Criminal Appeal No. 819 of 1891, against the order passed by J. Kelleher, Esq., Sessions Judge of 24-Pergunnahs, dated the 12th of September 1891.

1891 NOV. 9. — APPELLATE CRIMINAL. — 19 C. 105.

THIS was an appeal by Sheik Ferasat and seven other persons who had been convicted, after a trial before the Sessions Judge of the [107] 24-Pergunnahs and a jury, of rioting, armed with deadly weapons, and other offences under the Penal Code.

The Sessions Judge passed separate sentences on each of the accused in respect of each of the offences of which they were severally convicted, and the only question in the appeal was whether these sentences, being cumulative, were legal or not.

The facts of the case and the nature of the sentences passed appear sufficiently in the judgment of the High Court.

Mr. *Garth* and Munshi *Shamsal Hadda*, for the appellants.

Mr. *Leith* (Offg. Deputy Legal Remembrancer), for the Crown.

The judgment of the High Court (BEVERLEY and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of the first of the trials in connection with the riot that took place in the northern part of the town of Calcutta last May. In that trial the eight appellants were convicted by a jury of various offences, and sentenced to various terms of imprisonment, as set out below. The names of the eight appellants are—

1. Shaik Ferasat.	5. Shaik Manir Khan.
2. ,, Ismail.	6. ,, Abdul.
3. ,, Masand.	7. ,, Jan.
4. ,, Hisabul.	8. ,, Shairu.

In the first place all the appellants have been convicted of rioting, being armed with deadly weapons, and under s. 148 of the Penal Code, have been sentenced to three years' rigorous imprisonment for that offence. In the next place they have all been found guilty of assaulting and obstructing the police when endeavouring to supress the riot, and, under s. 152 of the Penal Code they have all (with the exception of Shairu) been sentenced to an additional term of two years' imprisonment for that offence.

Then Shaik Ismail has also been found guilty of causing hurt to Corporal Shankar Singh, and for that offence he has been sentenced, under s. 332, to an additional term of two years' imprisonment.

Similarly, Shaik Manir Khan has been convicted of causing hurt to Constable May, Constable Rose, and Superintendent [108] Robertson, and has been sentenced to an additional term of two years.

And Shaik Shairu has been convicted of causing grievous hurt to Superintendent Robertson, and under s. 333 has been sentenced to an additional term of five years.

Now, the first point taken by Mr. Garth on behalf of the appellants is that the learned Sessions Judge has contravened the provisions of s. 71 of the Penal Code by imposing separate sentences for the offences under s. 148 and s. 152. In this contention we think Mr. Garth is right. The common object of the unlawful assembly is set out in the charge as being "to resist the execution of a decree obtained by Suresh Chunder Deb against Shaik Ali Yar in the Court of the Second Subordinate Judge of Alipore, dated the 30th April 1891; *and also* by means of criminal force or show of criminal force to overawe the members of the police force in the execution of their lawful powers as police officers." Were it not for certain observations in the learned Sessions Judge's charge to the jury, we should have supposed from the manner in which the

indictment is worded that the intention was to charge the accused with being members of an unlawful assembly which had in view the double object of resisting the execution of the decree and overawing the police. The offence as charged is one—one unlawful assembly with a common, though twofold, object. There is no indication in the charge of two distinct assemblies with two distinct objects.

What the learned Sessions Judge says on this matter is this. He begins by saying :—"You will observe that it is a double object, but either of the two objects set out, if proved to be the common object of the assembly, would be sufficient to bring it within the definition of an unlawful assembly under s. 141." Further on he says :—"Had the persons composing the assembly a common object, and if so, what was that object? This is the first question that arises for your decision in the case. The case for the prosecution is that the men assembled in the manner described for the common object of resisting by force, &c. (quoting the words of the charge as set out above)." In another passage he says :—"Next morning when Sup-Inspector Binod Behari Sing went to the spot, a crowd of about 200 people assembled there. Whether **[109]** they were already assembled when he arrived, or whether they assembled immediately after his arrival, is one of the points to which cross-examination was directed." And again :—"The case for the prosecution is, not that execution was actually taken out, but that the persons composing the assembly were under an apprehension of the removal of the mosque in execution of the decree, and that they came there armed to resist that execution."

From these and other passages in the charge it would appear that one of the questions in the case was whether there was an unlawful assembly before the arrival of the police. There is no distinct finding upon this point by the jury however; they were not asked to say what the common object of the assembly was; they merely returned a verdict upon the charge as framed, and having regard to the wording of that charge, we must take it that the common object found was, partly at any rate, to resist the police.

That being so, resistance to the police was one of the component parts of the offence of rioting of which the appellants have been convicted, and for which they have been sentenced to the maximum punishment provided by the Code. The maximum punishment under s. 152, which deals with the offence of assaulting or obstructing a public servant when suppressing a riot, is the same.

Section 71 of the Penal Code says :—

"Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided. * * * Where several acts of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

The finding of the jury, we take it, was that the common object of the unlawful assembly was to obstruct the police, and the violence used to the police was the element which rendered the members of the unlawful assembly guilty of rioting.

For this reason we are of opinion that the additional sentences passed upon seven of the appellants under s. 152 were illegal, and must be set aside.

[110] We think there is another objection to the conviction of the appellants under s. 152, to which, however, we need do no more than refer in passing. Section 152 appears to contemplate an assault or obstruction to some particular public servant. But the charge as framed in this case is to the effect that the accused "assaulted and obstructed *members of the Police Force* in the discharge of their duties, &c."

1891 Nov. 9. — Appellate Criminal. — 19 C. 105.

The next point urged by Mr. Garth was that separate sentences under s. 152 and under ss. 332 and 333 were illegal. In this contention also we agree with him. The hurt inflicted upon certain police officers was the violence used towards them, which constitutes the essence of the offence under s. 152. As, however, we have said that the sentences under that section must be set aside, we think it unnecessary to say more upon this point.

The next point which Mr. Garth argued before us was that the cumulative sentences passed upon Ismail and Munir Khan under ss. 148 and 332 were illegal. Mr. Garth contended that under the same section (71 of the Penal Code) the punishment imposed for both offences could not exceed the maximum punishment provided for either offence, and that the maximum punishment under s. 332 being three years only, and these appellants having been already sentenced to three years' imprisonment under s. 148, they were not liable to additional punishment under s. 332.

It has been laid down by a Full Bench of this Court in *Nilmoney Poddar* v. *Queen-Empress* (1) that "separate sentences (to quote the head note) passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under s. 149 of the Penal Code." But it seems to be taken for granted in that case, and it has been ruled in other cases, that where a particular person causes hurt in the course of a riot, he may be punished both for causing the hurt and for taking part in the riot. [*Chandra Kant Bhattacharjee* v. *The Queen-Empress* (2), *Mohur Mir, in the matter of*, v. *The Queen-Empress* (3), *Empress* v. [111] *Ram Partab* (4), *Queen-Empress* v. *Pershad* (5), *Queen-Empress* v. *Ram Sarup* (6).] But Mr. Garth's contention is that although separate sentences may be legal, yet that, in the aggregate they cannot exceed the maximum punishment provided for either offence. On this point we have not been able to find any distinct authority. The sentences passed in this case are clearly legal, unless they contravene the provisions of s. 71 of the Penal Code. Mr. Garth admits that the first and third clauses of that section will not apply, but he relies on the second clause. That clause runs as follows:—"Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, &c." We are unable to see how this clause can possibly apply to the case before us. The clause is intended to apply to acts which might be offences under different Statutes or under different sections of the same Statute, as, for instance, offences under s. 152 and 353 of the Penal Code. The two offences of rioting and causing hurt are distinct offence; the accused were guilty of rioting independent of the hurt they caused, they were guilty of causing hurt independent of the riot. They could be punished for rioting even though they had not themselves caused hurt; they could be punished for causing hurt even

(1) 16 C. 442. (2) 12 C. 495. (3) 16 C. 725.
(4) 6 A. 121. (5) 7 A. 414. (6) 7 A. 757.

1891 Nov. 9. — Appellate Criminal. — 19 C. 105.

though they had not themselves been members of the unlawful assembly. We think there is nothing therefore in s. 71 that limits the punishment that may be imposed for these offences, and we do not think the sentences imposed are illegal.

There remains the question of punishment generally, and Mr. Garth has contended that all the sentences imposed are unnecessarily severe.

The riot in question arose out of a belief—a mistaken belief no doubt—that an attempt was to be made that day to pull down a mosque that stood on the land for which Suresh Chunder Deb had obtained a decree. The rioters, in the first instance at any rate, were all Mahomedans, and their religious enthusiasm was doubtless worked upon and excited by the harangues of the Moulvi or [112] Muezzin, Shaik Ali Yar, who subsequently lost his life in the riot. It would appear that the first attack was made upon some dhangar coolies who, though really only spectators, had, it was believed, been brought to the spot for the purpose of demolishing the mosque. But at that time the police were on the spot, though some of them were in plain clothes, and the attack upon the dhangars seems to have been immediately followed by an attack on the police. The police were driven back, and even after reinforcements arrived, they were again and again defeated. Ultimately the mob became so excited and was so swelled by increasing numbers, that it required nearly the entire police force of the town to put down the riot. Now, whatever may have been the initial cause of the disturbance, however misguided and blinded by fanaticism the actors in it may have been, we think that we are bound to take these circumstances into consideration, and while making allowance for the religious excitement under which the rioters were no doubt labouring, to take care that the majesty of the law is sufficiently vindicated. There can be no doubt, we think, that whatever may have been the object with which the mob originally assembled, their offence was very grossly exaggerated by the unprovoked and sustained attack upon the duly constituted authorities. It is a far worse case, we think, than the riots which unhappily so frequently take place between the adherents of rival zemindars regarding the possession of land. In the fight that ensued, several persons on both sides were severely injured and more than one person was killed. We think, therefore, that the punishment ought to be such as to mark our sense of the gravity of the offence by the defiance of the authorities. At the same time as regards those who have merely been convicted of rioting, and against whom no specific acts of violence have been proved, we think that some allowance may fairly be made for the state of religious fanaticism to which their feelings had been roused by the exhortations of their religious leaders, and that it is not necessary to exact the maximum penalty allowed by the law. In the case of those appellants therefore against whom no overt act of violence has been proved, that is to say, in the case of Ferasat, Masand, Hisabul, Abdul, and Jan, we reduce the sentence under s. 148 from three to two years, and reverse that under s. 152 altogether. These [113] appellants will therefore undergo rigorous imprisonment for a term of two years only, instead of five.

As regards the other appellants, specific acts of violence have been proved against them, and it may be presumed therefore that they were ringleaders or at any rate active participators in the riot. We see no sufficient reason therefore to reduce the sentence under s. 148 in their case, but the sentence under s. 152 will be reversed in the case of Ismail and Manir Khan. These appellants have also been sentenced to two

years' imprisonment under s. 332, but having regard to the fact that they have already been sentenced under s. 148, we do not think that the sentence under s. 332 should exceed that provided by s. 323. We accordingly reduce the punishment under s. 332 to one year. The result is that these two appellants will suffer four years' imprisonment, instead of seven years.

The appellant Shairu has been sentenced to five years under s. 333 in addition to three years under s. 148. Looking to the nature of the injuries that Superintendent Robertson is proved to have received, we are of opinion that an additional sentence of two years under s. 333 will meet the ends of justice. His aggregate sentence therefore will be reduced from eight years to five years.

H. T. H. *Appeal allowed and sentences modified.*

---

19 C. 113.

ORIGINAL CRIMINAL.

Before Mr. Justice Wilson.

QUEEN-EMPRESS *v.* A. M. JACOB. [7th December, 1891.]

Commission—Criminal Procedure Code (*Act X of* 1882), *ss.* 503, 507—*Evidence Act* (*I of* 1872), *s.* 33—*Practice.*

Evidence taken under a commission issuing from the Court of the Chief Presidency Magistrate during the course of an enquiry before him cannot be used in evidence at the trial before the High Court under s. 507 of the Criminal Procedure Code.

Held, further, that on the facts before the High Court it was also inadmissible under s. 33 of the Evidence Act.

[F., 19 B. 749 (756).]

PENDING the hearing of certain proceedings in the Court of the Chief Magistrate of Calcutta in September 1891 taken against the [114] accused for alleged criminal breaches of trust, the prosecution applied to the Magistrate for a commission to examine the complainant, the Nizam of Hyderabad. The accused made no objection to the commission issuing, and it issued accordingly. The evidence of the Nizam was taken at Hyderabad in the presence of counsel for both sides; and the commission was duly returned to the Magistrate's Court, and was read as evidence in the case on the 22nd October 1891. The accused was on that day committed to the sessions. At the trial before the Sessions Court on the 7th December the prosecution sought to read the evidence of the Nizam taken under this commission which had issued from the Court of the Chief Presidency Magistrate. An affidavit of one Hormusjee Nusserwarjee, a vakeel of Hyderabad, was read on behalf of the prosecution. The affidavit ran as follows:—"That I have been for the past three years and upwards the legal adviser to the Government of His Highness the Nizam of Hyderabad. That I know and am well acquainted with all the facts and circumstances of the transactions in respect of which criminal proceedings have been instituted against Mr. Alexander Malcolm Biery Sabanjee *alias* Alexander Malcolm Jacob, on the prosecution of His Highness the Nizam, and in respect of which he now stands committed for trial before this Hon'ble Court during the present Session.

1891
DEC. 7.
—
ORIGINAL
CRIMINAL.
—
19 C. 113.

"That I am well acquainted with the manner in which the affairs of the State of Hyderabad are conducted, and have to advise the Government of His Highness the Nizam on legal matters connected with that State, and am also often consulted on administrative and other matters of the said State connected with such legal matters.

"That His Highness the Nizam seldom leaves his dominions, and being the absolute ruler thereof, if he leaves, he takes with him his Ministers and other high officers of State, in order that the affairs thereof may not be completely paralysed by his absence; and that if he had to leave Hyderabad for Calcutta to give evidence in this case, His Highness's Ministers and all the Secretaries of State would have to accompany him at enormous cost and expense, and the administration of his State would be seriously impeded and disturbed.

[115] "That the evidence of His Highness the Nizam as a witness for the prosecution in this case being absolutely necessary for the ends of justice, whilst his provisional attendance at Calcutta could not be procured without an amount of delay and enormous expense, which under the circumstances of the case would be unreasonable, the Presidency Magistrate, who enquired into and committed this case to this Hon'ble Court, granted a commission directed to His Highness the Nizam's Resident at Hyderabad, under s. 503 of the Criminal Procedure Code, after he had expressed his intention to commit the accused for trial to this Hon'ble Court, for the examination of His Highness the Nizam as a witness on behalf of the prosecution, which commission was duly executed, and the return thereof together with the deposition of His Highness taken thereunder now forms part of the record of this case.

"That the examination of His Highness the Nizam, whether under commission or in open Court, was in his own dominion a thing unheard of in the annals of the Hyderabad State before the execution of the commission hereinbefore mentioned, and great dissatisfaction was expressed by a large portion of His Highness's subjects on hearing that he was about to present himself for examination at such commission. And His Highness, in order as far as possible to allay the same, issued a special manifesto before the said commission was opened; and I say that for His Highness to leave his State to give evidence in Calcutta would create still graver dissatisfaction, and in all probability serious disturbance would take place, as the subjects in question consider it in the highest degree derogatory to His Highness's dignity and position to attend and give evidence in any Court in British India.

"That the issuing of the commission in the Police Court by the said Presidency Magistrate was not opposed by the defence, but on the contrary was consented to by them. . . . . That the accused through his counsel had the fullest opportunity for cross-examining, and did cross-examine, the Nizam, and Mr. Woodroffe, counsel for the prosecution, intimated to Mr. Inverarity, counsel for the defence, before the commission closed (as the return shows), that it was the intention of the prosecution to use the deposition of His Highness, if the High Court permitted, and stated that His Highness [116] through him expressed his readiness and willingness to be cross-examined then on all and every matter whatsoever relevant to this case; and Mr. Woodroffe further said that it was impossible for His Highness, regard being had to his position as Head and Ruler of the Hyderabad State, to be present in Calcutta to give his evidence in the High Court."

The deponent was then cross-examined on his affidavit and stated:—"I have heard that the Nizam leaves his territories and goes into other territories. I believe he has been to Ootacamund once; so far as I know he was there two or three months; but I am not sure. I did not hear that the Government of His Highness's State was paralysed during that time, but I have heard that he had his Ministers and Secretaries with him; there are three principal Secretaries. Sir Salar Jung, the Second, was Minister at that time. I do not know whether the State was paralysed on that occasion; I can't say, as I do not know what arrangements were made. The Nizam does leave his own territories on shooting excursions, for weeks at a time, four or five hours' journey by rail from Hyderabad. I don't know whether he takes his minister and Secretaries with him on those occasions, but I know books and papers used to come to him every day from the Minister, and they were returned within a day or two. I mean books containing papers for the Nizam. It takes three days by rail from Hyderabad to Calcutta; if you leave on a Monday morning you would be at Calcutta on Thursday morning. The Nizam has been to Calcutta before, when he was young and not on the throne; he has also been, I believe, to Delhi during his minority."

On re-examination, he stated as follows:—"If the Nizam was compelled to come to Calcutta, he would have to bring a large number of people with him; his coming here would entail his bringing up a large retinue with him, besides his minister and Secretaries, all his personal staff; I should think not less than one thousand people would have to come with him. The Nizam told me it would cost him not less than fifty lakhs of rupees if he came here. According to my own opinion, it would cost a great deal of money. I may mention that when the Nizam goes out into the country, even in his own dominions, he takes his zenana with him. He took his zenana with him, I believe, to Ootacamund. **[117]** Even if His Highness could transact his business here, it would be a great inconvenience for him to do so."

The evidence taken under commission was objected to by the defence, mainly on the grounds that the commission having issued from the Magistrate's Court could not be used in the High Court under s. 507 of the Code, and that under the circumstances of the case. it was inadmissible under s. 33 of the Evidence Act.

The Advocate-General (Sir *Charles Paul*) (with him Mr. *Woodroffe* and Mr. *Dunne*):—I propose to put in the commission on two grounds, *viz.*, under the Code and under the Evidence Act. The commission was applied for in the Magistrate's Court under s. 503, and the Magistrate considered that the evidence should be taken on commission under that section. The objection to the commission, if it prevails, will make it necessary for a second commission to issue from this Court. Unless some particular advantage could be gained by a second examination, so soon after the first, which was one in which the accused was represented by counsel, I apprehend the commission would be accepted as evidence, unless there is anything to prevent it being received. Section 507 allows the commission to be read in evidence in the case, and makes it part of the record. There is a difference in the language used in ss. 503 and 507. The ruling of Mr. Justice Prinsep in *Empress* v. *Dabee Pershad* (1) as to the word "case" referring to the particular enquiry before the Magistrate's Court is an incorrect interpretation of the section of the Code then in use.

(1) 6 C. 532.

1891
DEC. 7.
ORIGINAL
CRIMINAL.
19 C. 113.

If it had been intended to confine the reading of the evidence to the enquiry before the trial, some other word than "case" would have been used. What is meant by the word "case?" Can it be said that a commission is not part of a case, or that a case concludes after commitment? A commitment is a preliminary stage in a case. If the word "case" refers only to the enquiry and commitment, there would be no need of cross-examination. I submit that reading ss. 503 and 507 together, the commission forms part of the record of the case. The case continues to be a case until a verdict is given.

[118] Under s. 33 of the Evidence Act it is also admissible. The accused had an opportunity of cross-examining, and the questions at issue in the Magistrate's Court were the same as in the present trial. It would be most unreasonable to expect the personal attendance of the Nizam, and it would cause enormous expense.

Mr. *Inverarity* (with him Mr. *Pearson* and Mr. *Garth*).—As to the argument under the Code, the Magistrate no doubt thought the commission was issuable under s. 503, seeing that it would have been inconvenient to compel the personal attendance of the Nizam, and the more so when his evidence was not to be adjudged upon by the Magistrate, who was merely holding the enquiry to see whether a *prima facie* case was made out. Supposing, however, the Magistrate was wrong in deciding that the commission should issue, is his decision to bind the High Court? In s. 503 the word "case" is made use of. The word includes all the circumstances attending the particular case before the tribunal deciding as to whether the commission should issue. Section 507 clearly only refers to the Court which issued the commission, as it states that the commission shall be returned to that Court. The proper course was for the prosecution to have applied to the High Court for a commission. They had ample notice in October that the Nizam's presence would be required. The Courts are, moreover, unwilling to examine the parties to a proceeding by commission : that is so in all civil cases, and *a fortiori* the same rule should apply to criminal cases. *In re Faridunnissa* (1) the Court refused to issue a commission to examine a complainant. I also refer to *Empress* v. *Dabee Pershad* (2), *Queen-Empress* v. *Burke* (3), *Empress* v. *Counsel* (4), in all of which the principle recognized was that a complainant should not be allowed to be examined on commission, but should be brought before the Court to give his evidence in the presence of the accused and before the tribunal which was to try the accused. With reference to the evidence given in Mr. Hormusjee Nusserwarjee's affidavit, and on his cross-examination and re-examination, it was no doubt clear from such evidence, if accepted, that heavy expenditure, would be entailed by the Nizam attending the Court. But the statement of the witness as [119] to the expenditure necessary was extravagant and preposterous, and cannot be entertained as a reason for the admission of the commission. There is therefore no ground for its admission under s. 33 of the Evidence Act; and, further, the questions raised in the Magistrate's Court were not the same as are now raised, as a charge of breach of trust as a merchant has been added in this Court. In the information no reference is made to such a case. Abid's evidence was silent as to it. Moreover, the Nizam was examined in a private house at Hyderabad, and was subject to no temporal tribunal, and could not, if his statements were controverted, be indicted for perjury, and on this ground his evidence on

(1) 5 A. 92. (2) 6 C. 532. (3) 6 A. 224. (4) 8 C. 896.

commission could not be accepted in this Court—*Taylor* on Evidence, 1174.

The Advocate-General (*Sir Charles Paul*) in reply.—A complainant is a witness. The case of *Empress* v. *Counsel* (1) makes no mention of either s. 503 of the Code or s. 33 of the Evidence Act. The case *In re Faridunnissa* (2) is in favour of my proposition. In *Queen-Empress* v. *Burke* (3) the accused had not cross-examined the witnesses giving their depositions under commission. The word " case " in s. 503 is used in a different sense to that in which it is used in s. 507. The fact that the accused was not charged with criminal breach of trust as a merchant is a triviality. He was charged under s. 409. I refer also to *In re Din Tarini Debi* (4) and *In re Hurro Soondery Chowdhrain* (5).

RULING.

WILSON, J.—The prosecutor in this case, the Nizam of Hyderabad, was examined and cross-examined under a commission issued by the Chief Presidency Magistrate, during an enquiry before him, under the terms of s. 503 of the Criminal Procedure Code. *Prima facie* upon that section alone the deposition given under that commission would be capable of use only before the tribunal which issued the commission. But it has been suggested that by virtue of s. 507 it followed that the evidence taken under that commission by the Magistrate is admissible in this Court on the present trial. It is contended that the words " may, subject to all just exceptions, be read in evidence in the case " apply not only to the enquiry going on before the Magistrate, but also to the [120] subsequent trial before this Court. I think that is not so for several reasons. The sections must be construed distributively. The rational construction of the word " case " in s. 507 is that the evidence is to be used during the course of the enquiry or other proceeding before the Magistrate. The Magistrate had only to enquire whether there was a *prima facie* case or not, and on the question of the commission he had to consider whether delay, expense, or inconvenience would be occasioned on that enquiry if the Nizam had to attend to give his evidence. His decision upon that point was absolutely conclusive, but not so upon the question of the admissibility of the evidence. In other words, the propriety of the admission of the evidence should be decided, not by the Magistrate, but by the Court trying the case, and all convenience is on that side; otherwise the Magistrate, who has only to decide upon the questions whether an unreasonable delay, expense, or inconvenience would be incurred by compelling the attendance of the witness, would be deciding that the propriety of the admissibility of evidence in a particular case is to be binding on another Court.

The case appears to me to be covered by authority. There is the case of *Empress* v. *Dabee Pershad* (6) and an unreported case, the records of which I have sent for, which are sufficient authority, had I otherwise doubt of my construction of the section. I find in the unreported case an express decision of Prinsep and O'Kinealy, JJ., upon this point, namely, upon the power of a Judge to set aside a conviction upon the ground that a Sessions Judge had allowed to be used before him evidence taken under a commission issued by a committing Magistrate without first satisfying himself

(1) 8 C. 896. (2) 5 A. 92. (3) 6 A. 224.
(4) 15 C. 775. (5) 4 C. 20. (6) 6 C. 532.

1891 DEC. 7. — ORIGINAL CRIMINAL. — 19 C. 113.

that the circumstances were such as warranted the issue of the commission under s. 503 of the Code. There is also the case of the *Queen-Empress* v. *Burke* (1). Both on reason and authority, therefore, I hold that s. 507 does not render evidence taken on commission issuing from the Magistrate's Court binding on this Court.

But is it admissible under s. 33 of tht Evidence Act? That section differs altogether from the language used in the Code. The Code allows the issue of a commission in the case of unreasonable **[121]** delay, expense or inconvenience. If the prosecution had desired to obtain evidence on commission before this Court upon the grounds of inconvenience, expense or delay, they might either have applied for it to this Court of Sessions, or have applied to the High Court after commitment for a fresh commission. They took neither of these courses, and they now desire to make use of evidence in this Court obtained by a former commission issuing from the Magistrate's Court. With reference to s. 33, the evidence no doubt was taken before a person authorized by law to take it, but the witness, the Nizam, is not dead, and it cannot be said that he cannot be found, nor that he is kept out of the way, and it is not suggested that there would be any delay. The only objection to obtaining his presence here that can be raised is on the ground of expense of attendance, which it is alleged would be so great as to render his attendance unreasonable under the circumstances of the case. I do not say that s. 503 does not include any party to a proceeding, but it is certainly primarily intended for the purposes of some witness other than the parties principally concerned—persons "whose presence could not be obtained without an amount of delay and expense, which under the circumstances of the case the Court considers unreasonable."

This case is one said to turn on a conversation between the prosecutor and the accused, and, therefore, if the evidence of the prosecutor could be obtained, it ought to be so obtained. It is of the highest importance that his evidence should be heard by the jury. On the other hand, if there was sufficient evidence to show that the expense would be unreasonable, the attendance of the witness might be dispensed with. There is evidence of expense—that given by Hormusjee Nusserwarjee in his affidavit, the third and fourth paragraphs of which are the only paragraphs which deal with expense; the rest of the affidavit deals with matter which may be of importance, but which I have no power to consider—they are matters of State policy. The gentleman who made the affidavit said in an off-hand way that the Nizam could not travel to Calcutta without a thousand people, or without his zenana, and this from motives of State policy. The cross-examination shows the absurdity of the views of Hormusjee Nusserwarjee as to expense. I think the case is not brought within s. 33, and the evidence **[122]** cannot therefore be read. But if an application is desired to be made in order to facilitate the coming of His Highness here, I shall be glad to consider it.

The Advocate-General (Sir *Charles Paul*).—Under these circumstances I apply for the issue of a commission to examine the Nizam on the grounds stated in the affidavit of Mr. Hormusjee Nusserwarjee.

[WILSON, J.—The difficulty seems to be in the time at which you make your application. The jury are sworn.]

Mr. *Inverarity*.—It would be without precedent to stop a trial to issue a commission to Hyderabad. It is impracticable to go on with the

(1) 6 A. 224.

case and the commission at the same time. The prosecution have had time since October to make this application. The inconvenience alleged is not really that of the Nizam. The proclamation issued by the Nizam stated that the Nizam had no objection to appear in Court. But that "the love of his subjects was so great" that they objected to his giving evidence. Then does s. 503 apply to complainants? The only inconvenience to the Nizam is that he is the Nizam. The interests of the accused have not been noticed by the other side.

1891 DEC. 7. — ORIGINAL CRIMINAL. — 19 C. 113.

The Advocate-General (Sir *Charles Paul*) in reply.

WILSON, J.—I do not think I can grant this application. I think that to do so would be wholly without precedent after the jury have been sworn, and whilst the trial is proceeding I do not think it would be right to do so. It would lead to great difficulties and to considerable inconvenience if I were to allow the case to be postponed. I do not see how the trial and the commission can go on at the same time. I do not think I can risk the danger of granting an adjournment and allowing the jury to scatter. The prosecution are bound to be ready with their case. I cannot grant the application.

Attorneys for H. H. the Nizam: Messrs. *Sanderson & Co.*

Attorneys for the accused: Messrs. *Morgan & Co.*

T. A. P.

---

19 C. 123 (P.C.) = 18 I.A. 158 = 6 Sar. P.C.J. 91.

[123] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and *Morris Sir R. Couch and Lord Shand.*

[*On appeal from the High Court at Calcutta.*]

HANUMAN KAMAT (*Plaintiff*) v. HANUMAN MANDUR AND OTHERS (*Defendants*).
[11th November, 1891.]

Limitation Act (*XV of* 1877), *arts.* 62 *and* 97—*Money paid, suit to recover upon, failure of consideration—Consideration, failure of.*

A sale, which a member of a joint-family (Mithila) had attempted to make, went off upon the objection made by other co-sharers, but not before the purchase money had been paid. It might have been that the agreement for sale was not void from the beginning, but was only void upon objection being made; and if it was only voidable, the consideration did not fail at once, at the time of the receipt of the purchase-money, so as to render it money had and received, to the use of the payer within the meaning of art. 62 of sch. II of Act XV of 1877. But it failed, at all events, when the purchaser being opposed found himself unable to obtain possession. He would have had a right to sue at that time to recover his purchase-money upon a failure of consideration. And, therefore, the case appeared to fall within art. 97. It must fall either within that article or within art. 62.

[Diss., 25 B. 593 = 3 Bom. L. R. 190; 14 M.L.J. 443 (460); F., 26 B. 750 (756) = 4 Bom. L. R. 571; 24 M. 27 (31); 21 Ind. Cas. 581 (582); 15 M.L.T 240; (1914) M.W. N. 376; R., 29 C. 257 (259); 37 C. 67 (70) = 10 C.L.J. 558 = 13 C.W.N. 1080 = 2 Ind. Cas. 559; 18 M. 173 (174); 35 M. 39 = 8 Ind. Cas. 1087 = (1910) M.W N. 827 = 9 M L.T. 467; 21 A.W.N. 24; 17 C.P.L.R. 67 (72); 10 Ind. Cas. 716 = 14 O. C. 74; 16 Ind. Cas. 33; 17 Ind. Cas. 437 = 23 M. L. J. 487 = 12 M. L.T. 431 = (1912) M.W.N. 1130; 2 M. L. J. 34 (35); 2 N L R. 174 (175); 8 O. C. 166 (169); (1913) M W N. 1029 = 21 Ind. Cas. 740 (742) = 14 M.L.T. 524 (525); D., 32 C. 527 = 1 C.L.J. 167; 30 M. 316 (318) = 17 M.L.J 149; 5 A.L.J. 484 (485) = A.W.N. (1908) 185; 40 C. 187 (190) = 15 Ind. Cas. 707; 35 A. 419 = 11 A.

1891 Nov. 11.

PRIVY COUNCIL.

19 C. 123 (P.C.) = 18 I.A. 158 = 6 Sar. P.C.J. 91.

L.J. 606 (612) = 19 Ind. Cas. 986 ; 37 B. 538 = 20 Ind. Cas. 254 = 15 Bom. L. R. 559 (563) ; 9 Ind. Cas. 237 = 66 P.L.R. 1911 = 202 P.W.R. (1911) ; 10 Ind. Cas. 486]

APPEAL from a decree (14th June 1887) of the High Court (1) affirming a decree (22nd March 1886) of the Subordinate Judge of Bhagalpur.

The plaintiff sued on 4th March 1885 to recover from the defendants, as joint-survivors, according to the Mithila law, agreeing on this point with the Mitakshara, of Dowlut Mandur, deceased in 1883. The claim was for Rs. 3,600 paid by the plaintiff to the last named on the 1st August 1879, as the price of a two-annas-and-a-half share in a mauza which the plaintiff had agreed to buy.

The question now was whether the claim was barred by time; with reference to when the consideration for this money had failed, possession not having been given; and the appellant [124] contended that the case was governed by art. 97 of sch. II of Act XV of 1877; and not by art. 62, as has been held in the Court below.

Dowlut Mandur and his five sons, the latter now being the first five defendants, formed, together with the sons of the first three, a joint and undivided family, of which Dowlut was the karta or manager.

In that capacity he had obtained the mauza for the family; and after the sale of the $2\frac{1}{2}$ annas share the Collector of the district, rejected, on the 22nd December 1880, an application for mutation on the record of the share into the purchaser's name. This he did on the opposition made by the family to the transfer. On the 16th March 1881, Hanuman Kamat sued for possession, not asking, however, for a return of the purchase-money in case he should not be held entitled to have the sale completed. The first Court decreed the suit in his favour. But the District Court dismissed the suit on the 18th December 1882. The latter Court referred to *Sadabart Prasad Sahu* v. *Foolbash Koer* (2), as showing the inability of a member of a joint-family to encumber joint property without the consent of his co-sharers, and was of opinion that this case fell within the same principle.

This was affirmed, on the 5th March 1884, by the High Court which added, with reference to the death of Dowlut Mandur in 1883, that it had not been shown that he had sued in order to pay off antecedent personal debts.

The present suit, for the recovery of the purchase-money and interest, was dismissed by the Subordinate Judge, who held that in the suit of 1881 the plaintiff should have demanded the return of the purchase-money as one of his remedies. And that he was now barred by the 43rd section, Civil Procedure, 1882.

On the plaintiff's appeal to the High Court a Division Bench (WILSON and O'KINEALY, JJ.) reversed the above, holding that the 43rd section in no way applied. But they dismissed the suit on limitation, applying art. 62. The purchase-money was money received to the plaintiff's use. The failure of the consideration was in their opinion, a failure from the beginning, though this was [125] not manifest at the time. The judgment is reported in I.L.R., 15 Calc. 51.

Mr. *R. V. Doyne*, for the appellant, argued that not the 62nd, but the 97th article was applicable; and under the latter, the suit was within time. The date of the failure of the consideration was the date of the dismissal of Hanuman's suit for possession. Thus the suit was within

(1) 15 C. 51. (2) 3 B.L.R. F.B. 31.

three years. It was also submitted that Dowlut Mandur having died pending the appeal to the High Court in the suit for possession, the liability of his sons to pay a debt not incurred by him for any immoral purpose had arisen.

1891 NOV. 11. — PRIVY COUNCIL. — 19 C. 123 (P.C.) = 18 I.A. 158 = 6 Sar. P.C.J. 91.

JUDGMENT.

No one appeared for the respondents. Their Lordships' judgment was delivered by

SIR R. COUCH.—On the 1st August 1879, one Dowlut Mandur, the father of the respondents, sold to the appellant $2\frac{1}{2}$ annas out of 8 annas of a certain property, and the consideration was then paid by the appellant. On the 1st April 1881, and after the death of Dowlut Mandur, the appellant filed a plaint, in which he stated that after the purchase he had applied to the Collector for registration of his name in respect of the $2\frac{1}{2}$ annas which had been so sold to him; that his application was opposed on the part of two of the members of the joint-family of which Dowlut Mandur was the head; and that in consequence of that opposition the Court rejected his petition for registration of his name on the 22nd December 1880; and treating that as giving him a cause of action for a suit to recover possession, he asked in the plaint that possession might be given to him. The Subordinate Judge of Bhagalpur decreed the suit; the District Judge dismissed it, and on appeal by the appellant to the High Court that Court dismissed the appeal. On the 4th March 1885 the appellant commenced a suit for the recovery of his purchase-money and interest. The Second Subordinate Judge of Bhagalpur dismissed this suit on the ground that it was barred by s. 43 of the Civil Procedure Code. The High Court, on appeal from the Subordinate Judge, held the suit to be barred by the Law of Limitation, apparently under the 62nd article of the second schedule to the Limitation Act. There are two articles in that schedule which it has been said may be applicable to the present case. [126] The 62nd article provides that, in a suit for money had and received, the period of limitation runs from the time of the money being received. The 97th article applies to a suit to recover money upon an existing consideration which afterwards fails, and it is said that the period of limitation is to date from the time when the consideration failed. Their Lordships are of opinion that the case must fall either within art. 62 or art. 97. If there never was any consideration, then the price paid by the appellant was money had and received to his account by Dowlut Mandur. But their Lordships are inclined to think that the sale was not necessarily void, but was only voidable if objection were taken to it by the other members of the joint-family. If so, the consideration did not fail at once, but only from the time when the appellant endeavoured to obtain possession of the property, and being opposed, found himself unable to obtain possession. There was then, at all events, a failure of consideration, and he would have had a right to sue at that time, to recover back his purchase-money upon a failure of consideration; and, therefore, the case appears to them to be within the enactments of art. 97.

It appears to their Lordships unnecessary to give any opinion upon the other question which was decided by the High Court and the Subordinate Court, the High Court differing from the latter, namely, whether the appellant, ought, in his suit brought in 1881, to have included a claim to recover back the purchase-money. It may be a question of some difficulty in a case of this kind as to what is the effect of s. 43 of the Civil Procedure Code. Their Lordships consider it is unnecessary for them to give any

1891 Nov. 11. — Privy Council. — 19 C. 123 (P.C.) = 18 I.A. 158 = 6 Sar. P.C.J. 91.

opinion upon that, and they abstain from doing so. Upon the question of limitation they are of opinion that the decree of the High Court ought to be affirmed, and the appeal dismissed; and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

---

19 C. 127.

[127] CRIMINAL RULE.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

ANANDA CHANDRA BHUTTACHARJEE (*Petitioner*) *v.* CARR STEPHEN (*Opposite Party*).* [13th November, 1891.]

Code of Criminal Procedure (Act X of 1882), *ss.* 144, 435, 439—*Charter Act* (24 *and* 25 *Vict.*, c. 104), *s.* 15—*Order prohibiting collection of rents—Temporary orders in urgent cases of nuisance—Powers of revision and superintendence of the High Court.*

An order forbidding a person who claimed an interest in certain properties from collecting any rent from the raiyats on the properties, does not fall within s. 144 of the Code of Criminal Procedure. Such an order is therefore made without jurisdiction, and may be set aside under the High Court's powers of revision and superintendence conferred by s. 439 of the Criminal Procedure Code and s. 15 of the Charter Act.

Chapter XI of the Code of Criminal Procedure refers to interference or dealing of some kind with the land itself or with something erected or standing upon it, and is directed to the prevention or direction by prompt order of some definite act on the part of an individual so that injury or nuisance may not be caused.

[**F.**, 25 C. 852 (856); 26 C. 188 (193); 2 C.W.N. 572 (573); 4 L.B.R. 75 (76); **R.**, 24 B. 527 (532); 17 A. W.N. 50; 4 Bom.L.R. 582 (583); 12 Bom.L.R. 1029 (1033) = 11 Cr.L. J. 705 = 8 Ind. Cas. 747; 8 Cr.L.J. 170 = 1 S.L.R. 50; 5 O.C. 1 (4); **D.**, 24 M. 45 (46) = 2 Weir 92.]

IN this case a rule was granted by the High Court calling upon the District Magistrate of Mymensingh to shew cause why an order passed by him on the 15th September 1891, and purporting to be made under the provisions of s. 144 of the Code of Criminal Procedure, should not be set aside.

Ananda Chandra Bhuttacharjee in his petition to the High Court stated that one Dwarka Nath Chuckrabati died on the 5th January 1886, having two days previously executed his will, whereof he appointed his wife, Bama Sundari Dabya, the executrix, but no probate of the will had been taken out by her; that the said Dwarka Nath Chuckrabati on the 22nd January 1885 granted an ijara lease of all his zamindari properties in favour of one Gour Mohun Chuckrabati for the term of ten years; that the said ijaradar had all along been in possession of the ijara properties, and **[128]** his title had always been recognized by Bama Sundari; that the ijaradar on the 4th Bysack 1296 granted a dar-ijara in respect of all the ijara properties to the petitioner, and the petitioner had since been in possession of the said properties by collecting the rents and profits from

* Criminal Rule No. 469 of 1891, against the order passed by H. A. D. Phillips, Esq., Magistrate of Mymensingh, dated the 15th of September 1891.

1891 NOV. 13.

CRIMINAL RULE.

19 C. 127.

the raiyats and tenants on the land, paying the dar-ijara rent in accordance with the terms of the dar-ijara pottah.

The petition further stated that on the 9th September 1891, the District Magistrate of Mymensingh on the application of Mr. Carr Stephen, the manager of Bama Sundari's estate, issued a notice calling upon one Prasanna Kumar Chuckrabati to appear before him, and the said Prasanna Kumar Chuckrabati appeared and presented to the Magistrate a petition complaining of various illegal acts committed by the said Mr. Carr Stephen, and praying that he might be bound down to keep the peace. That the Magistrate after hearing both parties passed on order on the 15th September 1891, under s. 144 of the Code of Criminal Procedure, prohibiting the petitioner from collecting the rents of the properties held by him under dar-ijara.

The order of the Magistrate proceeded upon the grounds (*inter alia*) that by a decree of the Privy Council, dated the 18th July 1891, the will of the deceased Dwarka Nath Chuckrabati was declared to be genuine; that under that will Bama Sundari was entitled to a 4 anna share in the estate of the testator on behalf of her adopted minor son, Dejendra Nath Chuckrabati; the remaining 12 annas of the said estate being owned by Prasanna Kumar Chuckrabati, Satis Chuckrabati, Jogesh Churckrabati; that Bama Sundari was entitled to probate under the Privy Council decree and to collect 4 annas of the rents, and concluded as follows:—

"But there is no serious denial of Bama Sundari's right to collect 4 annas. The only petition put in is that of the dar-ijaradar, though the notice was issued to Parasanna Kumar Chuckrabati. He and others who may be opposing Bama Sundari are sheltering themselves behind the dar-ijaradar.

"It remains, then, to see if this dar-ijara is *bona fide*. If it is, of course it must run to the end of its term or two years longer. But I am clearly satisfied on the lessee's own statement that he [129] is not the dur-ijaradar. He is a mere puppet and creature. He says his annual income is Rs. 120, and he has probably over-estimated it. He has given no security for the rent. He does not collect rents, and money does not pass through his hands. He remains in Kishoreganj, where he is a tahsildar in one of Prasanna Babu's mahals. He has never been sued for rent, nor has he sued any raiyat for rent. He says he owes Rs. 1,000 or Rs. 1,500. He is Prasanna Babu's maternal uncle and a great friend of his. It seems Prasanna Babu is really getting the rents for Tara Sundari, one of Dwarka Nath's widows, and her claim is quite inconsistent with the will. Further, the lessee does not pay his servants, or rather the zemindari servants. They are paid by Goluck Chundra Bhuttacharjee, Prasanna Babu's naib.

"It follows from the above that, so far the Criminal Court is concerned, protection must be given to Bama Sundari. I do not think it is necessary to institute proceedings under s. 107, Criminal Procedure Code, at present; but if after this order any persons attempt to collect rents otherwise than in Bama Sundari's behalf, they will be proceeded against in due course of law.

"The dar-ijaradar is the only person put forward to oppose Bama Sundari's petition. Therefore he is the only person against whom I shall pass an injunction under s. 144 of the Criminal Procedure Code.

"Ananda Chandra Bhuttacharjee is hereby directed, under s. 144, Criminal Procedure Code, to abstain from collecting rents from the raiyats in respect of the 4-anna share to which Bama Sundari is

1891 NOV. 13. — CRIMINAL RULE. — 19 C. 127.

entitled under the will and the Privy Council decision. He is directed to abstain from any interference with the raiyats or from molesting or intimidating them in any way. This direction is made as likely to prevent riots, affrays, and disturbances of the peace, and also as likely to prevent obstruction, annoyance and injury to Bama Sundari and the officers employed by her in the collection of rents. The direction is made against the said Ananda Chandra Bhuttacharjee, as he is not a *bona fide* dar ijaradar, and has not in reality been acting as such, and to permit him to collect rents would in reality be to reverse the Privy Council decision ; that is, it would authorize collections to be made on behalf of Tara Sundari, who lost the case in the Privy Council."

[130] The rule was granted upon the ground that the acts from which the petitioner was ordered to abstain were not acts coming within the meaning and intention of chap. XI of the Criminal Procedure Code.

Babu *Durga Mohun Das* appeared in suport of the rule.

Babu *Iswar Chunder Chuckerbutty* appeared to shew cause.

The authorities cited appear from the judgment.

JUDGMENT.

The judgment of the High Court (PETHERAM, C.J., and GHOSE, J.) was delivered by

PETHERAM, C.J.—This was a rule which was obtained for the purpose of revising an order of the District Magistrate of Mymensingh, dated the 15th September in this year, and which, on its face, professed to be made under s. 144 of the Code of Criminal Procedure.

The order was an order forbidding a person who claimed an interest in certain properties from collecting any rent from the raiyats on the properties ; and the only question which it appears to us necessary to decide is whether such an order can be made under that section at all.

The section appears in the chapter which is headed " Temporary Orders in Urgent Cases of Nuisances," and reading the whole chapter we think it clear that it relates to interference or dealing of some kind with the land itself or with something erected or standing upon it ; and the section is directed to the prevention or direction by prompt order of some definite act on the part of an individual so that injury or nuisance may not be caused. Sections 145 and 146, which are in the next chapter, deal with the possession of property, and are sections which may be appropriately referred to where it is desired to prevent interference by one party with the collection of rent by another, and matters of that kind.

On the whole, we think that such a case as the present, where the Magistrate is asked to interfere to prevent a person from collecting rents from the raiyats generally of any property, does not fall within s. 144 at all.

But this matter is not new. In the case of *Abayeswari Debi* v. *Sidheswari Debi* (1), a Division Bench of this Court took exactly **[131]** the same view. In that case, which is absolutely on all fours with the present, this Court held that such a case as this was not within s. 144. And that was also the view that was taken in the case of *Prosunno Coomar Chatterjee* v. *The Empress* (2). The Magistrate, Mr. Phillips, while making the order complained against, has apparently ignored or lost sight of these decisions, which he was bound to have followed.

---

(1) 16 C. 80. (2) 8 C.L.R. 231.

1891
Nov. 13.
Criminal Rule.
19 C. 127.

The only other point which has been argued before us, and this is the point which has been most pressed, is that this Court has no jurisdiction to interfere with this order at all, on the ground that orders made under s. 144 are, by the last clause of s. 435, exempted from the operation of that section. The first answer which can be made to that is, that the mere statement that an order is made under s. 144, if it is not such an order as is contemplated by the section, and could not be made under it, does not make it an order under that section, and consequently any Court having jurisdiction to review orders under s. 435 would not be prevented from doing so by the proviso to that section, because the order under review, though headed under s. 144, was not in fact made under that section at all. See *Re Krishna Mohun Bysack* (1).

But there is another answer. Under s. 439, this Court has the general power of revision of all orders made by inferior Criminal Courts which come before it in any way whatsoever; and it is clear that this Court, under cl. 15 of the Charter, has a general power of superintendence, and under that power can send for any record which it may desire to see. In this particular case this Court did send for the record; but as the Magistrate had already sent the record to the Bengal Government, the record was sent for from that Government, and it has now come to this Court in pursuance of that requisition, so that the record is now before the Court in a perfectly regular and proper way, and under s. 439 this Court has cognizance of the record, and sees, upon the face of the record, that an illegality has been committed, and that an order has been made which the Magistrate has no jurisdiction to make.

We are further of opinion, that this Court has power to interfere under the Charter Act if the proceeding of the Magistrate is **[132]** *ultra vires* and could not be made under s. 144. That this is so has been accepted in this Court for a great many years, both under s. 144 of the present Code and s. 518 of the old Code. There is a whole current of decision to that effect with which we agree [see *Banee Madhub Ghose* v. *Wooma Nath Roy Chowdhry* (2), *Chunder Coomar Roy* v. *Omesh Chunder Mojoomdar* (3), *Sree Nath Dutt* v. *Unnoda Churn Dutt* (4), *Shurut Chunder Banerjee* v. *Bama Churn Mookerjee* (5), *Bradley* v. *Jameson* (6), *Gopi Mohun Mullick* v. *Taramoni Chowdhrani* (7), *Empress* v. *Prayag Singh* (8), *Abayeswari Debi* v. *Sidheswari Debi* (9)]. The learned vakeel for the opposite party before us has, however, relied upon a Full Bench decision of this Court in *Re Chunder Nath Sen* (10), but that case was considered and explained in the case of *Krishna Mohun Bysack* (1), and in the case of *Gopi Mohun Mullick* v. *Taramoni Chowdhrani* (7) which was a case decided by a Full Bench composed of 12 Judges of this Court. The rule will be made absolute.

A. A. C. *Rule absolute.*

---

(1) 1 C.L.R. 58. (2) 21 W.R. Cr. 26. (3) 22 W.R. Cr. 78.
(4) 23 W.R. Cr. 34. (5) 4 C.L.R. 410. (6) 8 C. 580.
(7) 5 C. 7. (8) 9 C. 103. (9) 16 C. 80.
(10) 2 C. 293.

1891
Nov. 23.

FULL BENCH.

19 C. 132 (F.B.).

19 C. 132 (F.B.).

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice O'Kinealy, and Mr. Justice Ghose.

PURAN CHAND AND OTHERS (*Decree-holders*) *v.* ROY RADHA KISHEN (*Judgment-debtor*).* [23rd November, 1891.]

Mesne profits, application for ascertainment of—Limitation Act (XV of 1877), *arts.* 178 *and* 179—*Code of Civil Procedure Act (XIV of* 1882), ss. 211, 212.

Neither art. 178 nor art. 179 of the Limitation Act applies to an application to ascertain the amount of mesne profits awarded by a decree in [133] accordance with the provisions of ss. 211 or 212 of the Code of Civil Procedure.

[**N.F.**, 24 B. 149 (155); **F.**, 25 A. 385 (387) = 23 A.W.N. 80; 24 B. 345 (349); 25 C. 203 (205); 6 C.L.J. 462 (466); 5 Ind. Cas. 272; **Rel.**, 13 Ind. Cas. 186; 20 Ind. Cas. 685 (687) = 18 C.W.N. 450; **Appr.**, 22 C. 425 (432, 433); **R.**, 14 A. 531 = 12 A.W.N. 154; 19 A. 296 = 17 A.W.N. 62; 26 A. 623 = A.W.N. (1904) 146; 23 B. 644 (652); 33 C. 867 (876) = 4 C.L.J. 141 (148); 37 C. 796 (806) = 12 C.L.J. 328 = 15 C.W.N. 337 = 6 Ind. Cas. 537; 39 C. 220 (225) = 16 C.W.N. 109 = 11 Ind. Cas. 939; 14 Bur. L.R. 323 = 4 L.B.R. 83; 11 C.L.J. 501 = 5 Ind. Cas. 387; 16 C.L.J. 3 (5) = 15 Ind. Cas. 709; 11 C.P.L.R. 141 (142); 15 Ind. Cas. 664; 18 Ind. Cas. 586 (590) = 24 M.L.J. 96 (104) = 13 M.L.T. 79 = 1913 M.W.N. 114 (119); 21 C. 550 (553); **D.**, 28 C. 242 (245).]

THIS was a reference to a Full Bench by Petheram, C.J., and Beverley, J., arising out of an order of the District Judge of Patna, who had dismissed the petition of the decree-holders for realization of mesne profits, on the ground that the claim was barred by limitation, the case being governed by the ruling in *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose* (1).

The order of reference ran as follows:—

This is a second appeal under the following circumstances:—

On the 31st May 1884, the appellants obtained a decree for possession of certain lands apparently with mesne profits. The decree is silent as to the period for which mesne profits are decreed; all that is said is:—"The amount of mesne profits shall be ascertained in the execution department."

On the 22nd June 1886, the decree-holders applied for execution of the decree, and in pursuance of that application possession is said to have been delivered on 6th September 1886.

On the 27th May 1887, the decree-holders complained that possession had not been regularly made over to them, and possession was accordingly again delivered on the 17th August 1887. The costs of the suit were also realized.

The applications of June 1886 and May 1887, had also contained a prayer that the mesne profits might be ascertained. Another application to this effect was made on the 3rd August 1889, but that appears to have been met by an objection that no mesne profits were awarded by the decree. That objection, however, was overruled, and on the 10th June and again on the 19th July 1890, the decree-holders applied to have the mesne profits ascertained.

* Appeal from order No. 123 of 1891, against the order of the District Judge of Patna, dated the 26th January 1891, reversing an order of Babu Karuna Das Bose, Subordinate Judge of that district, dated the 16th September 1890.

(1) 14 C. 50.

On this last occasion the judgment-debtor, relying on the decision in *Anando Kishore Das Bakshi* v. *Anando Kishore Bose* (1), objected that the application was barred, not having been made within three years from the date on which posssession was given of the lands in suit.

[134] The first Court overruled this objection, but its order has been reversed by the District Judge of Patna, on the ground that possession of the lands was given on the 6th September 1886, and that, under the decision above referred to the application of the 19th July 1890 was barred by art. 178, sch. II of the Limitation Act.

We are not prepared to assent to the correctness of the decision in *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose* (1). The principle upon which that decision is based is that an application to ascertain the amount of mesne profits decreed is not an application to *execute* the decree, but an application to *complete* the decree, and that the period within which such an application must be made is prescribed by art. 178, and that art. 179 will not apply. But putting aside the question whether, in this view of the application, it would be incumbent on the decree-holder to make an application to complete the decree, we think that under the terms of the Code the application must be regarded as an application to execute the decree within the meaning of art. 179. Reading ss. 211, 212, 230 (*b*) and 244 (*a*) and (*b*) of the Code together, we are of opinion that the intention of the Legislature was that an application to ascertain the amount of mesne profits awarded by a decree should be deemed to be an application in execution of the decree, and therefore governed as regards limitation by the provisions of art. 179 of the Limitation Act.

We therefore refer the following question for the decision of a Full Bench :—

Whether an application to ascertain the amount of mesne profits awarded by a decree in accordance with the provisions of ss. 211 or 212 of the Code of Civil Procedure is, as regards limitation, to be governed by art. 178 or by art. 179 of the Limitation Act ?

If the decision of the Full Bench be that art. 179 is applicable, this appeal must be allowed, and the order of the first Court restored with costs in all Courts ; if, on the other hand, art. 178 is held to be applicable, we think that upon the Judge's finding the appeal must be dismissed.

[135] Babu *Uma Kali Mookerjee*, for the appellants.—I submit the view taken by the referring Judges is the correct view. The present application is clearly an application to execute the decree and not to complete the decree, and art. 179 of the Limitation Act will therefore apply. The decree is made under s. 211 of the Code, and the question regarding the amount of the mesne profits has to be determined in execution as provided by s. 244 (*a*) and (*b*). The case of *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose* (1) should be overruled.

Munshi *Mahomed Yusuf* for the respondents.—Art. 178 of the Limitation Act was intended to apply to a case of this kind. This application is not for the purpose of executing the decree, but is in continuance of the original suit in order to complete the decree—*Bunsee Singh* v. *Mirza Nuzuf Ali Beg* (2), *Wodoy Tara Chowdhrain* v. *Syud Abdool Jubbar Chowdhry* (3), *Fuzeelun* v. *Syud Keramutt Hossein* (4).

Baboo *Uma Kali Mookerjee* was heard in reply.

(1) 14 C. 50. (2) 22 W. R. 328. (3) 24 W. R. 338. (4) 21 W. R. 212.

1891 Nov. 23. — FULL BENCH. — 19 C. 132 (F.B.).

The judgment of the Full Bench (PETHERAM, C.J., PRINSEP, PIGOT, O'KINEALY, and GHOSE, JJ.,) was as follows:—

JUDGMENT.

It appears that the appellants in this case obtained a decree on the 31st May 1884 for possession of certain lands, with a direction that the amount of mesne profits should be ascertained in execution of the decree. An application for execution was made on the 22nd June 1886 in regard to the immoveable property It was renewed on the 27th May 1887, and, on the 17th of August of that year, possession of the real property was delivered to the appellants. The costs of the suit were also realized. In the applications of June 1886 and May 1887, the appellants also asked that the mesne profits might be ascertained according to the direction in the decree. Another application to the same effect was made on the 3rd August 1889 and was met by the objection that no mesne profits had been awarded by the decree. This objection was overruled, and, on the 19th July 1890, the decree-holders applied to have the mesne profits ascertained. The judgment-debtor then objected that the application was barred, and, in support of that objection, he cited [136] the case of *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose* (1), which decided that all applications of that nature fell within art. 178, sch. II of the Limitation Act, and were barred if not made within three years from the delivery of possession of the lands decreed This objection was overruled by the first Court, but was given effect to in the Court of first appeal. The appellants, dissatisfied with that decision, brought a second appeal in this Court and the Judges of the Divisional Bench who heard the appeal dissenting from the decision already referred to, referred the following question for the decision of a Full Bench—"Whether an application to ascertain the amount of mesne profits awarded by a decree in accordance with the provisions of s. 211 or 212 of the Code of Civil Procedure is, as regards limitation, to be governed by art. 178 or by art. 179 of the Limitation Act."

Sections 211 and 212 of the present Procedure Code correspond to ss. 196 and 197 of Act VIII of 1859. In order to determine the question referred to the Full bench, we must first consider the form of the order. No time is stated in the order as to the period for which mesne profits should be calculated; but, in the subsequent applications for mesne profits made by the appellants, the order was always treated as an order for mesne profits from the date of suit to the date of obtaining possession. This view of the order may be supported by the judgment of their Lordships of the Privy Council in the case of *Fakharuddin Mahomed Ahsan Chowdhry* v. *The Official Trustee of Bengal* (2). We shall therefore take it, for the purposes of the decision of this case, that the meaning of the present order regarding *wasilut* is that *wasilut* should be calculated from the institution of the suit to the date of obtaining possession. The object of the Legislature in enacting s. 211 appears to have been the prevention of unnecessary litigation and multiplicity of suits, and for this purpose they empowered the Courts to give, with the possession of the real property, such *wasilut* as they thought the plaintiff would be entitled to by the law. The proceedings, therefore, in determining the amount of *wasilut*, are not proceedings in execution of a decree in regard to any fixed sum, but merely a continuation of the original suit and

(1) 14 C. 50.

(2) 8 I.A. 197=8 C. 178.

1891 Nov. 23. — Full Bench. — 19 C. 132 (F.B.).

carried on in the same way as if a single suit were brought for mesne profits by [137] itself. This has been the view accepted by this High Court in the cases of *Fuzeelun* v. *Syud Keramut Hossein* (1), *Bunsee Singh* v. *Mirza Nuzuf Ali Beg* (2), *Dildar Hossein* v. *Mujeedunnissa* (3), and *Anundo Kishore Dass Bakshi* v. *Anundo Kishore Bose* (4). We must therefore take it as settled law, so far as this Court is concerned, that an order and decree in this case referring to mesne profits is in the nature of an interlocutory order, and that there is nothing that can be executed under s. 255 of the Code until the actual amount of mesne profits has been found and determined—*Radha Prasad Singh* v. *Lal Sahab Rai* (5).

Nor is the question, if any, and, if so, what limitation applies to applications to have mesne profits assessed, devoid of authority. In the case of *Fuzeelun* v. *Syud Keramut Hossein* (1), it was argued that applications asking the Court to assess mesne profits were governed by s. 20 of Act XIV of 1859, which was the Limitation Act then in force. That section ran as follows:—"No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution."

That contention was overruled, and it was decided that there was no bar to proceedings for assessment of mesne profits arising out of the Limitation Act. This decision was followed in the case of *Bunsee Singh* v. *Mirza Nuzuf Ali Beg* (2), and this latter decision was approved of in the case of *Dildar Hossein* v. *Mujeedunnissa* (3); and made applicable to decrees passed under s. 197 of Act VIII of 1859 which corresponds to s. 212 of the present Code. Thus it is clear that the view which prevailed till the decision of the case of *Anundo Kishore Dass Bakshi* v. *Anundo Kishore Bose* (4), was that proceedings under ss 196 and 197 of Act VIII of 1859 were proceedings similar to those in a regular suit not governed by the Limitation Act at all, although it had been argued that s. 20 of that Act, which more or less corresponds [138] with art. 179 of the present Limitation Act, applied. The case of *Anundo Kishore Dass Bakshi* v. *Anundo Kishore Bose* (4) was one under the present Civil Procedure Code, and the Judges who decided it in no way dissented from the opinion of the previous Courts in so far as art. 176 of the Limitation Act was concerned; but, dissenting from the decision in the case of *Baroda Sundari Dabia* v. *Fergusson* (6), they decided that art. 178 of sch. II of the Limitation Act applied to applications under s. 211 of the Code. Article 178 runs as follows:—"Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, s. 230,—three years from the time when the right to apply accrues."

In the case of *Govind Chunder Goswami* v. *Rungunmoney* (7) it was pointed out that where general words are used, those words must be construed with some limitation; that the article was not intended to govern applications for transfer of cases from one Court to another or to transfer a case to the bottom of the board, or to applications for change of attorneys or other applications of that nature. The same principle was laid down in the case of *Kylasa Goundan* v. *Ramasami Ayyan* (8) and *Vithal Janardan*

(1) 21 W.R. 212. (2) 22 W.R. 328. (3) 4 C. 629. (4) 14 C. 50.
(5) 13 A. 53 (65). (6) 11 C.L.R. 17. (7) 6 C. 60. (8) 4 M. 172.

1891 Nov. 23. — Full Bench. — 19 C. 132 (F.B.).

v. *Vithojirav Putlajirav* (1), in which it was held that to make the provisions of art. 187 applicable, the application must be of such a nature that the Court would not be bound to exercise the powers desired by the applicant without such an application being made. There are numerous sections in the Code which direct that for certain relief, an application must be made; but there is nothing in the Code compelling a person having the conduct of a pending suit to make formal applications from time to time, asking the Court to proceed to judgment. The form of procedure and the manner of dealing with suits is amply provided for by the Code. In the present case, so far as we can see, the Court was bound, on the oral applications of the appellants' pleader, indeed without any such application at all, to fix a date for the first hearing of the enquiry, and after hearing the parties and fixing such issues as might be necessary for the disposal **[139]** of the subject-matter in dispute, to proceed with it as if it were dealing with a case based on a plaint. Upon the dates of the previous applications made for execution of the decree, and having regard to the nature of them, we think that the applications, were art. 178 or 179 applicable, would not have been barred. But upon the question referred to us, we think the conclusion must be that neither art. 178 nor art. 179 of the Limitation Act is applicable, that the application is not barred, and that this appeal must be decreed with costs.

A. A. C. *Appeal decreed.*

---

19 C. 139 (F B.).

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice O'Kinealy, and Mr. Justice Ghose.

ASHUTOSH BANNERJEE (*Judgment-debtor*), *Appellant v.* LUKHIMONI DEBYA (*Decree-holder*), *Respondent.**
[23rd November, 1891.]

Future maintenance, decree declaring right to—Maintenance subsequently falling due enforced in execution.

Future maintenance awarded by a decree when falling due can be recovered in execution of that decree without further suit.

[**R.**, 38 C. 13 (22) = 12 C.L J. 130 = 14 C.W.N. 918 = 6 Ind. Cas. 826; 12 C.L.J. 173 (183) = 15 C.W.N. 205 (213) = 7 Ind. Cas. 118; 17 M.L.J. 423 (430) (**F.B.**); **D.**, 16 A. 179 (180, 181) = 14 A.W.N. 17; 22 C. 903 (907); 15 Ind. Cas. 389 (391) = 15 O.C. 99.]

ON the 4th January 1889 one Lukhimoni Debya obtained a consent decree for maintenance against Ashutosh Bannerjee in the High Court. The decree was in the following terms:—"It is ordered and declared by consent of parties that the decree of the lower Court be, and it hereby is, set aside, and, in lieu thereof, that the defendants 2 and 3 do pay, out of the estate of the late husband of the plaintiff, Rs. 2,000 on account of maintenance from September 1882 to December 1885, with interest at the rate of 6 per cent. per annum from the date of the lower

---

* Full Bench Reference, on Appeal from Order, No. 91 of 1891, against the order of Babu Hemango Chunder Bose, Third Subordinate Judge of Hooghly, dated the 28th February 1891.

(1) 6 B. 586.

Court's decree until payment; and it is further crdered and decreed, by and with the like consent, that the defendants 2 and 3 do pay to the plaintiff, out cf the estate of the late husband of the plaintiff, which is now in their hands, Rs. 50 per month, on account of her maintenance from 1st January 1886, and onwards, during the lifetime of the said plaintiff." And the decree further declared the maintenance **[140]** to be a charge upon certain specified properties, and awarded to the plaintiff her costs in the lower Court.

1891 NOV. 23. — FULL BENCH. — 19 C. 139 (F.B.).

In the year 1889, Lukhimoni Debya, the plaintiff, applied for execution of this decree in the Court of the Subordinate Judge of Hooghly, and attached certain property of the judgment-debtor, but the proceedings terminated without any portion of the decree being realized.

On the 19th September 1890 the decree-holder, Lukhimoni Debya, applied to execute the decree in respect of (amongst other items) the sum of Rs. 2,800, being maintenance at the rate of Rs. 50 per mensem from the 1st January 1886 to the 31st August 1890. The judgment-debtor objected to this item on the ground that as regards future maintenance, the decree was merely declaratory and could not be enforced without a further suit. The Subordinate Judge overruled the objection on the ground that the decree was a command to the judgment-debtor to pay the sum monthly from the 1st of January 1886 and onwards during the lifetime of the plaintiff and could be enforced without further suit.

The judgment-debtor appealed to the High Court.

On the hearing of the appeal the Court (PETHERAM, C. J., and BEVERLEY, J.) referred the point decided by the lower Court to a Full Bench.

The order of reference, after stating the facts above set out, was ollows:—

"In support of the order of the lower Court, we have been referred to tho following reported cases:—*Peareenath Brohmo* v. *Juggessuree* (1), *Mansa Debi* v. *Jiwan Lal* (2), *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (3), *Vishnu Sambhog* v. *Manjamma* (4), *Sinthayee* v. *Thanakapudayen* (5), *Muttia* v. *Virammal* (6). In these cases the Courts have held that a decree could be made directing the payment of maintenance in future, and that such future maintenance could be recorded in execution of that decree, and they have done so on the assumption that such a decree is analogous to a decree for money payable by instalments.

[141] "In the case of *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (3) Westropp, C.J., remarked as follows:—

'I may observe, however, that it is to be regretted that in the former suit, an order, awarding to the plaintiff future maintenance, was not included in the decree. It is not desirable that there should be several suits in respect of the maintenance of one widow. The system of seeking or granting relief piecemeal, subjects both plaintiff and defendant to much unnecessary expense and trouble, and is only advantageous to the legal profession; such a course ought to be discontinued so far as may legitimately be done by the Civil Court.'

And in the case of *Vishnu Shambhog* v. *Manjamma* (4), Sargent, C. J., said:—

(1) 15 W. R. 128. (2) 9 A. 33. (3) 2 B. 494.
(4) 9 B. 108. (5) 4 M. H. C. 183. (6) 10 M. 283.

1891 Nov. 23. — Full Bench. — 19 C. 139 (F.B.).

'We share in the regret expressed by Sir M. Westropp, C.J., that distinct orders directing the payment of future maintenance should be too frequently, as in this case, omitted from decrees of this nature.'

"We are unable to assent to these decisions or to recognize the analogy that has been relied on. In a decree for money payable by instalments, the total amount to be recovered is actually decreed, although for the convenience of the judgment-debtor the amount is ordered to be paid by instalments.

"A decree which directs that a person shall receive maintenance in future at a certain rate is, in our opinion, no better than a declaratory decree ; and is not a decree upon which that person can recover the maintenance at any time merely by putting that decree in force, and without further suit. It seems to us that the actual sum due must be ascertained and declared to be due before it can be recovered by proceedings in execution. As well might it be said that a landlord could obtain a decree fixing a certain rent, and that if words were inserted in the decree directing such rent to be paid in future, the rent could be recovered in execution without further suit. It is obvious that many questions may arise in answer to the claim (as, for instance, in the case of a Hindu widow, whether she is still alive and leading a chaste life, and whether the amount is really due), which cannot conveniently be disposed of in the execution proceedings.

"It would also follow, if the cases referred to are right, that the maintenance must always be paid through the Court, unless the [142] judgment-debtor chooses to subject himself to the liability of having execution taken out against him.

"We accordingly refer the following questions for the consideration and decision of a Full Bench: A decree having been made declaring a person's right to maintenance at a certain rate, and directing the payment of such maintenance in future, can the maintenance, when due, be recovered in execution of that decree without further suit?"

Babu *Srinath Das* (with him Babu *Boido Nath Dutt*).—The question is whether the decree is declaratory, and as such can only be enforced by a regular suit, or whether it may be enforced by an application in the execution department. I submit that the claim for maintenance is a recurring cause of action, and the decree is not sufficient to include all future causes of action. The present decree is indefinite, *Srikrishna Tata Chariar* v. *Singara Chariar* (1), and cannot include a command to pay a particular sum in a particular month, *Vinayak Amrit Deshpande* v. *Abaji Haibatra* (2). The case of *Sabhanatha* v. *Lakshmi* (3) and *Venkanna* v. *Aitamma* (4) are in my favour. In the case of a decree for payment by instalments the entire sum is known and can be apportioned. I submit *Peareenath Brohmo* v. *Juggessuree* (5) was wrongly decided. Section 210 of the Civil Procedure Code does not make any provision for the payment of money before it becomes due, as that section expressly says that no decree is to be altered except as therein provided, whereas in a maintenance case circumstances may arise necessitating alteration ; for instance, misconduct on the part of the widow.

Dr. *Rashbehary Ghose* (with him Babu *Nolini Ranjan Chatterji* and Babu *Romesh Chunder Bose*).—The decree is not simply declaratory, but amounts to a command to pay a monthly sum and creates a periodically

(1) 4 M. 219. (2) 12 B. 416. (3) 7 M. 80.
(4) 12 M. 183. (5) 15 W.R. 128.

recurring right—*Lakshmibai Bapuji Oka* v. *Madhavrav Bapuji Oka* (1). I rely on the cases of *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (2) and *Vishnu Shambhog* v. *Manjamma* (3) and the remarks of the learned Judges who tried **[143]** those cases. The practice of the Indian High Courts is in my favour.

Babu *Srinath Das*, in reply.

The judgment of the Full Bench (PETHERAM, C.J., PRINSEP, PIGOT, O'KINEALY and GHOSE, JJ.) was as follows :—

JUDGMENT.

In this case a reference has been made to the Full Bench by the Chief Justice and Mr. Beverley sitting as a Divisional Bench of this Court, in connection with a decree obtained by the respondent, Srimati Lukhimoni Debya, against the appellant, Ashutosh Banerjee. It appears that Lukhimoni had sued the appellant, Ashutosh, for maintenance. The litigation was carried up to the High Court, and, on the 4th January 1889, a decree was entered up by consent in the following terms :—"It is ordered and declared by consent of parties that the decree of the lower Court be, and it hereby is, set aside, and, in lieu thereof, that the defendants Nos. 2 and 3 do pay, out of the estate of the late husband of the plaintiff, Rs. 2,000 on account of maintenance from September 1882 to December 1885, with interest at the rate of 6 per cent. per annum from the date of the lower Court's decree until payment; and it is further ordered and decreed, by and with the like consent, that the defendants Nos. 2 and 3 do pay to the plaintiff, out of the estate of the late husband of the plaintiff, which is now in their hands, Rs. 50 per month, on account of her maintenance from 1st January 1886, and onwards, during the lifetime of the said plaintiff."

And here it seems proper to point out that apart from the decision of the question referred to us, there appear on the face of the record sufficient reasons for upholding the decision of the lower Court. The decree was the decree of a Court possessing jurisdiction over the subject-matter of the suit and was made by consent of parties; and, even if it were irregular, as the learned Judges of the Division Bench think, still, on the authority of *Pisani* v. *The Attorney-General for Gibraltar* (4), *Sadasiva Pillai* v. *Ramalinga Pillai* (5), the appellant in this case having consented to the irregularity in the decree, is now precluded from raising any objection to its execution.

[144] Some short time after the decree and in the same year 1889, the lady applied for execution and attached certain immoveable properties of the judgment-debtor. The judgment-debtor objected, and the execution proceedings seem to have been struck off without any portion of the decree having been realised. No point seems to have been raised in the pleadings or in the decisions of the lower Courts in this case as to the effect of this order, and we must hold that it does not affect in any way the reference now before us.

On the 19th September 1890, the decree-holder made another application for execution. The judgment debtor objected on the ground that, so far as the decree awarded future maintenance, it was merely declaratory and could not be enforced without a regular suit. This objection was overruled by the Subordinate Judge, and against his decision the appellant

(1) 12 B. 65. (2) 2 B. 494. (3) 9 B. 108.
(4) L.R. 5 P. C. 516. (5) L. R. 2 I. A. 219=15 B. L.R. 383.

1891 Nov. 23. — Full Bench. — 19 C. 139 (F.B.).

appealed to this Court. In the grounds of appeal, he set forth the same objection which he has raised before the Subordinate Judge, namely, that upon a proper interpretation of the decree, the Court should have found that it was merely declaratory and gave no further relief, and, therefore, upon a correct interpretation of it the lady's remedy was by a regular suit, not in execution of the decree.

The Judges who made this reference say that, in support of the order of the lower Court, they have been referred to the following reported cases:—*Peareenath Brohmo* v. *Juggessuree* (1), *Mansa Debi* v. *Jiwan Lal* (2), *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (3). *Vishnu Shambog* v. *Manjamma* (4), *Sinthayee* v. *Thanakapudayen* (5), *Muttia* v. *Virammal* (6), and they then proceed to say:—"In these cases the Courts have held that a decree could be made directing the payment of maintenance in future, and that such future maintenance could be recovered in execution of that decree, and they have done so on the assumption that such a decree is analogous to a decree for money payable by instalments."

From this opinion, however, they dissent, and, in order to have it finally decided, they have referred for the decision of a Full Bench the following question, namely, whether "a decree having **[145]** been made declaring a person's right to maintenance at a certain rate, and directing the payment of such maintenance in future, can the maintenance, when due, be recovered in execution of that decree without further suit?"

From the number of cases mentioned by the Judges who made this reference, it appears that this form of decree has existed for a long time. The case of *Peareenath Brohmo* v. *Juggessuree* (1) was decided in 1871, and in the case of *Sinthayee* v. *Thanakapudayen* (5) the Judges said that it had been the practice of the Courts for many years in the Presidency of Madras to make decrees for the payment of future maintenance to Hindu widows either by directing periodical payment of a fixed sum, or by setting apart a portion of the property and a signing the interest or proceeds thereof to the widow for her maintenance, and, in support of that assertion, the learned Judges referred to a case decided as far back as 1863.

The records of our own Court enable us to trace the same form of decree back to a much earlier date. Thus, in the case of *Tohfa Dibia* v. *Pirthee Chund Rai* (7) decided by the Sudder Dewany Adalat in 1822, no objection seems to have been taken to a decree directing a monthly payment, and in the case of *Hursoonderi Goopta* v. *Nubogobind Sein* (8) decided by the Sudder Dewany Adalat on the 21st August 1850, maintenance was awarded at the rate of Rs. 15 monthly. The same form of decree appears to have been followed in the case of *Mussummat Beelas Munjaree* v. *Hursoondree* (9) decided on the 17th November 1851. Nor are these the only authorities in support of the procedure followed by all the High Courts. In the case of *Pirthee Sing* v. *Rani Raj Kooer* (10) a decree was passed in 1869 by the Subordinate Judge of Agra, directing maintenance at Rs. 150 a month, and providing both for arrears and future maintenance, and this decree was upheld without objection by the High Court of the North-Western Provinces in 1870 and by their Lordships of the Privy Council in 1873. A still earlier case is **[146]** that of

(1) 15 W.R. 128. (2) 9 A. 33. (3) 2 B. 494.
(4) 9 B. 108. (5) 4 M. H. C. 183. (6) 10 M. 283.
(7) 3 S. D. (Sel. Rep.) 134=6 I. D. (O. S.) 811. (8) 6 S. D. 422.
(9) 7 S. D. 653. (10) 12 B. L. R. 238.

1891 Nov. 23. — Full Bench. — 19 C. 139 (F.B.).

The Collector of Madura v. *Moottoo Ramalinga Sathupathy* (1), in which their Lordships of the Privy Council upheld a decree passed by the High Court of Madras in 1864, allowing maintenance at the rate of Rs. 10,000 yearly to one lady, and Rs. 833-5-4 monthly to another. It seems to us impossible to say that a form of decree adopted by all the Courts of this country sanctioned by the decisions of their Lordships of the Privy Council, and which has never been successfully attacked, can now be considered irregular. Indeed, so far from that being the case, it bears a striking resemblance to the form of decrees for maintenance given by Courts of Equity in England. We are unable, therefore, to agree with the learned Judges who made this reference, in dissenting from the series of authorities mentioned by them, and referred to in this judgment.

Nor is the second portion of the proposition placed before us less free from doubt. Not only do the cases referred to by the learned Judges show that it has been the universal practice, when relief is decreed in a suit of this nature, to grant that relief in execution of decree and not by a new suit, but the very point now referred was decided in the case of *Sinthayee* v. *Thanakapudayen* (2). In the present case the mode of execution is referred to in ss. 230, cl (*b*) and 255 of the Code. We think, therefore, that the question referred to the Full Bench must be answered in the affirmative, ahd that this appeal should be dismissed with costs.

A. A. C.

---

19 C. 146.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

A. B. MILLER (*Plaintiff*) v. THE NATIONAL BANK OF INDIA (*Defendant*).* [23rd November, 1891.]

Mutual credit—11 *and* 12 *Vic*., *c*. 21, *s*. 39—*Liability of drawer before dishonour—Dis-our of bill of exchange—Vesting order—Insolvency—Costs of suit in too extensive claim where claim denied* in toto.

There is no debt due by a drawer of a bill of exchange until dishonour.

[147] A mutual credit within the meaning of s. 39 of the Insolvent Act must in its nature terminate in a debt.

[N. F., 33 M. 53=5 Ind. Cas. 845=8 M. L. T. 83; R., 20 B. 133 (142).]

THIS was a suit brought by the Official Assignee to the estate of Leo Zander & Co. to recover from the defendant Bank a sum of Rs. 19,848-6-7 forming part of a balance of Rs. 32,403-1-9 standing to the credit of the firm of Leo Zander & Co. in the hands of the defendant Bank on the date of the order vesting the firm's estate in the Official Assignee.

The firm of Leo Zander & Co., which consisted of Leo Zander and one Raoul Quillet, carried on business as buyers and shippers of jute, and were in the habit of consigning goods to constituents in England, drawing bills of lading in respect of such goods, and of drawing bills of exchange against the said goods upon their consignees for the value thereof.

---

* Original Civil Suit, No. 241 of 1890.

(1) 12 M.I.A. 397. (2) 4 M.H.C. 183.

1891 Nov. 23. — Original Civil. — 19 C. 146.

Between the 9th and 30th September 1889, the firm of Leo Zander & Co. made in the course of their business certain shipments of jute against which they drew 12 bills of exchauge, amounting in the aggregate to £ 13,312-10-8. And under the terms of a certain letter of hypothecation given to the defendant Bank by the firm of Leo Zander Co., these bills were endorsed over to the Bank, together with the shipping documents relating to the goods against which the bills were drawn, and upon such negotiation the amounts of the said bills were placed to the credit of Leo Zander & Co.'s floating current account. This letter of hypothecation bore date the 16th June 1886, and contained (amongst others) the following stipulation :—" On default being made in acceptance on presentment or in payment at maturity of any bill or bills of exchange, or if the drawees or acceptors thereof suspend payment or become bankrupt or insolvent......we authorise you or any of your managers or agents at any time hereafter without notice to, or concurrence on the part of, any persons, and without waiting until the maturity of the said bills, to sell by public or private sale all or any part of the goods forming the collateral security, and to apply the net proceeds in or towards payment of the said bills with interest thereon; the balance, if any, to be retained and applied by you towards or in liquidation of any other debt or liabilities of ours to you, including bills current, and subject thereto, after having satisfied all or any claims you [148] may have on us in respect of our obligations to you, the surplus, if any, we request you to account for to the proper parties... In the event of the net proceeds of the goods being insufficient to pay the amount of the said bills.........we hereby authorise you or the holders thereof to draw on us for the amount of such deficiency and we engage to honour such drafts on presentation; it being understood that the account current rendered by you shall be acknowledged as sufficient proof of the amount due......The delivery to you of the above mentioned collateral securities is not to prejudice any of your rights on the said bills in case of dishonour, nor shall any proceedings taken thereon, or giving time, or entering into any composition or other arrangement prejudicially affect your title to the said securities or remedies against us."

On the 5th October 1889 the firm of Leo Zander & Co. suspended payment, and on the 14th of that month filed their petition in insolvency, on which day an order was passed vesting the estate and effects of the firm in the Official Assignee. On this latter date a sum of Rs. 32,403-1-9 stood to the firm's credit in the books of the defendant Bank.

On the 8th October 1889, three out of the 12 bills of exchange above mentioned were dishonoured in Dundee and were protested for non-acceptance, whilst other five of such 12 bills were dishonoured in London and were protested on the 9th October 1889; the amount of these eight bills being £8,420-2-5. The four remaining of such 12 bills, amounting in all to £4,832-10-3, which fell due in December 1889, were also dishonoured and protested, but after the date of the vesting order; notice of such dishonour of these four bills being given by the London branch of the National Bank of India to the firm of Leo Zander & Co. on the 31st January 1890. On the 9th October the defendant Bank wrote and informed Messrs. Leo Zander & Co. that telegraphic advice had been received from London as to all their bills having been refused acceptance. This information was, however, taken by all parties as referring to the eight bills dishonoured on the 8th and 9th October.

On the 17th October the Official Assignee wrote to the defendant Bank giving notice of the vesting order, and claiming all monies [149]

1891 Nov. 23. ORIGINAL CIVIL. 19 C. 146.

[149] standing to the credit of the firm of Leo Zander & Co. in the Bank's books on the date of such order.

On the 30th October the Bank wrote to the firm of Leo Zander & Co. enclosing a list of the bills which had been dishonoured and had been protested, such bills being, with one exception, the eight bills above referred to. These letters of the 9th and 30th October did not appear, however, to have been sent on to the Official Assignee.

Under the terms of the letter of hypothecation granted by the firm of Leo Zander & Co. to the defendant Bank, the defendant Bank subsequently to the vesting order caused the goods against which these 12 bills had been drawn to be sold, the net proceeds of the goods against which the eight bills, dishonoured before the vesting order, had been drawn amounting to £7,477-0-6; and the net proceeds of the goods against which the four bills, dishonoured after the vesting order, were drawn amounting to £4,429-12-2. The total amount therefore realized on the goods against which these 12 bills were drawn was £11,906 12-8, whilst the actual amount due on such bills was £13,312-10-8. There was therefore a balance of £1,405-18 due to the defendant Bank on such bills. The defendant Bank therefore, after giving credit to the firm of Leo Zander & Co. for the net proceeds of these sales, retained, out of the sum of Rs. 32,403-1-9 standing to the credit of the firm at the date of the vesting order, a sum of Rs. 19,848-6-7, the equivalent in rupees of the £1,405-18 due to them on the bills, and on the 24th February 1890 paid over Rs. 12,554-11-2, being the balance of the sum standing to the credit of the firm in their current account, to the Official Assignee.

The Official Assignee, however, claimed to be entitled to the whole of the balance of the current account as it existed at the date of the vesting order, and contended that the Bank could only rank with other creditors in respect of any sums which they might have lost on the bills which had been dishonoured.

Mr. *Jackson*, Mr. *Hill*, and Mr. *Zorab*, for the plaintiff.

Mr. *T. A. Apcar* and Mr. *Stokoe*, for the defendant.

Mr. *Jackson.*—The plaintiff is entitled to recover unless the Bank have a valid claim. What is the defendant's case? It is [150] not suggested that it is a set-off which is claimed; they do not admit the purchase of the bills: there is no particular case set up in the written statement. [TREVELYAN, J.—In a case of this sort where there is no question as to the facts, the law must be raised but need not be pleaded. The only question is, was there a mutual credit?] I am in ignorance as to the defendant's case. I should like to hear their case before I deal with the law. No attempt has been made to set up any case with regard to the four bills. [TREVELYAN, J.—The observations of Byles, J., and Montague Smith, J., in *Naoroji* v. *Chartered Bank of India* (1) are imporant.] The cases are all set out in *Rose* v. *Hart* (2), *Chalmers on Bills*, art. 215, *et seq. Naoroji* v. *Chartered Bank of India* shows that the mutual credit must terminate in a debt. In the Insolvent Act, 'mutual credit' are the words used. All the cases show that from the nature of things a mutual credit must have a natural tendency to terminate in a debt. So the mutual credit section has no application to this case. The possibility of a debt arising is not sufficient. That distinguishes the case from *Naoroji's* case. There is a clear distinction between out-and-out sales

(1) L.R. 3 C.P. 444. (2) 2 Sm. L.C. (9th ed.), 324, 338, 340; 8 Taunt, 499.

1891 Nov. 23. — ORIGINAL CIVIL. — 19 C. 146.

and negotiations, see *Alsager* v. *Currie* (1). If the bills were advanced upon by the Bank, then there would be a credit given by the Bank, but not so where there is an out-and-out sale. I say the mutual credit section is inapplicable to the case. I reserve further observations till I hear the defendant's case.

Mr. *Stokoe*, for the defendant.—We have a claim both under s. 39 of the Indian Insolvent Act, and also a lien. The reason why a lien is not given in express terms is because the relation of a banker and customer has been lost sight of. No lien is necessary; we have a right to set off, and that is why no lien is given to a banker. As to whether the transaction is a sale or not, I say that on the facts of the case it is a matter of indifference so far as it affects the parties. *Byles on Bills*, p. 182, 15th ed, chap. XII, explains when a bill is to be considered as sold; the real test as to whether it is a sale within the meaning of *Alsager* v. *Currie* is, whether when the bills were taken over, the [151] transferor was without remedy against the transferee. The form of the bill is not conclusive as to the sale being out-and-out, for the bills are to be read with the letter of the 16th June 1886. The words in paragraph 1 of the letter authorizing the firm to insure the goods and to add the premia and expenses of insurance to the bills admit a liability attaching to the Bank on these bills. The amount chargeable against the firm is the amount of the bills. This case is covered by *Alsager* v. *Currie*; it is nearly on all fours with it as to the facts, save that here we have a security. The words of the statute under which *Alsager* v. *Currie* is decided, are virtually the same as the Insolvent Act; the facts with regard to the bills are similar to those in *Alsager* v. *Currie*; they had not been accepted, and had not become due.

Whitehead v. *Walker* (2) shows that on dishonour by a refusal of acceptance there at once arises a right of action by the holder; and what is recoverable is the amount of the bill; it was decided there that the holder had not a separate cause of action for non-payment. A cause of action against the endorser arose in the present case on non-acceptance; that fact does away with the question whether it was a transaction terminating in a debt, as far as the eight bills are concerned; moreover, it had resulted in a debt at the time.

The Bank's claim came under s. 39 of the Insolvent Act. The position of affairs between the Bank and the insolvents at the date of the insolvency was that the Bank had possession of Rs. 32,000 odd, and had a claim on the eight bills for over a lakh. The set-off in insolvency is not a matter which may be applied, but it is a principle which must be applied. The fact that the Bank held security would not affect their right to set-off—see *Ex parte Barnett, in re Deveze* (3); *Mckinnon* v. *Armstrong Brothers* (4). With regard to the eight bills, either each bill separately is to be applied against the goods against which it is specifically drawn—and in such case the Bank would have to account in each instance for the balance on that as one transaction—or the eight bills are to be added together, and the goods against which they were drawn, sold and placed against the total of the bills as one item. If the [152] fact that the Bank held security does not affect the right to set-off, then on the 14th October we could set-off the amount of Rs. 32,000, the balance in Zander's account, against the Rs. 1,22,000 they owed us, and this we can do under the mutual credit section; the result is that

(1) 12 M. & W. 751.
(2) 9 M. & W. 506.
(3) L.R. 9 Ch. App. 293.
(4) L.R. 2 App. Cas. 531 (539).

1891 Nov. 23. — Original Civil. — 19 C. 146.

we have a claim on those bills for the difference of Rs. 92,000, that is, a claim against the eight bills, and they must be treated as an aggregate at the time the mutual credit is given. Then we have to account for the securities; these realized more than Rs. 92,000, and the balance in our hands we are entitled to carry over to the discharge of the four bills.

Section 39 applies to the four bills. I contend there is a liability before dishonour, the credit need not terminate in a debt previous to the insolvency—see *Byles on Bills*, p. 473, 15th ed. Here up to the time of the insolvency there has been no acceptance. The effect of the mutual credit clause enables us to set-off an aggregate sum which is due to us; that aggregate is composed of a series of bills. As to notice of dishonour, six letters were forwarded on 11th October from the Bank's London office, and reached Calcutta on the 30th October, setting out the actual fact of dishonour on the 8th or 9th October. The protests themselves were forwarded on the 22nd November. The 104th section of the Negotiable Instruments Act, gives the rule as to when notice of dishonour of foreign bills is required. These bills are foreign bills and must be protested according to the law of the place where they were drawn.

Mr. *Hill*.—There is no case made out bringing the case within the mutual credit section. [TREVELYAN, J.—I think there was a debt as far as the eight bills are concerned. As to the four bills, I think there are remarks in *Alsager* v. *Currie* which show that there was a mutual credit with regard to the four bills; but I should like to hear you as to that.] No date of dishonour has been given; and there was no credit within s. 39. If there was a debt, could the Bank have sued on it at the time? I say it could not, until notice of dishonour was given; and until notice of dishonour was given, it could not be asserted that a debt had arisen. Section 98 of the Negotiable Instruments Act is not applicable, assuming that there is no insolvency. The contracts relating to the eight bills covered seven other bills which were not dishonoured. Section 94 lays down how notice of dishonour must be given. It must give information that **[153]** a particular instrument has been dishonoured. The notice given here on the 30th October is "your bills" are dishonoured; that is not a proper notice. Therefore on the 14th October there was not a right which the Bank could have enforced by suit; Zander & Co. might have then said "here is your money, give us back our securities." There was no debt in respect of which credit was given; the assurance that the bills would be accepted is not a thing which would naturally terminate in a debt. It is not every trust reposed in another which becomes a debt. It has been laid down in *Rose* v. *Hart* (1), that every credit is not a debt. It is only credits which must in their nature turn into debts which fall within the mutual credit section. See *Young* v. *Bank of Bengal* (2); *Naoroji* v. *Chartered Bank of India* (3); *Astley* v. *Guerney* (4), which is decided in accordance with *Young* v. *Bank of Bengal*. I shall show on *Alsager* v. *Currie* that on the taking of the bills no credit was given; credit was not given on notice of dishonour, as they never gave us notice till after the vesting order. *Alsager* v. *Currie* is in support of the position that credit is not given in respect of these bills. In India a probable claim is not necessarily a subject of set-off, but in England it is. The case of *Starey* v. *Barns* (5) is under a special section of an English statute. The Bank required three things before handing over the bills: (1), approved

(1) 2 Sm. L.C. 324; 8 Taunt. 499.
(2) 1 M.I.A. 87.
(3) L.R. 3 C.P., 444 (449) (451).
(4) L.R. 4 C.P. 714.
(5) 7 East 435.

1891 Nov. 23. — Original Civil. — 19 C. 146.

drawees; (2), and assurance that the bills had been sold; and (3), further securities. Can it be said, therefore, that credit was given to the drawer of the bills? As to notice of dishonour, the object of the Insolvent Act was to place the insolvent in the same position as regards his rights as he would have had had he not been an insolvent; that being so, if notice of dishonour had not been set up on the 14th October, could the Bank have succeeded in a suit? If the conclusions in *Astley* v. *Guerney* are correct, then those conclusions apply to the four bills. The Bank have no right to appropriate the Rs. 6,000, and also to keep the securities. There can be no right of set-off as regards the four bills, and if there is a [154] right as regards the eight bills, it can only arise when the exact amount claimed to be set-off is put before the Court; this has not been done. As to costs, I refer to *Jeffryes* v. *Agra and Masterman's Bank* (1) and *Hill* v. *South Staffordshire Railway Company* (2).

JUDGMENT.

TREVELYAN, J.—This case depends upon how far the defendant Bank can make use of the provisions of s. 39 of the Insolvent Act.

Although the written statement raises a question of Banker's lien, no question of lien arises or has been argued before me. The determination of this case in no way depends upon any peculiar law incident to banking.

The Official Assignee of the Insolvent Branch of this Court as assignee of the Insolvent estate of Leo Zander and Company is suing to recover the balance of that firm's current account with the defendant Bank at the time of the vesting order.

The Bank contends that it is entitled to set off the amount of 12 bills drawn in their favour by the insolvents, and not accepted by the persons on whom they were drawn. Of these 12 bills, 8 were dishonoured by non-acceptance before the date of the vesting order. The remaining four were dishonoured after that date. There is no conflict of fact in this case. These bills were all drawn against shipments of jute made to England, which were hypothecated to the Bank in terms of an agreement made between the Bank and Messrs. Leo Zander and Company on the 16th of June 1886.

The jute has been sold by the Bank.

The Bank has given the drawers of the bills credit for the proceeds of the jute, has set off against their current account the difference between the amount of the bills and the net proceeds of the jute, and has paid the remainder of the amount to the plaintiff. The plaintiff claims to be entitled to the whole of the balance of the currrent account as it existed at the date of the vesting order, and contends that the Bank should only rank with the other creditors in respect of what they have lost on the bills.

The plaintiff contends that these bills having been sold in the open market to the Bank, are on a different footing to what they [155] would have been if they had been discounted in the ordinary course of business by the Bank. There is no doubt that the practice followed by Messrs. Leo Zander and Company was that when they wanted to raise money on their bills, they got their brokers to go round to the Calcutta Banks

(1) L.R. 2 Eq. 674.

(2) L. R. 18 Eq. 154 (171).

and get the best exchange they could for them. Sometimes the bills were sold to the defendant Bank, and sometimes to other Banks.

Apart from the bills there was no loan. It was not as the banker of Messrs Leo Zander and Company that these transactions were entered into, and I think it clear that the Bank's remedies depended only on their position as holders of the bills, and was not affected by the accident that the firm had an account with them.

In reality, I think the fact that the bills were dealt with in the way I have described makes no difference in the result of this case.

The determination of the questions in this case depends upon the construction of s. 39 of the Insolvent Act. That section is as follows :—

"When there has been mutual credit given to the insolvent and any other person or persons, one debt or demand may be set against the other."

The case as to the eight bills and that as to the four others stand on a different footing.

The eight bills had at the time of the vesting order been dishonoured by non-acceptance and had been protested.

Mr. Hill for the plaintiff admits that if at the time of the insolvency there was an existing debt, there could be no doubt that the case would come under s. 39. If there was a debt it would follow that there was a credit from, at any rate, the moment when the debt came into existence. But he contends that the absence of notice of dishonour has prevented a debt coming into existence. By s. 30 of the Negotiable Instruments Act the drawer of a bill of exchange is bound in case of dishonour by the drawee or acceptor thereof to compensate the holder, provided due notice of dishonour has been given to or received by the drawer as provided by the Act.

By s. 94 of the same Act notice of dishonour may be in any form, but it must inform the party to whom it is given, either [156] in express terms or by reasonable intendment, that the instrument has been dishonoured, and in what way, and he will be held liable thereon. Three of the bills were dishonoured in Dundee on the 8th October, the remaining five were dishonoured in London on the 9th October.

On the 9th October the Bank wrote to the firm of Leo Zander and Company as follows :—

"*Calcutta, 9th October* 1889.

Messrs. Leo Zander & Co.

Dear Sirs,

We beg to inform you that we have this morning received telegraphic advice from our Head Office that all your bills have been refused acceptance.

Yours faithfully,
(Sd.) W. H. Beddy,
For Manager.

We presume our Head Office refer to the bills which arrived in London this week."

Mr. Hill says that this included some other bills. It may have done so, but taking the whole letter together, I think not only that it included these bills, but that Messrs. Leo Zander must have taken it to include these bills. Mr. Quillet does not deny it. There is no evidence before me that it could have referred to anything but the eight bills. The remaining four bills could not have arrived in England. On the 30th October, which would be on the arrival of the first mail from London after the dishonour of the bills, the Bank wrote as follows :—

1891 Nov. 23. — ORIGINAL CIVIL. — 19 C. 146.

"*Calcutta*, 30*th October* 1889.

MESSRS. LEO ZANDER & Co., (in liquidation).

DEAR SIRS,

We hand you herewith six letters addressed to you by our London Office, dated 11th instant, advising that your bills of exchange, referred to overleaf, were refused acceptance and have been protested in consequence. The relative protests are in our hands.

Yours faithfuly,
(Sd.) J. A. TOOMAY,
Manager."

[157] *Memo*

Bill on P. W. Wallace	£ 1,250	17	10
	,, 1,274	11	1
	,, 1,263	7	10
Commercial Bill of Scotland ...	,, 940	14	8
	,, 300	6	9
	,, 925	18	7
	,, 1,232	2	10
	,, 1,232	2	10
Credit Lyonnaise	,, 1,248	4	3

In the meantime Messrs. Leo Zander had become insolvent, and this letter ought to have been sent to the Official Assignee. It doer not appear that it was sent to him. I think that under the circumstances this notice of dishonour was sufficient. No answer was sent to it, and I have no doubt whatever but that Messrs. Leo Zander and Company knew what it meant and were not in the smallest degree misled by it.

I think there can be no question that, so far as these eight bills are concerned, there was an existing debt, and the Bank was entitled to set off their loss on these eight transactions against the current account.

The case as to the remaining four bills is a different one. I don't think that there is any doubt but that the law in India is on this question the same as was the law in England at the time that the Indian Insolvent Act was passed. I do not think that in this respect, that is, with regard to the liability of a drawer of a bill before that bill is presented for acceptance, the Negotiable Instruments Act has altered the law. Section 37 of that Act provides that the drawer of a bill of exchange is liable thereon as principal debtor, and that the other parties thereto are liable thereon as sureties for the drawer. This only, I think, refers to their respective liabilities, and is enacted for the purpose of only distinguishing those liabilities. It does not give any new right of action. It must be read with the earlier section (s. 30) which provides for the liability of a drawer; until dishonour he has no liability and there is no debt.

Having regard to the position of the drawer, can it be said that, before the bill is presented for acceptance, there is a credit within the meaning of the Insolvent Act? I think not. The leading **[158]** case of *Rose* v. *Hart* (1) shows that the credit must in its nature terminate in a debt, or as Byles, J. puts it in *Naoroji* v. *Chartered Bank of India* (2), "Mutual credits I conceive to mean simply reciprocal demands which must naturally terminate in a debt." There is no demand or debt until dishonour. The dishonour is not the natural result of the drawing. The drawer only undertakes to pay the amount of the bill in case of dishonour either by non-acceptance or non-payment.

(1) 2 Smith's L. C. 7th ed. 296; 9th ed. 324. (2) L.R. 3 C. P. 451.

The cases show that at least there must be a credit which would naturally result in a debt. There is authority to show that there must be a credit which must result in a debt—be it the one or the other. I think it is clear that, as far as the last four bills are concerned, the Bank is not entitled to the benefit of s. 39 of the Insolvent Act. It is to be noticed that there is nothing in the Indian Act to permit everything provable being set off.

There remains another question. Mr. Stokoe appears for the Bank and contends that it is entitled to set off the whole amount of the eight bills against the amount of the current account, and then to realize their securities and set off the amount against the rest of the debt. I do not agree with this contention. In the first place, I do not think that such a course would be in accordance with the contract. The agreement, which must be taken as being made with regard to each bill, gives the Bank power in default of acceptance or payment to sell the particular goods and apply the balance to the amount of the particular bill; in the event of surplus it may be applied to other debts, and it is only in such event that it can be so applied. There was an agreement to carry the proceeds of the securities to the floating account. If what Mr. Stokoe contends for were to be allowed, the result would be that more than what was contracted for would be applied to the other bills, instead of the surplus after applying the particular bill to the particular security. Much more, namely, the whole amount of the security, would be applied. This is, I think, going beyond the contract. In the second place, I do not think that the Bank could be in a better position after the insolvency than they would have been if no vesting order had been made.

[159] If no vesting order had been made, the Bank would have been bound by the contract, and if they realized their securities, would only apply the proceeds in terms of that contract. In the third place, all that the Bank can set off under s. 39 is their debt. If they choose to realize their security, the debt is not the amount of the original bill, but the residue after the amount of the security has been applied towards payment. The result of these findings is as follows:—

The amount of the account current at the time of the vesting order was Rs. 32,403-1. Of this the Bank has paid the Official Assignee Rs. 12,554-11-2. This leaves a balance of Rs. 19,848-6-7, for which this suit has been brought. The amount of the eight bills which were dishonoured before the date of the vesting order is £8,420-2-5. The net amount realized by sale of the goods hypothecated against the eight bills was £7,477-0-6. Deducting this from £8,420 2-5 leaves £ 943-1-11, which at 1*s.* 5*d.* per rupee, which is taken as the rate of exchange, is equivalent to Rs. 13,314-14-9. Deducting this sum from Rs. 19,848-6-7 leaves Rs. 6,533-7-10, for which there must be a decree with interest at 6 per cent. on decree and costs on scale No. 2.

Decree for plaintiff.

Attorney for plaintiff: Messrs. *Dignam, Robinson and Sparkes.*
Attorney for defendant: Mr. *M. Camel.*

T. A. P.

1891 Nov. 21.

PRIVY COUNCIL.

19 C. 159 (P.C.) = 18 I.A. 165 = 15 Ind. Jur. 749 = 6 Sar. P.C.J. 80 = Rafique & Jackson's P.C. No. 125.

19 C. 159 (P.C.) = 18 I.A. 165 = 15 Ind. Jur. 749 = 6 Sar. P.C.J. 80 = Rafique & Jackson's P C. No. 125.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, and Morris, Sir Richard Couch and Lord Shand.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

JAGATJIT SINGH (*Plaintiff*) *v.* SARABJIT SINGH (*Defendant*). [6th and 21st November, 1891.]

Execution—Suit for possession of land ascertained after decree—Limitation, commencement of twelve years—Claim in part included in former dismissed suit—Civil Procedure Code (Act XIV of 1882), *ss* 13, 42 *and* 43*—Reference to pleadings and judgment to explain decree—Mesne profits—Act XIX of* 1868, s. 111.

That a claim has been included in a previous suit, without its having been directly and substantially put in issue and decided, does not upon the dismissal of that suit preclude a subsequent suit upon it.

[160] A consent decree of 1873 decided that alluvial land belonged to the plaintiff's village Sipah. The area was judicially determined in 1876 on a map of 1874, but actual possession was not obtained from the defendant, who owned villages on the opposite side of the river. The decree-holder in 1877 included a claim for part of the same land in a suit for an accretion to another of his riparian villages, Khasapur, and the latter suit was wholly dismissed.

To get possession of the land decreed in 1873 he then brought rent-suits against two tenants upon it, the defendant intervening under s. 111 of the Oudh Rent Act, 1868. Both the rent suits were dismissed; and, according to the right reserved in the latter section, the plaintiff, to establish his title in a competent Court, brought the present suit, including in it the land which he had made part of his claim in the dismissed suit of 1877.

Held, first as to limitation, that the twelve years' bar must be calculated from 1876, the date of the judicial ascertainment of the land decreed. Secondly, on the question whether the dismissal of the suit of 1877 precluded further suit for that part of the land which had been included in it, *held*, that it did not, and that s. 13 of the Civil Procedure Code was inapplicable. The pleadings and judgment in the suit of 1877 were referred to, showing that what belonged to Sipah had not been in issue, and that nothing respecting it had been heard or decided. Thirdly, *held*, as to the rest of the land claimed in this suit, that there was no bar on account of its omission from the suit of 1877.

As to mesne profits, it would have been open to the High Court to direct an enquiry under s. 212 of the Civil Procedure Code.

[F., 31 C. 95 (101) = 8 C.W.N. 30; Cited, 60 P.R. 1894; R., 25 B. 115; 1 C.L.J. 337 (349); 35 C. 961 = 6 C.L.J. 735 = 12 C.W.N. 127; 12 Bom.L.R. 956 (965); 13 Ind. Cas. 82; D., 9 C.W.N. 679 (687).]

APPEAL from a decree (18th October 1886) of the Judicial Commissioner modifying a decree (1st March 1886) of the District Judge of Lucknow.

The principal questions on this appeal were—first, as to whether the suit was barred by limitation, Act XV of 1877, sch. II, art. 142 or 144; secondly, whether the claim for 2,226 bighas, part of the land sued for, was barred under s. 13, Civil Procedure Code, as *res judicata*, it having been included in a former suit, dismissed, against the same defendant; thirdly, whether the claim for the rest of the land sued for was barred by the rule against splitting claims under ss. 42 and 43, Civil Procedure.

The minor Raja of Kapurthala, owner of an estate in the Baraitch district which included the villages of Sipah and Khasapur on the north bank of the Gogra, brought this suit, by Koer Harnam Singh,

1891
Nov. 21.

PRIVY COUNCIL.

19 C. 159 (P.C.) = 18 I.A. 165 = 15 Ind. Jur. 749 = 6 Sar. P.C.J. 80 = Rafique & Jackson's P.C. No. 125.

his guardian, against the Raja Sarabjit Singh, **[161]** talukdar of Ramnagar in the Bara Banki district, on the south bank; that taluk including villages Durgapur, Sissounda, Deoriya, and Para. The Gogra here divides the districts, and the above sets of villages are opposite to one another. The plaintiff claimed possession of 2,679 bighas valued at Rs. 12,340 as being in village Sipah, on the north side of the deep stream channel opposite to the defendant's villages. His title was under a decree of 3rd February 1873. Mesne profits Rs. 5,526 were also sued for.

The defence was, first, that under the decree of 1873 no actual possession had been given, and that the suit in 1886 was barred by time. Secondly, that by reason of the dismissal on 2nd April 1878 of a suit instituted on 16th January 1877, in the time of the present plaintiff's father, to recover part of what had been decreed in 1873 as belonging to Sipah, it followed that under the 13th section, Civil Procedure, so much of the present claim as related to that part was barred. At the hearing the defendant insisted that as to the rest of the claim he had a defence under the 42nd and 43rd sections inasmuch as, according to his contention, this ought also to have been included in the suit of 1877.

The substance of the decree of 1873, and all the subsequent proceedings that are material, appear in their Lordships' judgment; the origin of the dispute having been a change in the channel of the deep stream of the Gogra. With reference to what appears in the judgment of the Judicial Commissioner, it may be mentioned that Kharram Rae, in whose name the suit of 1877 was brought, was manager of the Oudh estates of the Kapurthala Raj; and that the decree of 1873 was obtained by the preceding manager, Dewan Banna Mal. Also that, in 1882, the Kapurthala manager, resorting, in order to obtain possession, to the Revenue Courts, instituted in that year two rent-suits against alleged tenants on parts of the land now sued for; and that in those suits the present defendant, the talukdar of Ramnagar, intervened under s. 111 of the Oudh Rent Act, XIX of 1868, and successfully contended before the Deputy Commissioner of Bara Banki, who dismissed the suits. that though the holdings in dispute fell within the boundaries of Sipah, the rents in question had been received **[162]** by Raja Sarabjit, as owner in good faith. The Revenue Court held that the matter was appropriate for a civil suit, and the appellate authority was of the same opinion. Hence this suit.

The District Judge dismissed the suit. He held that, though not barred by limitation, it was barred as to the 1,226 bighas, as *res judicata*, those bighas having been included by the plaintiff, the holder of the decree of 1873, in his subsequent suit of 1877. He applied s. 13, Civil Procedure; and as to the remainder of the claim, he held it barred by the rule against splitting claims, ss. 42 and 43.

The Judicial Commissioner, on an appeal by the plaintiff, was of the same opinion, except as to the last matter. As to this he reversed the decree of the first Court, decreeing possession of all but the 2,226 bighas. He refused mesne profits, for the reason given in the following extract from his judgment:—

"Omitting all arguments which go behind the decree of 3rd February 1873, and the execution proceedings, 14th January 1874, and the map 16th June 1874, the defendant's chief pleas are that he has had adverse possession for more than 12 years, that the suit is barred as *res judicata* (referring to the Deputy Commissioner's order of 2nd April 1878), and that the land in question has gradually accreted to his, defendant's villages.

1891 Nov. 21. — PRIVY COUNCIL. — 19 C. 159 (P.C.) = 18 I.A. 165 = 15 Ind. Jur. 749 = 6 Sar. P.C.J. 80 = Rafique & Jackson's P.C. No. 125.

"I have already said that I consider it is wholly beyond the scope of the Court's functions to discuss the propriety or otherwise of the orders passed in 1873, 1874, and in 1876 (27th June 1874 is the date of the *dakhalnama* signed by the plaintiff). The practical questions for the Courts are—(1) Can the lands then given to the plaintiff be now ascertained? (2) Has the plaintiff by any action on his part debarred himself from obtaining further relief from the Civil Courts, in respect of any of such lands, and, if so, in respect to what lands is he so debarred? In reply to the first question, I think there is no sort of doubt that notwithstanding the fact that since this long litigation commenced the main channel of the Gogra has shifted considerably to the north, nevertheless the lands given to the plaintiff in 1874 and detailed in the map of June 1874, are capable of identification. A comparison of the map in the record of 1878, of the District Judge's Court, with the map in the case decided on 28th April, 1884, and the map, dated 16th June 1874, will [163] sufficiently explain, to a person conversant with surveying, what the land was which was given to plaintiff in 1873-74 and its present locality.

"As to the second question, I agree with the lower Court that the decision of the Judge in Kharram Rae's case bars the present claim as far as regards 1,226 bighas of that claim. For those 1,226 bighas were comprised in the claim made in that suit, and that claim was decided on the merits and was wholly dismissed. The mere fact that the plaintiff then claimed it on an incorrect allegation that it was an accretion of his village of Khasapur seems to me immaterial. The material point is that he claimed possession of it and his claim was disallowed.

"Nor can I allow the contention that the present minor Raja ought not to be bound by Kharram Rae's action. It seems to have been the ordinary practice of the Maharaja of Kapurthala to bring suits relating to the Kapurthala estate in his agent's name, and in the very case before us the plaintiff is seeking to benefit by a decision (3rd February 1873) given in a case so brought on behalf of the Kapurthala estates by a manager, Dewan Banna Mal. In fact, the very foundation of the present claim is the decree given in that case. So in the 1878 case, Khurram Rae, the ostensible plaintiff, was acting for the Kapurthala estates as much in the minor's time as in that of the minor's father.

"For these reasons I am of opinion that s. 13, Civil Procedure, bars the present suit as regards 1,226 bighas.

"The lower Court has held that the suit as regards the rest of the land claimed is barred by ss. 42, 43, Civil Procedure. The grounds for this conclusion are not clear to me. The lower Court has assumed that plaintiff has never had more than formal possession over *any* part of the decreed land. But I do not find proof on the record to this effect. The defendant himself frequently limits himself to a declaration that plaintiff is not in possession of *all* the land claimed, and the plaintiff on several occasions has framed his prayer that his possession be confirmed where it exists, and that possession be granted where not existing. At the time that the 1,226 bighas were claimed by the plaintiff, there is no clear evidence proving in respect to what other plots the plaintiff was then dispossessed, and how and since what time. All these points had to be [164] proved distinctly before it could be rightly decided that the plaintiff at the time he sued for the 1,226 bighas had also a cause of action for other plots and had failed to sue on such causes of action. Again, seeing that the plaintiff had obtained formal possession from the Civil Courts in 1876, any person remaining on

1891 Nov. 21.

PRIVY COUNCIL.

19 C. 159 (P.C.) = 18 I.A. 165 = 15 Ind. Jur. 749 = 6 Sar. P.C.J. 80 = Rafique & Jackson's P.C. No. 125.

the land so given to the plaintiff without his permission was a mere trespasser, and until the plaintiff had demanded his rent from such person, there was nothing to show that payment would have been refused. Until such refusal to pay rent occurred, the plaintiff himself alleges that he had no clear cause of action against the said tenant and his abettors. I think this contention is valid. For these reasons I disapprove of the finding of the lower Court that this suit is barred by ss. 42 and 43.

"Nor do I think that the suit is barred by reason of the adverse possession of defendant for more than 12 years. And this for two reasons :—

"First, because though there are vague, often conflicting, statements as to the length of time that the defendant has by his tenants held possession of portions of his land, there is nothing definite or precise either as to particular plots, or tenants, or periods. And again in any case the formal possession given to the plaintiff in 1876 appears to me to clearly bring him within limitation.

"For these reasons I modify the judgment below and decree to the plaintiff the land sued for less 1,226 bighas, respecting which I hold that (under s. 13, Act XIV, 1882) the plaintiff's claim is barred by the judgment of Colonel Chamier, Deputy Commissioner, Bara Banki, dated 2nd April 1878.

"As to mesne profits, no evidence exists whatever to show that such are due; and, moreover, the extraordinary supineness for years exhibited by the plaintiff after the decree of 1873, disentitles him to any relief under this head."

On the appellant's appealing from that part of the above judgment which was adverse to him, the respondent filed a cross appeal; which afterwards was dismissed for want of prosecution.

On this appeal—

Mr. *R. V. Doyne*, for the appellant, contended that the judgment of the appellate Court below, as to the part of the plaintiff's **[165]** claim which was dismissed, and except so far as it reversed the decree of the first Court, was wrong. No question existed as to the whole of the land now sued for having been decreed in 1873 in favour of the plaintiff's father, his predecessor in title as against the defendant; and there was no doubt that proprietary possession was at one time given, nominally, in the proceedings. In 1878 the District Judge did not consider that he was dealing with, or dismissing, the claim to the 2,226 bighas: no issue as to the title to them having been fixed, or disposed of, by him. It was a matter of mistake in identifying the land, that it was treated, in preferring the claim in 1877, as if it belonged to Khasapur; but as soon as it was discovered that the land belonged to Sipah, nothing further was put forward, or decided, about this portion of the claim. To render s. 13, Civil Procedure, applicable, an issue as to the 2,226 bighas should have been raised, and the ownership should have been directly and substantially put in issue. The respondent could not, in this suit, dispute the title of this appellant to any of the lands comprised in the decree of 1873, and demanded in the execution proceedings. There was no reason why the remainder of the claim should have been included in the suit of 1877; and ss. 42 and 43 did not apply. Lastly, the appellant should have been declared entitled to mesne profits, and it was a case for the exercise of the power given by the 212th or 244th sections.

The respondent did not appear.

1891 Nov. 21. — PRIVY COUNCIL. — 19 C. 159 (P.C.) = 18 I.A. 165 = 15 Ind. Jur. 749 = 6 Sar. P.C.J. 80 = Rafique & Jackson's P.C. No. 125.

JUDGMENT.

Their Lordships' judgment, on the 21st November, was delivered by

LORD HOBHOUSE.—The appellant is the Raja of Kapurthala, and the proprietor of estates in Oudh on the banks of the Gogra river. The respondent is the Raja or talukdar of Ramnagar, and the proprietor of estates on the other side of that river. There has been litigation between the two houses extending over many years. The present dispute commenced in the year 1871, when the appellant's father was living; but his death has not, except on one point not necessary to decide or state now, affected the question. There have been suits and cross-suits, appeals and cross-appeals, petitions and cross-petitions, sometimes by agents and sometimes by principals, and the parties have interchanged places on the record so often that it is confusing to speak of them in the [166] character of plaintiffs or defendants. It will perhaps be clearer to call the appellant's side Kapurthala and the respondent's Ramnagar.

In the month of December 1871, Kapurthala brought a suit against Ramnagar to assert his title to a tract of land on the banks of the Gogra; and in January 1872 Ramnagar brought a cross-suit against Kapurthala in respect of the same land. After a while the parties came to a compromise, which was expressed in a decree dated the 3rd February 1873, and pronounced by Colonel Chamier, the then Deputy Commissioner of Bara Banki, in whose Court Ramnagar's cross-suit was pending. The terms of the compromise were to the following effect:—Part of the land in dispute was to be attributed to Kapurthala's village, Tappa Sinah, according to the Revenue Survey map; another part was to be attributed to Ramnagar's villages, Para and Deorya Tilkunia, according to the same map; the remainder was to be apportioned rateably to the villages above named.

In December 1873 an order was made in the execution proceedings, ascertaining the acreage apportionable to each village; and it seems that Ramnagar was disappointed with the result, considered that he had been outwitted in the transaction, and began to offer opposition to the execution of the decree. In point of fact he has successfully resisted its execution from that day to this—a state of things which appears to their Lordships to suggest grave doubts as to the efficiency of legal processes in Oudh.

After this point the execution proceedings dragged slowly on. It is not necessary to detail them. A map was made and signed by Colonel Chamier in June 1874. In April and June 1876 orders were made for possession, and on the 27th June 1876 a receipt of possession was signed by Kapurthala's agent, and the long dispute appeared to be finally decided on the 1st September 1876, when Mr. Wood, the then Deputy Commissioner of Bara Banki, pronounced an order as follows:—

"After hearing the objections of the pleaders on both sides, the Court decides that the decree must be executed according to the map prepared bp Colonel Chamier, dated 16th June 1874, and the southern boundary of the disputed land will be that drawn in the above map. If either party consider that [167] they have any claim to lands thrown up by the river, they have their remedy by a regular suit.

"This Court cannot go contrary to the map prepared by Colonel Chamier. The parties have been informed of this order, and as the decree, from the report of the Extra Assistant Commissioner, has now been executed, the papers will be consigned to the records."

A controversy then arose respecting alluvial land, which Kapurthala alleged to belong to another of his villages called Khasapur. In one of the execution proceedings, a petition of the 27th June 1876, a statement was made on behalf of Kapurthala to the effect that Khasapur land had by error been mixed up with Tappa Sipah land. Probably Deputy Commissioner Wood was referring to that statement, when he spoke of a regular suit being brought for lands thrown up by the river. However that may be, Kapurthala did, on the 16th of January 1877, bring a fresh suit, the proceedings in which must be accurately stated, because the main question now to be decided is whether the decree does not exclude a large portion of the relief sought in the suit now under appeal.

1891 Nov. 21.

PRIVY COUNCIL.

19 C. 159 (P.C.) = 18 I.A. 165 = 15 Ind. Jur. 749 = 6 Sar. P.C.J. 80 = Rafique & Jackson's P.C. No. 125.

The claim made is for possession of 3,921 bighas 18 biswas in village Khasapur, on the basis of ancient possession, by cancelment of possession wrongfully taken by the defendant since the month of June 1876. The record does not show what issues were settled, which is a defect, because the judgment of the Court is framed by reference to them. But the language of the judgment shows clearly enough to what they must have been confined. The case was heard on the 2nd April 1878 before Colonel Chamier, who was again Deputy Commissioner of Bara Banki. In giving judgment he said :—

"The plaint set forth that the land belonged to Khasapur, but after a survey of the land the plaintiff discovered that he must abandon this contention, inasmuch as he holds land between Khasapur and the land in suit, under a decree in a former suit, when it was assigned to Tappa Sipah, another of his villages. . . . . It is quite clear from the map, the correctness of which has not been impugned by either party, that the plaintiff has no business south of the Gogra under his [168] ownership of the village of Khasapur. The fact appears to be that there is some doubt as to the exact land decreed to Tappa Sipah, and therefore the defendant applied for an amin to point it out, but the plaintiff asked that it might be postponed until this suit might be determined. But be that as it may, the plaintiff cannot complete his possession under the Tappa Sipah decree by tacking on land to Khasapur."

After these observations the learned Judge proceeds to state his findings on the several issues. The material ones are :—

"On the second issue I find that this suit cannot be maintained for land alleged to belong to Khasapur when land decreed to Tappa Sipah intervenes.

"On the third issue I find by an examination of the present map A with the maps of the Revenue Survey, that the greater portion of land marked B in red is the exact site of defendant's villages Durgapur and Sissounda, and therefore it would be manifestly impossible to decree the land shown in green to the plaintiff. In my opinion the claim is without any fair foundation.

"The plaintiff should take steps to have the land defined which has been decreed to him under Tappa Sipah, and this judgment of course will not affect any of that land."

And on these findings he dismissed the plaint.

Kapurthala appealed to the Commissioner of Lucknow, Colonel Reid, who on the 20th June 1878 dismissed the appeal. In so doing he made the following observations :—

"The facts appear to be as set forth by the District Judge in his judgment, and I agree with him that the claim, as laid, is quite untenable.

1891 Nov. 21. — Privy Council. — 19 C. 159 (P.C.) = 18 I.A. 165 = 15 Ind. Jur. 749 = 6 Sar. P.C.J. 80 = Rafique & Jackson's P.C. No. 125.

"But the District Judge himself remarks that there is some doubt as to the exact land decreed to proprietor Sipah, and I am therefore of opinion that, on an assign (probably a misprint for application) to that effect being made by P. H. appellant, the District Judge should proceed to the spot and satisfy himself by local inquiry, in presence of the parties, that his decree has been proper, land has been assigned to Tappa Sipah exactly in accordance with his decree."

After this Kapurthala (who indeed was a little child, but their Lordships speak of the acts of principals and agents as all due to [169] the principals) addressed himself to the Sisyphean task of executing the decree of the 3rd February 1873. On the 11th October 1878 he addressed the Deputy Commissioner, praying "that proceedings may be taken as directed by the Commissioner of Lucknow in his order dated 20th June 1878. A clear determination of boundaries will probably put a stop to all litigations." It is apparently to this application that the order which stands next in the record relates. It was made by the Deputy Commissioner, Colonel Chamier, on the 3rd March 1879, and is as follows:—

"This is another file which Mr. Harington has not touched during his three months' incumbency. It is impossible now to take it up this season. It seems to me that, before the Raja of Kapurthala can expect the Court to ascertain whether or no a decree passed years ago was accurately executed or not, he should state the section of Act X, 1877, under which he applies, and he should present an accurate map of the land showing what he is entitled to under the decree, and what he does not hold.

"Papers to be filed."

Their Lordships cannot refrain from observing that this appears to them a very unsatisfactory way of dealing with such a business; the land to which Kapurthala was entitled under the compromise was not ascertained and put beyond the reach of dispute till September 1876. In the suit of 1877 it appeared that there were still some doubts as to the exact land, and in the final judgment given in that suit, on the 20th June 1878, it was intimated to Kapurthala by the Commissioner, Colonel Reid, that on his application the District Judge should proceed to the spot, and satisfy himself that the land has been assigned to Tappa Sipah in accordance with his decree. The District Judge and the Deputy Commissioner appear to be one and the same officer. In October 1878 Kapurthala asks the Deputy Commissioner to do what Colonel Reid said he ought to do. And then, after five months' delay not imputed to Kapurthala but to Mr. Harington, he is told that his decree was passed years ago, and that, before anything can be done, he should state under what section he applies, and present an accurate map of the land showing what he is entitled to, and what he does not hold. Now, when Kapurthala made this application, the land had been finally and effectually ascertained [170] barely more than two years. The Court was in possession of the map of 1874 (Colonel Chamier's own map), which the Courts had taken as conclusive. The execution sections of the Code, if unknown to the Deputy Commissioner, could have been referred to at once. What Kapurthala was entitled to was the land awarded him by the decision resting on the map of 1874. What he had not got in actual possession was the matter to be ascertained by the Deputy Commissioner or his officers, and was in fact ascertained by his successor in the course of a day's visit to the spot.

It is not very surprising that, after this repulse in the Civil Court, Kapurthala should have tried whether he could get assistance from the Revenue Court. On the 28th January 1880 he procured an order for the erection of boundary marks, according to the decree of February 1873. Ramnagar appealed, but though his appeal was dismissed, nothing effectual was done till the 2nd February 1881, when Mr. Forbes, Deputy Commissioner, visited the spot, ascertained the boundary line adjudged under the decree, and ordered pillars to be erected. At the same time he found that the adjudged land, within certain lines which he laid down on a map, was in the possession of Ramnagar, who strongly urged his right to remain in possession until ousted in due execution of the Civil Court decree, and denied the right of the Revenue authorities to lay down boundaries except on the basis of actual possession. The boundaries, however, were laid down on the 11th August 1881, as appears from an order of that date.

1891 Nov. 21. — Privy Council. — 19 C. 159 (P.C.) = 18 I.A. 165 = 15 Ind. Jur. 749 = 6 Sar. P.C.J. 80 = Rafique & Jackson's P.C. No. 125.

Kapurthala's next step was to bring rent-suits against tenants who paid their rent to Ramnagar. He got decrees on the 19th June 1882 from the Extra Assistant Commissioner against the tenants, and notwithstanding the intervention of Ramnagar. But on appeal it was decided that the question was not within the competence of a Revenue Court, but should appropriately be decided in a Civil Court. This decision was upheld by the Judicial Commissioner, who by order, dated the 14th October 1882, dismissed Kapurthala's appeal, saying, "I quite agree with the Deputy Commissioner; if the appellant has any claim to the land, he should sue Raja Sarabjit Singh in the Civil Courts."

It appears to their Lordships that those decisions were right, but their effect was to throw Kapurthala back again upon the [171] Civil Courts. After two failures, owing to want of proper formalities, and much loss of time in consequence, the plaint in the present suit was presented and received on the 5th February 1886. It claims 2,679 bighas 14 biswas of land under the decree of February 1873.

The first question, going to the entire suit, is whether it is barred by time. Both of the Courts below have decided this point in favour of Kapurthala, and their Lordships concur with them. It is true that the compromise which is the foundation of the claim dates from February 1873, but the land which accrued to Kapurthala under the compromise was not ascertained till the proceedings in 1876. Therefore, without considering the effect of any of the subsequent litigation, June 1876 is the very earliest time at which a right to recover the land in suit accrued to Kapurthala, and that is less than 12 years before the reception of the plaint.

The Deputy Commissioner, Colonel Newberry, dismissed the suit with costs. As to 1,226 bighas 6 biswas, he considered that the dispute had been previously decided in the suit of 1877 by the decree of the 2nd April 1878. As to the rest of the land claimed he held that the case fell within the sections of Civil Procedure Code (42 and 43) which relate to the splitting of claims.

On appeal by Kapurthala the Judicial Commissioner affirmed the decree, so far as it relates to the 1,226 bighas 6 biswas comprised in the suit of 1877. But as to the rest of the claim he varied the decree, and decided for Kapurthala. In the latter part of the Judicial Commissioner's decree their Lordships entirely concur, and as there is no appeal from it by Ramnagar, they need not further examine that part of the case. But

1891 Nov. 21. — PRIVY COUNCIL. — 19 C. 159 (P.C.) = 18 I.A. 165 = 15 Ind. Jur. 749 = 6 Sar. P.C.J. 80 = Rafique & Jackson's P.C. No. 125.

Kapurthala now appeals from the rest of the decree, and the question is whether it can be maintained.

Both the learned Judges grounded their opinion on the fact that the tract of land claimed in 1877, being 3,921 bighas, included the 1,226 bighas belonging to Tappa Sipah, and that the claim was dismissed. That, they say, is conclusive. The Judicial Commissioner says the mere fact that Kapurthala claimed it as belonging to Khasapur is immaterial. And as to the direction given by the Courts to have the Tappa Sipah lands defined, the Deputy [172] Commissioner says it is the decree which contains the formal adjudication, and it is not possible to amplify the decree from the judgment. But the fact that Kapurthala in 1887 claimed the whole tract as belonging to Khasapur, and that, when part was found not to belong to Khasapur but to another of his villages, he was left to recover it in another way, may be very material. And when a decree simply dismisses a suit, it is necessary to look at the pleadings and judgment to see what were the points actually heard and decided.

Section 13 of the Civil Procedure Code does not enact that no property comprised in a suit which is dismissed shall be the subject of further litigation between the parties. What it does enact is that no Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit, and has been heard and finally decided. Was then the title to Tappa Sipah lands put in issue by the suit of 1877, and was it heard and finally decided against Kapurthala?

The proceedings have been stated above at some length. Their Lordships will recapitulate them. Kapurthala claimed a large area as belonging to Khasapur. Whether land belonging to Tappa Sipah was included in that area by mistake, or in the hope of getting some advantage in the other dispute, does not appear. It must be remembered that far the greater portion of these disputed lands is still uncultivated and jungle. Anyhow, the fact was discovered by a survey made in the suit of 1877; it appeared that doubts had been raised as to the position of the land decreed to Tappa Sipah; Ramnagar asked for an amin to point it out, but Kapurthala preferred to have the suit decided first. The decision is that the land not belonging to Tappa Sipah belonged to two of Ramnagar's villages, rather more, apparently, than two-thirds of the whole. But it is clear that the moment land was shown to belong to Tappa Sipah, it was considered as out of the suit. Both Courts treat it so, and both Courts direct Kapurthala to get the Tappa Sipah land ascertained. Their Lordships cannot see what matter respecting Tappa Sipah was in issue between the parties, or what was heard or decided. It seems to have been the express intention of both Courts to decide nothing about [173] Tappa Sipah. Yet, according to the view now put forward, the moment that this suit was dismissed Kapurthala was deprived of all right to recover those 1,226 bighas, and was incompetent to take the proceedings which the Courts contemplated.

The only remaining point is that of mesne profits. The Deputy Commissioner says there is no proof. There is some proof, because the rent-suits show that Ramnagar was receiving rent for some of the land. But it is quite competent for the Court to direct an inquiry under s. 212 of the Code. Ramnagar has for a number of years kept Kapurthala out of property which clearly belonged to him, and it would be a denial of justice not to make him account for the profits. The Judicial Commissioner says that Kapurthala ought not to have any mesne profits, because of his extraordinary supineness for years. To their Lordships it seems

1891 Nov. 21.

PRIVY COUNCIL.

19 C. 159 (P.C.) = 18 I.A. 165 = 15 Ind. Jur. 749 = 6 Sar. P.C.J. 80 = Rafique & Jackson's P.C. No. 125.

that Kapurthala has been constantly endeavouring, through great discouragements, and sometimes by mistaken proceedings, but with no great intervals of time, ever since February 1873, to get the land which he was entitled to under that decree, and that Ramnagar has been thwarting him by every device in his power, with a success which is very lamentable; and that, even if supineness could be properly treated as equal to a bar by lapse of time, there is in this case no supineness which affords a reason for leaving Ramnagar to enjoy the fruits of his illegal and wilful holding on to land not his own.

Their Lordships are of opinion that both the decrees below should be discharged, and that a decree should be made for the plaintiff for possession, according to the prayer of his plaint, and for mesne profits, with an inquiry as to the amount. Whether this decree will be more fruitful in results than former ones have been their Lordships cannot tell, but it is to be hoped that the Oudh Government will see its way to give suitors what the Courts of law award to them. The plaintiff should also have the costs of suit in the first Court, and of the appeal before the Judicial Commissioner, and the costs of this appeal. Their Lordships will humbly advise Her Majesty in accordance with this opinion.

Appeal allowed : inquiry as to mesne profits directed.

Solicitors for the appellant: Messrs. *Barrow* and *Rogers*.

C. B.

---

19 C. 174 (P.C.) = 19 I.A. 33 = 6 Sar. P.C.J. 93 = Rafique & Jackson's P.C. No. 124.

[174] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Morris, Sir L. Couch and Lord Shand.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

PARTAB BAHADUR SINGH (*Appellant*) *v.* CHITPAL SINGH AND OTHERS (*Respondents*). [11th November, 1891.]

Account between debtor and creditor—Special directions as to sums borrowed by an agent in collusion with creditor—Restriction of the principal's liability to those debts only which were shown to have been just—Burden of proof.

Fraud and undue influence having been found, with the result that a decree cancelled transfers executed in favour of a creditor by a talukdar whose manager had received in his name money forming the consideration for the transfers, an account was directed to be taken of the sums actually due and payable by the principal. Directions were given for the payment not of all the money received from the creditor by the manager but only of sums (*a*) shown to have been lent by the creditor to the principal himself personally, and of those (*b*) received by the manager on behalf of the principal in the course of a prudent management. The burden of proof lay on the creditor of showing that any particular advance fell within the class (*b*); and where the advance having been received by the manager, had been partly used in payment of Government revenue, due on the estate managed by him; *held*, that the Court below had rightly presumed that the rents should have covered the revenue due; and this presumption having to be met, it was for the creditor to bring proof to overcome it.

[R., 2 N.L.R. 10 (13).]

APPEALS from two decrees (3rd December 1887) of the Judicial Commissioner of Oudh, varying two orders (1st March 1887) of the District Judge of Rai Bareilly.

1891 Nov. 11. — Privy Council. — 19 C. 174 (P.C.) = 19 I.A. 33 = 6 Sar. P.C.J. 93 = Rafique & Jackson's P.C. No. 124.

These consolidated appeals, two cross-appeals having also been filed but not prosecuted, related to the orders made by the District Judge in carrying out (s. 394, Civil Procedure) the directions contained in the order of Her Majesty, which followed the judgment of their Lordships, dated 24th June 1884, in *Ajit Singh* v. *Bijai Bahadur Singh*, and the cross-suit (1). That judgment was given upon appeals in two suits, of which the first was instituted by the predecessor in estate of the present appellant against Raja Bijai Bahadur Singh, a talukdar, of Oudh and his wife, Rani Janki Kunwar, she having been made a **[175]** defendant, as she alleged an assignment to her from her husband. The claim was for Rs. 1,37,441, due upon an hypothecation of a taluk by deed executed on the 19th June 1878, to secure repayment of the aggregate amount of several loans.

The second suit was brought by Bijai and his wife against Raja Ajit Singh for the recovery of possession, together with mesne profits, of certain property comprised in a sale deed of 26th May 1879, and for cancellation of the deed, on the ground of fraud, undue influence and want of consideration, said to have been attendant in the transaction. The decision of 24th June 1884, on those appeals, affirmed the finding of the Courts in India, the Judicial Commissioner having concurred in the view of the District Judge, and in his findings as to the incapacity of Bijai, the advantage taken of his weakness by Ajit, and the collusion of the latter with Wahaj-ud-din, the untrustworthy manager of Bijai's estate. The appeals of Ajit were dismissed by the judgment of 24th June 1884, which affirmed the above. But, on the cross-appeal of Bijai, their Lordships were of opinion that the judgments below erred in making him responsible for all the advances made by Ajit, without considering how much of them had actually gone into the hands of Bijai himself, and what had been spent by the manager. They were also of opinion that Ajit could not claim against Bijai merely by showing that he had paid money to Wahaj-ud-din. He must show, further, that his advances were really applied to the benefit of Bijai, or were properly borrowed in a due course of management. As to these points they advised amendment of the decrees of the Judicial Commissioner, and that the suits should be remitted to India for the accounts to be taken on this latter basis. On the receipt of Her Majesty's order, according to the above, the District Judge of Rai Bareilly, having appointed his munsarim to examine, under s. 394, Civil Procedure, the accounts, the munsarim reported, in the first suit, that Rs. 1,14,961 were due to Ajit Singh for principal and interest in respect of the hypothecation deed of the 19th June 1878, and in the cross-suit he found that Rs. 41,650 was due for principal and interest in respect of the sale-deed of the 26th May 1879, from which Rs. 5,100 had to be deducted for mesne profits, leaving a balance of Rs. 36,550 **[176]** due to Ajit. These reports were approved by the District Judge on the 1st March 1887, but were modified, unfavourably to the present appellant, by the Judicial Commissioner in the judgment now appealed from.

The parties to the appeals, disposed of by the order of 1884, having died in the interval, they were represented by the present appellant and respondents. Three different persons—Raja Chitpal Singh, Bhuron Baksh Singh and Lal Sheo Partab Singh (the first two claiming each as nearest

---

(1) 11 C. 61 = 11 I. A. 211.
Another suit brought by the Rani against Ajit Singh was barred by limitation; see 15 C. 58.

sapinda to Bijai, and the third as nearest sapinda of Rani Janki Kunwar) —were entered on the record of the proceedings. On these appeals,

1891 Nov. 11.

PRIVY COUNCIL.

19 C. 174 (P.C.)= 19 I.A. 33= 6 Sar. P.C.J. 93= Rafique & Jackson's P.C. No. 124.

Mr. *J. Graham*, Q. C., and Mr. *R. V. Doyne*, appeared for the appellant and cross-respondent, Partab Bahadur Singh.

The respondents and cross-appellants, Raja Chitpal Singh and others, did not appear.

For the appellant it was argued that the District Judge was right in allowing, as borrowings consistent with prudent management, all monies borrowed, and applied, by Wahaj-ud-din, for payment of Government revenue; and that the Judicial Commissioner had no evidence before him that there were then rents in hand applicable to such payments.

The entire amount of Rs. 20,445, part of the consideration of the deed of sale of the 26th May 1879, of which sum the receipt was admitted by Bijai before the Registrar, should have been allowed.

Counsel for the appellant having been heard, their Lordships' judgment was delivered by—

JUDGMENT.

LORD SHAND.—This case is the sequel, or more properly the second part, of a case which has already occupied their Lordships' attention (1).

The creditor, Raja Ajit, who is now represented by the appellant, sued his debtor Raja Bijai, now represented by Raja Chitpal and others, for payment of certain sums which were stated to be vouched by a number of different securities. The Court below had given him a decree for a very considerable [177] amount. As the result of the argument before their Lordships this decree was recalled, and the case was remitted with certain directions to the Court below; and as a key to the meaning of these directions, it seems desirable to read the following passage in the judgment then delivered by this Board: "It is true that there is no direct evidence in the record of a conspiracy between Ajit and Wahaj-ud-din; but they acted together against the interest of this unfortunate talukdar," the talukdar being the defendant in the case. "His agent induced him to sign a number of bonds for sums of money which have been found not to be necessary for the purposes of the estate; and Ajit, whose duty as a relative, a friend, and a neighbour of Bijai, a man of weak intellect, was to have warned Bijai against the proceedings which were going on to his own ruin, so far from doing this, acts in concert with the unfaithful steward, and not only does he act in concert with him, but he profits principally by their joint transactions."

That being the view which their Lordships then took of the relation between the parties, they were unable to affirm the judgment giving decree for the large sums to which reference has been made, and a remit was made to the Court below to take the following accounts:—"1. An account of such sums advanced or paid by Raja Ajit Singh by way of consideration for the said deed of the 26th May 1879, as shall be proved to have been paid to and received by Raja Bijai Bahadur Singh personally. 2. An account of such sums advanced or paid by Raja Ajit Singh by way of consideration for the same deed as Wahaj-ud-din would have been justified in borrowing in course of a prudent management of Raja Bijai Bahadur Singh's estate. 3. An account of what is due upon such

(1) 11 C. 61=11 I. A. 211.

Another suit brought by the Rani against Ajit Singh was barred by limitation; see 15 C. 58.

1891 Nov. 11. — PRIVY COUNCIL. — 19 C. 174 (P.C.)= 19 I.A. 33= 6 Sar. P.C.J. 93= Rafique & Jackson's P.C. No. 124.

advances or payments for simple interest at 8 per cent. from the date of each advance or payment to the time of repayment."

The two classes of advances then which were to be allowed were, first, advances which the creditor was able to prove had been paid to and received by Bijai Bahadur personally; secondly, advances which the creditor was able to show Wahaj-ud-din, the manager, would have been justified in borrowing in the course of a prudent management of his principal's estate. That being so, an [178] investigation has taken place in the Court below, and the questions which are now raised are really questions of accounting, but to some extent they raise questions of principle. Their Lordships, as the result of full argument, have come to the conclusion that there is really no difficulty attending the decision of the case, that the judgment of the Judicial Commissioner is sound, and that it has been put upon grounds which their Lordships are prepared to affirm.

The creditor, the plaintiff, has been allowed credit for all the sums which have been paid to and received by Raja Bijai Bahadur personally. It is said there is one sum which it has been proved was paid to him personally which has not been allowed. That will be spoken of immediately. But the main controversy had arisen upon the second branch of the remit, as to whether sums under that branch have been improperly disallowed.

It will be necessary shortly to notice the items *seriatim*. The judgment of the Judicial Commissioner, so far as it is complained of, is to be found on page 40 of what is called record No. 3; and the first item objected to is this:—A sum of Rs. 6,000, borrowed on the 2nd February 1877. The facts stated about it are these: "Bond executed in favour of Bisheshar Singh and Sheo Dayal Singh, servants of Rajah Ajit Singh, registered at the instance of Wahaj-ud-din, who received the consideration before the Sub-Registrar. The munsarim allowed Rs. 4,220-7-9, and disallowed the remainder, and the District Judge endorsed the munsarim's report. Rs. 4,221-7-9 were paid into the Partabgarh Tahsil in payment of the Government revenue. The learned Judge adds: "For such payment Wahaj-ud-din had no business to borrow money in February, just after the rents from the tenants had been realized."

This item raises the legal question whether, upon the facts admittedly proved, the plaintiff is entitled to credit for this sum. The facts proved are these: in the first place the money was not paid to the defendant himself, but was paid to Wahaj-ud-din; in the second place, it is shown that to the extent of Rs. 4,221 that money was applied in payment of Government revenue in connexion with the estate. Is that sufficient to entitle the plaintiff to credit? In order to settle that, it is necessary to have in view the terms of the remit, which have already been set out. It [179] appears to their Lordships to be quite clear that the onus of proving that any particular sum or advance falls within the second heading of the remit, lies on the creditor; and the only proof that is here advanced is that money did find its way into this manager's hands, whose management was distrusted by their Lordships in their former judgment; and secondly, that it was used partly by way of payment of revenue; but as to the necessity for resorting to borrowing money for payment of revenue, or as to any state of facts that could justify that, so as to make it a loan obtained in the course of a prudent management of the estate, there is no evidence whatever. It must be assumed, in the first instance, that a manager having the whole rents of an estate to deal with would have the means of at least meeting the necessary payments of Government revenue, and if that presumption is to be met, the creditor must bring

1891 Nov. 11. — Privy Council. — 19 C. 174 (P.C.) = 19 I.A. 33 = 6 Sar. P.C.J. 93 = Rafique & Jackson's P.C. No. 124.

proof to overcome it. So far from there being evidence of that kind, as pointed out by the Judicial Commissioner, there is a great deal to show the contrary. He refers to the fact that it had been shown that Wahaj-ud-din was an imprudent and dishonest manager, and, that, according to his own deposition, he had been wasting the money of the estate in supporting a horde of relations, friends, and dependants, from the income of his master's property. It appears to their Lordships to be quite clear, therefore, that upon this item of the account, the mere circumstance that the money in part found its way in payment of Government revenue is no proof that there was a necessity for its so being used, or that this was done in the course of a prudent management. The judgment given on this item seems really to settle the main points in the case, because the others generally fall under the same principle.

The next item mentioned is:—"Rs. 2,120 borrowed by "Wahaj-ud-din on a promissory note signed by himself." As to that the Judicial Commissioner says that there is "no proof whatever that he borrowed this money in the real interest of the estate." Counsel for the appellants pointed out, no doubt, that this sum was mentioned in one of the bonds which had been granted, but the fact of its being there mentioned was no evidence whatever that the money, although received by Wahaj-ud-din, had been borrowed in the interest of the estate, or in the course of a reasonable management. This item was not only disallowed by [180] the munsarim in his report, but also by the District Judge and by the Judicial Commissioner; and there is, therefore, a concurrent finding of fact by those two Judges, which their Lordships would not disturb—that there is no proof that the money was required for the purposes of a prudent management of the estate.

The next item is:—"Rs. 2,000 advanced on the 17th February 1878 on a promissory note." That money was stated by the Judicial Commissioner to have been "realized by Wahaj-ud-din, who devoted Rs. 1,000 to the payment of Government revenue," and was disallowed by him, also for the reason which he had previously given, and which their Lordships think sound. These items dispose of the case so far as regards the main suit.

In the cross-suit there are only two items that have been brought under their Lordships' notice. In regard to the first of these, item (*b*), a sum of Rs. 11,773-10, their Lordships think that it stands precisely in the same position as the other items already referred to, having merely this to support it, that it is proved the money went in payment of Government revenue. There is no proof whatever that it was required to be so used; or that there were not rents sufficient to have paid the whole of the Government revenue; and therefore this item is disposed of by what has been already said.

There remains only the item (*c*), with respect to which it is said there is a speciality, to take it out of the rule with regard to the other items. What is said about it is this. It is mentioned in the deed of the 26th May 1879, as having been received in cash by Raja Bijai Bahadur, but the Judicial Commissioner says in regard to it: "On looking over the evidence, I am satisfied in coming to the same conclusion as the District Judge as to Wahaj-ud-din being the real recipient of the whole of this money, amounting to Rs. 20,445. He can only satisfactorily account for Rs. 15,510-10 paid into the Government Treasury as revenue; but, as I have said before, money should not have been borrowed on that account."

1891
Nov. 11.
——
Privy
Council.
——
19 C. 174 (P.C.) = 19 I.A. 33 = 6 Sar. P.C.J. 93 = Rafique & Jackson's P.C. No. 124.

Now in regard to this item it has been submitted by the counsel for the appellant that there is evidence to show that it was paid to Bijai Bahadur himself, and what is relied on is simply a narrative in one of the deeds, together with a statement by the Registrar that the correctness of what was stated in the deed [181] had been affirmed by Bijai Bahadur. The question whether the money really was ever paid to Bijai Bahadur personally seems to have been made the subject of very careful investigation, in the first place before the munsarim, and again by the Judge of first instance, and finally by the Judicial Commissioner. What the munsarim says about it is this. He presents a report to the Court in which he classifies the moneys. He puts under one schedule all the money that he is satisfied was paid personally to Bijai Bahadur; in the second schedule he puts the money that was not paid to Bijai Bahadur personally, but was paid to Wahaj-ud-din, and that item of Rs. 20,445 is entered in the second schedule, the reason given being this :—" As to non-receipt of money by Bijai Bahadur himself, see evidence of Registrar and finding of Court at page 267, Rs. 15,510-10 paid into treasury, as proved by Dakhila at page 53, remainder not proved beyond Wahaj-ud-din's account, which is untrustworthy." Accordingly he holds upon the evidence before him, having gone into the whole matter, that, although no doubt Rs. 15,510-10 of this money found its way to the treasury, yet it was all money that was not paid to Bijai personally, but to Wahaj-ud-din. That report of the munsarim was approved of by the Judge of first instance, and by the Judicial Commissioner. There is therefore the concurrent finding of fact by those two Judges, that this money was paid to Wahaj-ud-din, and it must come under the principles to be applied to money so paid. It has not been proved that any part of it was expended in a course of prudent management of the estate by him, and accordingly it has been properly disallowed.

On these grounds their Lordships will humbly advise Her Majesty to affirm the judgments of the Judicial Commissioner and dismiss the principal appeals. The cross appeals must stand dismissed for non-prosecution. Their Lordships make no order as to costs.

Appeals dismissed.

Solicitors for the appellant, and cross-respondent, Raja Partab Bahadur Singh: Messrs. *Lawford, Waterhouse* and *Lawford*.

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

C. B.

19 C. 182 (F.B.).

1891 Nov. 25. — FULL BENCH. — 19 C. 182 (F.B.).

[182] FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Norris, Mr. Justice Pigot, and Mr. Justice Ghose.

DEBENDRO KUMAR BUNDOPADHYA AND OTHERS (*Opposite Party*) *v.* BHUPENDRO NARAIN DUTT AND OTHERS (*Petitioners*).* [25th November, 1891.]

Bengal Tenancy Act (*VIII of* 1885) *s.* 158—*Incidents of tenancy, application to determine—Admission of tenancy, effect of.*

An application made nominally for the determination of the incidents of a tenancy, but substantially for the purpose of setting aside the lease under which the tenant came into possession, does not come within the scope of s. 158 of the Bengal Tenancy Act.

Per PETHERAM, C.J., PRINSEP, PIGOT, and GHOSE, JJ.—An admission of a tenancy in order to give jurisdiction under s. 158 does not bring the case within the meaning of the section, the object of the section being to enable the Court to ascertain what are the incidents of the existing arrangements between a landlord and his tenant and not to enable the Court, in effect, to make a new contract for parties between whom no contract was in existence at and before the date of the application.

Per NORRIS, J.—The true construction of the application was a question for the determination of the Division Bench.

[**F.**, 6 C. W. N. 592 (593) ; **R.**, 20 C. 249 (252) ; **D.**, 18 C. W. N. 466 = 20 Ind. Cas. 910 (912).]

THIS was an application to the lower Court on the part of the respondents, three of whom were brothers, and the fourth the son of a deceased stepbrother, under s. 158 of the Bengal Tenancy Act to have determined by the Court under the provisions of that section (*a*) the class to which the appellants belonged, that is, whether they were tenure-holders, of a permanent character or not, and whether the rent payable by them was liable to enhancement or not during the continuance of their tenure; (*b*) the rent payable by them at the time of the application.

The appellants (the opposite party in the lower Court) held the lands in suit, being part of Sunderbun lot No. 44 under a certain *dur-mourusi* pottah, dated the 18th Assin 1284, purporting to have been granted by Bhupendro Narain Dutt, applicant No. 1, for himself, and as guardian of Jotendra Narain Dutt, applicant No. 4, who was a minor, and by one Bhobo Sundari Dasi [183] the mother of Gyanundo Narain Dutt and Norendra Narain Dutt, the applicants Nos. 2 and 3, who were minors, Bhobo Sundari Dasi being the executrix of their father's will. The respondents (the applicants in the Court below) contended that the pottah was obtained by misrepresentation, Bhobo Sundari Dasi having no right to grant a *kaemi* pottah, that they were not bound by it, and the appellants (the opposite party in the Court below) had therefore acquired no *kaemi* title to the lands under the pottah. They admitted that the opposite party were their tenants, but contended that the tenancy was of a non-permanent character.

The defence set up was that the application was virtually one to set aside a *mourusi* pottah, and as such not within the scope of s. 158 of the

* Full Bench on Miscellaneous Appeal, No. 16 of 1891, from the order of Babu Amrito Lal Chatterji, First Subordinate Judge of the 24-Parganas, dated the 29th September 1890.

1891 Nov. 25. — FULL BENCH. — 19 C. 182 (F.B.).

Bengal Tenancy Act. The opposite party also pleaded limitation; that there was no fraud or misrepresentation; that Bhobo Sundari Dasi had full authority under the will to grant the pottah; that she as natural guardian of the minors was competent to make the grant for the benefit of the estate, and that the lease had been ratified by the minors upon their coming of age; and that the applicant No. 1 having granted the lease with the sanction of the District Judge, the lease was a valid one; and that they had spent a large sum of money in reclaiming the land.

The Subordinate Judge, upon the authority of *Bhupendro Narayan Dutt* v. *Nemye Chand Mondul* (1), held that the applicants were entitled to have the validity of the lease enquired into and determined under s. 158 of the Bengal Tenancy Act. He further held that the application was not barred by limitation; that the allegations of fraud and misrepresentation had not been made out; that the lease was binding as regards the shares of applicants Nos. 1 and 4; that as regards the shares of the other two applicants the lease was invalid, their mother Bhobo Sundari alone having no power under their father's will to grant such a lease; and that the acts relied on by the opposite party did not amount to any ratification of the lease.

From this decision the opposite party appealed to the High Court.

The Division Bench (PIGOT and BANERJEE, JJ.) after hearing arguments on both sides referred the case to a Full Bench.

[184] The order of reference was as follows:—

This is an appeal from an order made on an application under s. 158 of the Bengal Tenancy Act.

The applicants who are three brothers, and the minor son of a deceased brother, represented by his certificated guardian, the applicant No. 1, in their application, amongst other things set out—

That the opposite party were in occupation of a portion of the lands of Sunderbun lot No. 44, belonging to the applicants in equal shares, under an alleged permanent lease granted by the applicant No. 1, for self and as guardian of his minor nephew, applicant No. 4, and by Bhobo Sundari, mother and guardian of applicants Nos. 2 and 3, who were then minors.

That the said lease was invalid, as it was obtained by fraudulent misrepresentation of facts, and as Bhobo Sundari had no power to grant any lease on behalf of applicants Nos. 2 and 3.

That the opposite party had no permanent interest in the land occupied by them, but the applicants admitted that they were non-permanent tenants.

That the opposite party had not come to any proper settlement of the land, though repeatedly called upon to do so.

And the application concluded with asking the Court to determine—

(*a*) the class to which the opposite party belonged, that is to say, whether they were permanent tenure-holders or not, and whether their rent was liable to enhancement during the continuance of their tenure;

(*b*) the rent payable by them at the time of the application.

The opposite party in their petition of objection urged that the application in this case was really a suit for setting aside their lease, and did not come within the scope of s. 158 of the Bengal Tenancy Act, and that the right of the applicants Nos. 1, 2 and 3 to set aside the lease was barred by limitation, and on the merits of the case, they denied the charge

(1) 15 C. 627.

1891 Nov. 25. — Full Bench. — 19 C. 182 (F.B.).

of fraud and misrepresentation, and alleged that the lease was obtained in good faith, and was for the benefit of the lessors; that the grantors of [185] the lease had full authority to grant it; that applicants Nos. 2 and 3, after attaining majority, took rent from them and ratified the lease, and that they had spent a large sum of money in reclaiming the land.

The Court below has held that the applicants are entitled to have the validity of the lease enquired into and determined by an application under s. 158 of the Bengal Tenancy Act; that the application is not barred by limitation; that the allegations of fraud and misrepresentation have not been made out; that the lease is binding as regards the shares of applicants Nos. 1 and 4; that as regards the shares of the other two applicants, the lease was invalid; their mother Bhobo Sundari alone having no power under their father's will to grant such a lease, and that the acts relied upon by the opposite party did not amount to any ratification of the lease.

The first point urged in appeal against this decision, on behalf of the opposite party, is that an application like the present does not come within the scope of s. 158 of the Bengal Tenancy Act.

In our opinion this contention appears to be well founded. It is admitted in this case that the opposite party came upon the land under the lease now sought to be set aside, and that that lease was the sole origin of their tenancy. That being so, it would seem unreasonable that the law should allow an application like the present, which under colour of asking for the determination of the incidents of a tenancy, really seeks to set aside the transaction which was the origin of it.

The real object of s. 158 of the Bengal Tenancy Act apppears to us to be to enable the landlord or the tenant to obtain a determination of the incidents of a tenancy, such as they are upon the existing state of things, and not of the incidents such as they would be if the state of things be altered in any way, even though the applicant be entitled to have it so altered.

The lower Court's decision on this point is based on the case of *Bhupendro Narayan Dutt* v. *Nemye Chand Mondul* (1). The learned Judges who decided that case observed:—"The only point on which the enquiry under this section seems to differ from the [186] trial of a regular suit under the Code of Civil Procedure is the omission on the part of the Legislature to provide for the levy of the usual court-fee stamp on the institution of suits, and this omission, we must presume, was foreseen and intended." If this view is correct, the Court below is right; and if the point adverted to was the only point of difference between a suit and an application under s. 158 of the Tenancy Act, the decision of the Court below would, at any rate, be unassailable in appeal, by reason of the provisions of s. 578 of the Code of Civil Procedure. But there appears to us to be another and a more important point of difference between a suit and an application under s. 158, and that is as regards the application of the law of limitation. If the present applicants brought a suit to set aside the lease, three of them would be clearly barred by limitation, though coming before the Court as applicants they may not be so barred. The result, then, of our holding that the present application comes within the scope of s. 158 of the Tenancy Act will be that, though a certain relief is no longer obtainable in the ordinary way by a suit, such a suit being barred by limitation, the very same relief may be obtained if the party

(1) 15 C. 627.

1891 Nov. 25. — Full Bench. — 19 C. 182 (F.B.).

seeking it brings his case before the Court by way of an application. We are not prepared to hold that such a result was intended or foreseen by the Legislature.

We think, therefore, that an application like the present does not come within the scope of s. 158 of the Tenancy Act. But as this view is in conflict with that taken by a Division Bench of this Court in the case referred to above, and as we are unable to distinguish that case from the one before us, we must refer the following question to a Full Bench :—

Whether an application made nominally for the determination of the incidents of a tenancy, but substantially for the purpose of setting aside the lease under which the tenant came into possession, is one that comes within the scope of s. 158 of the Bengal Tenancy Act?

Mr. *Woodroffe.*— The decision in *Bhupendro Narayan Dutt* v. *Nemye Chand Mondul* (1) cannot be supported. The learned Judges **[187]** who tried that case felt considerable hesitation, and proceeded on the assumption that the only point upon which an inquiry under this section differed from a regular suit was the omission to provide for any court-fee stamp on the part of the Legislature. They overlooked the fact that a claim barred by limitation might nevertheless be presented under this section. In that case Mr. *Evans* argued that, because of the similarity between s. 158 and ss. 101 to 108 of the Tenancy Act, it was to be inferred that s. 158 was intended to apply to isolated cases the provisions of the foregoing sections with regard to the record of rights in local areas, with the difference that a local enquiry should only take place when deemed necessary by a revenue officer, and that the appeal to this Court should be in the nature of a first, and not a second appeal; and the High Court agreed in that view of the matter. I submit the view taken by the referring Judges is the right one. It could never have intended that a suit which was virtually a suit for ejectment or for enhancement of rent should be brought under colour of the proceedings contemplated by s. 158. An argument under s. 102 is not *in pari materia* with one under s. 158. An investigation under s. 101 may be made at the instance of the Local Government, no application by either landlord or tenant being necessary. Where there is already a contract, as in the present case, the Revenue officer acting under s. 102 would not enquire if the pottah was genuine. He has only to record the existing state of things. The provisions of ss. 101 to 111 do not confer any power which would be binding to deal with disputed matters. Then there are special provisions in ss. 184 and 185 with regard to limitation, but if an application of this kind could be made under s. 158 there would be no limitation. It is hardly possible that the Legislature could have intended to introduce such a radical change. Section 111 provides that suits are not to be entertained pending the proceedings under the previous sections. The proceedings here are colourable.

Mr. *Bonnerjee.*—We were entitled to treat them as tenants, and ask for a determination of the matters referred to in s. 158, as they are holding the land under us. It is very difficult to say whether there is such a thing as a trespasser under the **[188]** Tenancy Act, and it was optional with us to treat them as tenants holding under a cultivating lease. If the applicants waive the wrong, it would not be open to the tenants to deny the tenancy, and such a case, I submit, comes within

(1) 15 C, 627.

1891 Nov. 25. — Full Bench. — 19 C. 182 (F.B.).

s. 158. Section 3, sub-s. 3, defines 'tenant.' Section 89 says nothing about notice being necessary. 'Raiyat' is defined in s. 5, clauses (2) and (4). I submit that s. 158 deals with all classes of raiyats and tenure-holders. The Tenancy Act has supplied two modes for the settlement of disputes between landlords and tenants, by ss. 101 to 111, and, by the section under consideration, the last being a summary procedure. 'Payable' in s. 158 means whatever the tenant is bound to pay for the use and occupation of the land at the time of the enquiry; and there is nothing to limit the scope of the enquiry. The lease had no binding effect upon us. The reference assumes the relationship of landlord and tenant which is also apparent on the face of the petition. The cases of *Nityanund Ghose* v. *Kissen Kishore* (1) and *Lalun Monee* v. *Sona Monee Dabee* (2) show that there can be a tenancy by use and occupation of land. I submit the decision in *Bhupendro Narain Dutt* v. *Nemye Chand Mondul* (3) is good law.

Dr. *Rash Behary Ghose* followed.

Mr. *Woodroffe* in reply.— There is no such person as a tenant-at-will under the Bengal Tenancy Act, ss. 42, 44, 45, 46 and 89. It is not open to a landlord to treat a trespasser as a tenant—*Jalha* v. *Koylash Chunder Dey* (4).

The opinion of the Full Bench was as follows :—

OPINION.

PETHERAM, C. J. (PRINSEP, PIGOT and GHOSE, JJ., concurring).— We agree with the referring Bench that the present application does not come within the scope of s. 158 of the Tenancy Act, and we think the application should have been rejected, and that the present appeal must be allowed on that ground.

Upon the statements contained in the petition as recited in the order of reference, it is, we think, clear that the petitioners assert that no tenancy in fact existed between themselves and the opposite [189] party at and before the date of the petition, and the admission of a tenancy, we think, merely amounts to an expression of willingness on their part that a tenancy should now be treated as existing, in order to give jurisdiction under s. 158, and so to enable them to remove the opposite party from the land. This admission does not, in our opinion, bring the case within the meaning of the section; the object of which is to enable the Court to ascertain what are the incidents of the existing arrangements between a landlord and his tenant, and not to enable the Court in effect to make a new contract for parties between whom no contract was in existence at and before the date of the application. In the present case the petition alleges that the opposite party obtained possession of the land by fraud and still keeps illegal possession of it by force, and has always refused and still refuses to make or acknowledge any arrangement with the owner, except that under which he alleges that he obtained possession, and which the present applicant says was vitiated by fraud. It is true that the fraud charged was only alleged to have been committed with respect to two of the applicants; that fraud has been negatived, and that the applicants in this proceeding founded their attack on the validity of the appellant's lease, on the allegation that it had been entered into by their mother and guardian without any power in that behalf. But the petition does allege

(1) W. R. (1864) (Act X) 82.
(2) 22 W.R. 334.
(3) 15 C. 627.
(4) 10 W. R. 407.

1891 Nov. 25. — FULL BENCH. — 19 C. 182 (F.B.).

that the whole possession was obtained by fraud. It is evident that, if these allegations are true, no binding arrangement existed between the parties with reference to this land, nor was any rent payable by the opposite party to the petitioner in respect of it at the time when the application was made, and although the application was no doubt entitled under the Act and made nominally for the determination of the incidents of a tenancy, it amounts on the face of it to a denial that any real tenancy existed of which the incidents could be ascertained, and that it was not in fact an application for that purpose at all, but was one for the purpose of getting rid of the only contract under which the opposite party claimed any interest in the land.

We answer the question referred to us in the negative.

The result will be that the appeal must be allowed and the application dismissed with all costs.

[190] NORRIS, J.—If the plaintiff's plaint or application is to be construed in accordance with the terms of the judgment of the Chief Justice, I agree in holding that it is not one that comes within the scope of s. 158 of the Bengal Tenancy Act.

What is the true construction of the plaint or application was, I think, a question for the determination of the Division Bench, and I express no opinion upon the point.

A. A. C. *Appeal decreed.*

---

19 C. 190.

CRIMINAL REFERENCE.

Before Mr. Justice Norris and Mr. Justice Beverley.

QUEEN-EMPRESS *v.* BABURAM KANSARI, (*Accused.*)*
[12th November, 1891.]

Theft—Habitually receiving stolen property—Evidence to justify conviction—Penal Code, s. 413.

A person cannot be said to be an habitual receiver of stolen goods who may receive the proceeds of a number of different robberies from a number of different thieves on the same day. In order to support a conviction under s. 413 of the Penal Code of being an habitual receiver of stolen property, it must be shown that the property was received on different occasions and on different dates.

THE accused was charged with habitually receiving property which he knew or had reason to believe to be stolen property, an offence punishable under s. 412 of the Penal Code. He was tried on this charge by the Sessions Judge of Nadia and a jury, and the trial resulted in the jury unanimously acquitting him, with which verdict the Sessions Judge disagreed.

The case came before the High Court on a reference by the Sessions Judge under the provisions of s. 307 of the Criminal Procedure Code.

The facts of the case, so far as are material for the purposes of this report, were as follows:—The stolen property found in the possession of the accused was alleged to be the result of some nine separate thefts extending over a period of two years, but there was [191] no evidence to show as to when the accused became possessed of any of the various

* Criminal Reference No. 17 of 1891, made by G. K. Deb, Esq., Officiating Sessions Judge of Nadia, dated the 2nd of October 1891.

articles, or that they were received by him on different occasions. The articles consisted of metal utensils, most of which the owners purported to identify, and in some of the cases the articles were alleged to have been stolen within two months of the date on which they were found with the accused, and in one instance the theft took place only two days prior to their recovery.

1891 NOV. 12. — CRIMINAL REFERENCE. — 19 C. 190.

The Sessions Judge considered the identity of the property had been amply proved by the respective owners, and that the circumstances of the case justified a presumption being made under s. 114 of the Evidence Act that the accused knew the articles were stolen and was bound to account for his possession of them which he had not done; and further, that under the provisions of s. 14 of the Evidence Act, an inference could be drawn against the accused, and that the jury should have at least convicted under s. 411 of the Penal Code, if not under s. 413.

It appeared that no charge had been framed against the accused under s. 411.

At the hearing of the reference—

Babu *Ram Churn Mitter*, appeared for the Crown.

Mr. *H. E. Mendies*, for the accused.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

In this case we think that the prisoner must be acquitted and discharged. He was tried upon a charge framed under s. 413 of the Indian Penal Code of habitually dealing in stolen goods, and has been unanimously acquitted by the jury.

The very essence of that offence, as was pointed out by the learned Judges who set aside the former conviction of the prisoner, he having been previously tried and convicted, and directed him to be re-tried, is the habitual, that is to say, constant, receipt of or dealing in goods which the prisoner knew or had reason to believe were stolen.

There is no evidence on the record to show that the goods which are alleged to have been stolen, assuming them to have been stolen, and assuming that their identity has been satisfactorily established, were received on different occasions. There is some evidence [192] indeed, namely, the prisoner's own admission, to show that the goods were received from various persons. And not only is there no evidence on the record to show that the goods were received on different dates, but the Sub-Inspector of Police distinctly says in his evidence : " I could find no evidence as to when the accused became possessed of each of the stolen utensils."

We do not think that a man can be said to be habitually receiving stolen goods who may receive the proceeds of a dozen different robberies from a dozen different thieves on the same day, but in addition to the receipt from different persons there must be a receipt on different occasions and on different dates.

The prisoner was not charged, as he ought to have been, under s. 411, and the jury could not have convicted him under that section. It is very much to be regretted that he was not charged under s. 411. It seems to be a considerable oversight on the part of the Officiating Sessions Judge not to have framed a charge under s. 411. But in the result the only course we can take is to confirm the verdict of the jury and to acquit the prisoner, and considering that he has been in peril twice upon this charge, we do not think there is any necessity for directing a re-trial.

H. T. H. *Prisoner acquitted.*

1892
March 14.

Original
Civil.

19 C. 192.

19 C. 192.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

In the matter of Mutty Lall Ghose.
[14th March, 1892.]

Specific Relief Act (*I of* 1887), *s.* 45—*Election law—Municipal election—Bengal Act II of* 1888, *ss.* 14, 24, 31—*Joint family representative for voting purposes—Franchise.*

Section 31 of Bengal Act II of 1888 does not impose on the Chairman of the Municipality the duty of exercising any judicial discretion or taking any judicial action with regard to the list of candidates prepared under that section.

[Appr., 22 C. 717 (725).]

[193] This was a rule obtained by one Pasupatinath Bose, calling upon the Chairman of the Calcutta Municipality to show cause why the name of one Mutty Lall Ghose should not be removed from the list of candidates for election as Commissioners, published under Bengal Act II of 1888.

Pasupatinath Bose was one of eight candidates standing for election as a Municipal Commissioner for Ward No. 1 in the town of Calcutta, there being seven other persons (amongst whom was Mutty Lall Ghose) standing for election for that ward, the day fixed for the election being the 15th March 1892.

On the 8th March Pasupatinath Bose first became aware that Mutty Lall Ghose had sent in his name to the Chairman of the Municipality as a candidate for election, and he thereupon wrote to the Chairman objecting to the name of Mutty Lall Ghose being placed on the list of candidates on the following grounds:—

(1) That Mutty Lall Ghose was only an agent of a joint Hindu family alleged to be authorized to vote on behalf of the joint family.

(2) That he was not himself personally qualified as a voter under any of the sections preceding s. 14 of Bengal Act II of 1882.

(3) That he was not properly authorized by the joint family purporting to confer on him authority to vote, inasmuch as all the members of the family had not concurred in conferring such authority.

(4) That the joint family, which was alleged to consist of four members, had only two votes, whereas the Act required that a person should at least have two votes on his own account to be entitled to election.

On the 10th March the Secretary of the Municipality, in reply to such letter containing the objections set out above, wrote, at the direction of the Chairman disallowing such objections, stating that, with regard to objections 1, 2 and 4, the Hindu joint family in question was qualified to vote, and therefore Mutty Lall Ghose was qualified to stand as a candidate, and that objection No. 3 at **[194]** most would only affect any votes which might hereafter be recorded by Mutty Lall Ghose, but that such objection would be taken to be one made under s. 16 of the Government rules.

On Monday, the 14th March, Pasupatinath Bose applied for the rule above mentioned under s. 45 of the Specific Relief Act, and on such application Mr. Hill contended that Mutty Lall Ghose was not qualified

1892 MARCH 14. — ORIGINAL CIVIL. — 19 C. 192.

to be elected as a commissioner, inasmuch as he was not himself qualified to vote under any of the sections of the Act preceding s. 14, he being merely the manager appointed to vote on behalf of a joint family under s. 24; citing the cases of *Dr. Rajendra Lal Mittra* and *In the matter of the election of Municipal Commissioners for Ward No.* 10, both decided by Norris, J., and dated the 30th September 1882 and 30th March 1889, respectively,* as authorities for such or similar rules under s. 45 of the Specific Relief Act, the latter being a case in which the rule asked to expunge votes already recorded. Mr. Justice Trevelyan granted the rule above mentioned, making it returnable forthwith.

Mr. *Pugh* (with him Mr. *Garth*) to show cause.—The candidate should be represented. The Chairman has complied with s. 31; he had no choice but to accept the candidate's name, and had no power to strike it off the list. Section 45 of the Specific Relief Act does not therefore apply.

Mr, *Hill* in support of the rule. The Chairman is not a mere polling officer; he is bound to see that persons are not put before the public as candidates for election who are ineligible, and the Court can compel him to do his duty. A person empowered to vote under s. 24 is not qualified to be elected under s. 14. In *Rejendra Lal Mittra's* case Mr. Justice Norris, on the 30th September 1882, granted a similar rule, but on a candidate and on the Chairman, and held that though the member of the joint family through whom the rates and taxes were paid was Dr. Rajendra Lal, yet he was not qualified to become a candidate, he being merely the trustee or manager on behalf of the joint family of certain debottar property dedicated to an idol, and not having paid on his own account any rates or taxes on account **[195]** of the property, and having no beneficial interest therein; it being possible that it might prejudice the position of other candidates if he was allowed to go to the poll, an injury being done to a person who has the franchise by the introduction of an ineligible candidate, and as the applicant had no other remedy.

ORDER.

TREVELYAN, J.—This is an application under s. 45 of the Specific Relief Act. I granted a rule this morning calling upon Mr. Lee to show cause why the name of Mutty Lall Ghose should not be removed from the list of candidates for election as Commissioners, published under Bengal Act II of 1888. There are two possible defects in that rule which I need not now, however, take into consideration; first, the rule ought possibly to have gone to the Commissioners as a body instead of to the Chairman, and in the second place it might reasonably be objected that no effect could be given to the rule unless it were served upon the candidate also. To do the latter now would lead to delay, and it is very necessary that the question should be decided at once. There are of course, as Mr. Justice Norris pointed out in a case (1) in some respects similar to this, difficulties in the way of a Judge in deciding a question of this kind on such short notice.

---

* See foot-notes 1 and 2, pp. 195—198.

19 C. 195 N.

(1) IN THE MATTER OF RAJENDRA LAL MITTRA.

In this matter a rule was obtained by one Gopal Lall Mitter, calling upon the Chairman of the Calcutta Municipality to show cause why the name of Dr. Rajendra Lal Mittra should not be expunged from the list of candidates eligible for election as Municipal Commissioners. It was argued on behalf of Gopal Lall Mitter that Dr. Rajendra Lal Mittra, who was merely the manager and trustee of certain debottar property, and who had no beneficial interest himself in such property, was ineligible as not

1892 MARCH 14. — ORIGINAL CIVIL. — 19 C. 192.

[196] The point in the case is this: Mutty Lall Ghose, who is also a candidate, is on the revised list of voters of Ward No. 1 for the Municipal elections to be held to-morrow for himself and other co-sharers. He is not in the list separately. . . . . . The portion of the Municipal Act which deals with persons qualified to be elected is to be found in s. 14 of the Act. Now the right of a Hindu joint-family to empower a person to vote on their behalf is given by s. 24, which does not precede s. 14.

Therefore Mr. Hill contends that a person empowered to vote under s. 24 is not a person qualified to be elected under s. 14. I am bound to say there is a great deal to be said with regard to that objection, but I do not think that it would be safe, unless it is absolutely necessary, for me to lay down, on such a short consideration, an absolute rule which might have a serious effect in the exercise of the franchise.

I cannot, under s. 45 of the Specific Relief Act, make any order unless, amongst other things, it is shown that the doing or the forbearing to do an act by any person holding a public office, or by any corporation or inferior Court, is clearly incumbent on [197] such person or court in his or its public character, or on such corporation in its corporate character.

After a careful examination of the sections of the Municipal Act, the counsel engaged in the case have failed, and I have also failed, to find out that there is anything approaching to a duty incumbent upon Mr. Lee to exercise any judicial discretion or judicial action with regard to the list of candidates. It is true that Mr. Lee has written a letter in answer to the applicant's letter, but this letter is written only by way of civility and courtesy and as expressing an opinion. I think that before I can make the rule absolute, I must see that it was clearly incumbent on Mr. Lee to exclude Mutty Lall Ghose's name from the list which is prepared under s. 31 of the Municipal Act. There is an obligation upon the Chairman to publish a list of all persons who are candidates for election. If the Chairman declined to publish Mutty Lall Ghose's name, the latter might have come to Court and said that it was clearly incumbent upon the Chairman to publish his name. There is no more obligation upon

---

falling within ss. 11 or 12 of Bengal Act IV of 1876. It appeared that the property formerly belonged to Rajah Petumber Mitter; that the Rajah had dedicated such property to the worship of a family idol, appointing Dr. Rajendra Lal Mittra (who was one of his twelve grandsons) manager of this property; directing that any surplus, if any, after the expenses attending the worship had been provided for, should go over to other charities. The rates and taxes on this property were paid by Dr. Rajendra Lal Mittra as such manager. It did not appear that the 12 grandsons and their descendants lived together jointly as an undivided Hindu joint family, they being the sons of different brothers of the Rajah. It, however, appeared that under s. 12 of the Act eight of the surviving grandsons of the Rajah or their descendants wrote to the Chairman of the Municipality agreeing to select Dr. Rajendra Lal Mittra as eligible for election, and that three of these gentlemen subsequently wrote to the Chairman asking to have an error corrected, stating that the Doctor had been appointed manager by them of the whole estate by right of which he claimed to be elected, and that on the Chairman issuing a list of the names of the several candidates for election, an application was made to him by Gopal Lall Mitter, calling on him to expunge the name of Dr. Rajendra Lal from such list. The Chairman, after hearing both parties, refused to comply with the request, and that thereupon the rule above set out was obtained. Mr. Justice Norris, who heard the rule, held that Babu Gopal Lall Mitter had no remedy other than under s. 45 of the Specific Relief Act, under which section the rule had been obtained; and after finding that Dr. Rajendra Lal had himself no beneficial interest in the property for which he paid rates and taxes, he being simply the manager and trustee of such property and holding that he was not qualified under s. 11 or 12 of the Act, directed that the Chairman should expunge the Doctor's name from the list of canditates eligible for election. [This case is referred to in 19 C. 192.]

1892 MARCH 14. — ORIGINAL CIVIL. — 19 C. 192.

the Chairman than upon any of the Municipal Commissioners to determine the right of a candidate. Looking carefully through the Act and the rules framed thereunder, I cannot find any trace of this obligation or duty anywhere, and no one engaged in the case has been able to show me that any such right or duty is given under the Act and rules. I must, therefore, discharge the rule with costs.

This order is, of course, without prejudice to any question which may be raised after the election.

T. A. P. *Rule discharged.*

Attorney for applicant: Babu *M. M. Chowdhry.*
Attorney for the Corporation : Messrs. *Sanderson & Co.*

---

19 C. 198-N.

[198] (2) IN THE MATTER OF THE ELECTION OF MUNICIPAL COMMISSIONERS FOR WARD NO. 10, CALCUTTA.

This rule was served upon the Chairman of the Municipality and upon one Rash Behari Dass, calling upon the Chairman to show cause why he should not forbear from counting certain votes given in favour of Rash Behari Dass by certain persons who were merely agents appointed to vote under ss. 24 and 25 of Bengal Act II of 1888.

It appeared that in the election of Municipal Commissioners for Ward No. 10, Gonesh Chunder Chunder stood at the head of the poll, Rash Behari Dass second, with 207, and Surendra Nath Dass (the person who obtained the above rule) third, with 197 votes.

It appeared that certain persons who had voted for Rash Behari Dass had voted merely as agents appointed under ss. 24 and 25 of the Act, and that such persons possessed none of the qualifications required by s. 8 of the Act; and that such persons were neither members of the joint families or members of the firms for which they were appointed to vote, but were strangers to such joint families or firms; and it further appeared that if the votes recorded by such agents in favour of Rash Behari Dass were expunged, then the applicant Surendra Nath Dass would stand second on the poll. It was therefore contended on his behalf that it was not the intention of the Legislature that a stranger should be a person entitled to vote for either a joint family or a firm; and further, that no person could be returned as exercising the franchise on behalf of a joint family or firm, unless he came within the provisions of s. 8. On the other side it was contended that there was no provision in s. 24 or 25 making it obligatory on the family or firm to nominate a member of themselves to exercise the franchise on their behalf.

Mr. Justice Norris, in deciding the questions raised, stated that he could not help thinking that the Legislature intended to provide that a family, firm, company, or association should be represented by one of their own members on whom they could rely and who would vote as they desired; and that although the omission so to provide appeared to be a grave defect in the Act, which the Legislature might well take into consideration, still he could not introduce into ss. 24 and 25 words which were not to be found in such sections, *viz.*, "such persons being a member of such joint Hindu family, etc.;" and he therefore reluctantly came to the conclusion that he would not be justified in putting such an interpretation on the Act as would involve the addition in the Act of words which the Legislature had left out.

Rule discharged.

1891
Nov. 18.

APPEL-LATE CIVIL.

19 C. 199.

19 C. 199.

[199] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

KARAMUDDIN HOSAIN (*Defendant*), *Appellant* v. NIAMUT FATEHMA AND ANOTHER (*Plaintiffs*), *Respondents*.*
[18th November, 1891.]

Benami purchase—Suit against a purchaser from the benamidar—Civil Procedure Code, s. 317.

At a sale in execution of a decree, in February 1875, the plaintiff purchased certain property in the name of *M.* who was recorded as the purchaser. In 1886, eleven years after the execution sale, *M* sold the property to *H*, whose name was subsequently registered as owner, notwithstanding the plaintiff's objections. The plaintiff thereupon, in 1888, brought a suit against *H* for a declaration of his title to the property, on the grounds that it had originally been purchased on his behalf at the execution sale, and that he had been in possession for more than 12 years.

Held, that the suit did not fall within s. 317 of the Civil Procedure Code. *Buhuns Kowar* v. *Lalla Buhooree Lall* (1) relied on.

[R., 22 B. 672 (678).]

THE facts of this case are sufficiently set out in the judgment of the High Court.

Babu *Rash Behari Ghose* and Munshi *Seraj-ul-Islam*, for the appellant.

Mr. *C. Gregory* and Babu *Saligram Singh*, for the respondents.

The judgment of the Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

The plaintiff states that in February 1875 he, in the name of a third party, in execution of a decree purchased certain property; that he has since that time continuously held possession of that property; and that in 1886, that is to say, more than 11 years after the execution-sale, the benamidar has sold it to a third party, and that, in consequence of the benamidar's name being borne on [200] the Government register, the purchaser from the benamidar has succeeded in obtaining registration of his name, notwithstanding his (the plaintiff's) objection. The plaintiff accordingly asks for a declaration that he is the lawful proprietor of this property by reason of the original purchase having been made on his behalf, and also by reason of his having held possession thereof for more than 12 years before suit. He also asks for a further declaration that the sale by his benamidar to the defendant No. 1 conferred no title. There is a further prayer that if a decree be given in favour of the plaintiff, an order for registration of his name be passed. It is unnecessary to notice this part of the case, as we apprehend that if the plaintiff should otherwise succeed, the Revenue authorities will necessarily recognize the rights that will be declared by the Civil Courts.

The Subordinate Judge dismissed the plaintiff's suit, finding that the plaintiff failed to prove his possession subsequent to the sale. The

* Appeal from Appellate Decree, No. 1471 of 1890, against the decree of G. W. Place, Esq., Judge of Tirhut, dated the 16th of August 1890, reversing the decree of Babu Matadin, Subordinate Judge of Tirhut, dated the 29th of June 1890.

(1) 14 M.I A. 496.

Subordinate Judge also held that the suit was barred under s. 317, Civil Procedure Code.

On appeal, this decision was set aside by the District Judge, who held that s. 317 was no bar to the present suit because, after the sale in this case, there was an actual transfer and the plaintiff got possession. He further found that the execution-sale was not really a benami transaction, inasmuch as the plaintiff paid up certain sums of money to Monohur Dass, the person whose name was recorded as purchaser, and was allowed to take possession, although the nominal ownership remained with Monohur. He also found that the plaintiff proved his possession by a large mass of documentary evidence, while, on the other side, the defendant wholly failed to prove any possession whatever in the disputed land.

It would have been more satisfactory in this case if the District Judge had expressly found the continuous possession of the plaintiff for more than 12 years such as was pleaded by him in his plaint. That was, however, the plaintiff's case in the lower Court, and although the Judge's expression of opinion is somewhat ambiguous, we can have no reasonable doubt that his finding on this point amounted, and was intended to amount, to this.

[201] It has been contended before us, as in the lower Court, that s. 317 of the Civil Procedure Code bars this suit. We think, however, that this is not a suit strictly coming within the purview of that section. The plaintiff sues rather on a title acquired by long possession, that title being in itself alone sufficient to constitute a statutory title explained by him to have its origin in the transfer of title made by Monohur Dass, in whose name the execution purchase was made, by allowing plaintiff to obtain and take possession. The case, in our opinion, falls within the judgment of their Lordships of the Privy Council in the case of *Buhuns Kowur* v. *Lalla Buhooree Lall* (1), and specially within the terms of the passage at the bottom of p. 527. Under such circumstances we think that s. 317 is not applicable to the present case so as to bar it, and that this appeal must be dismissed with costs.

C. D. P. *Appeal dismissed.*

---

19 C. 201.

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice.

COHEN AND ANOTHER (*Plaintiffs*) v. NURSING DASS AUDDY (*Defendant*).* [7th April, 1892.]

Civil Procedure Code—Act XIV of 1882, s. 80—*Practice—Writ of summons, Service of.*

An affidavit in support of service of a writ of summons under s. 80 of the Civil Procedure Code should show that proper efforts have been made to find out when and where the defendant is likely to be found.

[F., 5 C.L.J. 555 (557); 2 N.L.R. 63 (64); L.B.R. (1872—1892) 639 (640); R., 18 A. 241 (244).]

THIS was a suit brought by the trustees of a marriage settlement to recover a sum of money, forming part of the trust funds, lent by the plaintiffs to the defendant on the security of a certain indenture of mortgage.

---

* Suit No. 88 of 1892.

(1) 14 M.I.A. 496.

1892 APRIL 7. — ORIGINAL CIVIL. — 19 C. 201.

The suit was undefended, and to prove service of summons on the defendant, a joint affidavit of one T. C. Cohen and one Kissen Singh was relied upon. This affidavit showed that Cohen knew and was well acquainted with the defendant [202] and his place of residence, situate at No. 1, Champatollah 2nd Lane, in Calcutta, and that he on the 1st, 2nd, and 3rd days of March had accompanied the other deponent, Kissen Singh, to the said dwelling-house for the purpose of serving the defendant with the writ of summons, and that on the said several days respectively he was unable after due enquiry to find the said defendant or any agent empowered to accept service of the said summons on his behalf, or any other person on whom the service of the said summons could be made; and that he pointed out the said house to the other deponent, Kissen Singh, as being the dwelling-house of the defendant in which he ordinarily resided and was on the said date residing and that thereupon the said Kissen Singh served the said writ by affixing a copy thereof and a true translation of the same on the outer door of the house. Kissen Singh for himself affirmed that he in company with Cohen proceeded on the 1st, 2nd, and 3rd days of March to the house in question, which was pointed out to him by Cohen as the dwelling-house of the defendant, and that on the said several days he being unable to find the said defendant or any agent of his empowered to accept service, or any person on whom the summons could be served, served the said writ on the said defendant by affixing a copy thereof and true translation of the same to the outer door of the house, he having been informed by the said Cohen that the said house was the dwelling-house of the defendant in which he ordinarily resided and was on the said dates before referred to then residing.

Mr. *Sinha*, who appeared for the plaintiffs, contended that the facts stated in the joint affidavit were sufficient, and that it had always been the practice of the Court on the original side to accept such affidavits as sufficient under s. 80 of the Code.

ORDER.

PETHERAM, C.J.—Section 80 of the Code is intended for cases in which the writ should be affixed in the way required by that section after a proper attempt has been made to find the defendant. It is true that you may go to a man's house and not find him, but that is not attempting to find him. You should go to his house, make enquiries, and if necessary follow him. You should make enquiries to find out when he is likely to be at home, and go to the house at a time when he can be found. Before service [203] like this can be effected it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found—not as seems to be done in this country, to go to his house in a perfunctory way, and because he has not been found there, to affix a copy of the summons on the outer door of his house. I think this affidavit is insufficient, and it is as well that persons should know that such service is not good service, and that suits should not be tried as undefended suits on service such as has been relied on in this case. A proper attempt must be made to find the defendant and serve him with the writ.

Plaintiff's attorney: Mr. *H. C. Chick.*

T. A. P.

19 C. 203.

1891 AUG. 7. APPELLATE CIVIL. 19 C. 203.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

PIRAN (*Defendant No.* 1), *Appellant v.* ABDOOL KARIM (*Plaintiff*) AND OTHERS (*Defendants*).*
[7th August, 1891.]

Mahomedan Law—Wakf—*Sajjadanashin*—*Mutwali*—*Minor, appointment of as sajjadanashin.*

In order to constitute a *wakf* it is not necessary to use the word *wakf*. So long as it appears that the intention of the donor is to set apart any specific property or the proceeds thereof for the maintenance or support in perpetuity of a specific object or of a series of objects recognized as pious by Mahomedan Law, it amounts to a valid and binding dedication. *Jewun Dass Sahoo* v. *Shah Kubeeroodd en* (1) referred to.

The respective duties of *sajjadanashin* and *mutwali* discussed. The mode of appointment of *sajjadanashin* referred to.

Semble.—A minor cannot be appointed the *sajjadanashin* of a *durgah* or shrine.

[F., 8 C.L.J. 196; R., 20 A. 482 (493); 20 C. 810 (822); 27 C. 674 (681); 6 Bom. L.R. 1058 (1061); 78 P.L.R. 1908=52 P.W.R. 1908; 30 P.R. 1908=102 P.L.R. 1908=35 P.W.R. 1908; D., 20 C. 116 (197).]

THE plaintiff Abdool Karim, as the *sajjadanashin* of the *durgah* of Shah Budhan, instituted this suit for the recovery of possession with mesne profits, *inter alia* of mauza Khundwa, parganna Saseram, on the ground that it was wakf property [204] dedicated to the *durgah*, and that his predecessor in office had no right to alienate it.

It appeared that the property in suit had been in the possession of the plaintiff's family from the latter end of the last century.

That under Reg. II of 1819 Government had instituted an enquiry into the titles of proprietors of land who professed to hold their properties free from Government revenue under grants from the former rulers; and that in the course of such an enquiry, held in the year 1835, the father of the plaintiff, Rahimuddin Ahmed, who was at that time the *sajjadanashin* of the *durgah*, was called upon to prove his title to hold the villages in his possession free from Government revenue. He alleged that the villages, including mauza Khundwa, had been originally granted as *maddab maash* for the support of the *khankah* of Shah Budhan. The documents produced by him in support of his allegation were found not to be genuine. The property was resumed by Government, and after a temporary settlement with one Kadira, it was in 1839 permanently settled with Hamida, the mother of the plaintiff, to whom, however, Rahimuddin had previously purported to convey the same in lieu of her dower by a *baimokasa* dated the 1st March 1836. Hamida died in 1852, and the names of her two sons, Mahomed Abdur Ruzzack (deceased) and Abdool Karim (plaintiff), and daughter, Wasia, were thereupon registered in the Collector's records.

It further appeared that by a *taksimnama* or deed of partition dated the 24th June 1855, Rahimuddin, while holding the office of *sajjadanashin* of the durgah of Shah Budhan, partitioned among his two sons Abdur

---

* Appeal from Original Decree, No. 9 of 1890, against the decree, of Baboo Dwarka Nath Mitter, Subordinate Judge of Shahabad, dated the 19th of September 1889.

(1) 2 M.I.A. 390.

1891 AUG. 7. — APPELLATE CIVIL. — 19 C. 203.

Ruzzack and Abdool Karim and his daughter Wasia all the family properties, consisting of properties which he stated were purchased by them and standing in their names, property which they had inherited from their mother Hamida, and property which belonged to him and stood in his name, expressly reserving mauza Khundwa and 22 houses of raiyats in Mahulla Budhan Bari for the expenses of the *durgah*. The portion of the deed material to this report ran as follows :—

"Therefore I, of my own accord and free will and according to the request and consent of Mahomed Abdur Ruzzack, Abdool Karim, sons, and Wasia, daughter, with the view of removing and [205] avoiding future mutual dispute and disturbance, divide amongst my heirs aforesaid all the properties owned and possessed by me, together with the purchased mauzas and the mauzas and tenants' houses and dwelling-houses and Rasulbagh, &c., which are inherited by the abovenamed from their mother, with the exception of mauza Khundwa, pargana Saseram, and 22 houses of raiyats situated in Mahulla Budhan Bari (details of which are inserted below) and [which are] set apart specifically for the expenses of the holy shrine [and which] I had made over to the *sajjadanashin* of the *durgah* of Shah Budhan (may he rest in peace) according to the following specification :—[Here followed the shares given to each son and daughter]......that with respect to mauza Khundwa and the 22 houses of raiyats made over [or appertaining] to the said *durgah*, none of the heirs shall prefer any claim or make any dispute; that as divided by me the declarant they shall continue in possession and appropriation of their respective shares, so that the property may continue preserved in perpetuity. Therefore these few words are written as *taksimnama* that they may be of use when required." In the schedule annexed to the deed the property set apart for the *durgah* was mentioned thus :—"The whole 16 annas of mauza Khundwa and the 22 houses of raiyats appertaining to the holy *durgah* of the Huzrat Dewan Shah Budhan (may he rest in peace) shall remain in charge of the *sajjadanashin*." Abdur Ruzzack, the plaintiff Abdool Karim, their sister Bibi Wasia, and the heir of Mariam accepted the *taksimnama* and signified their acceptance by signing the deed.

Rahimuddin died in 1856, and was succeeded in the office of *sajjadanashin* by his eldest son Abdur Ruzzack, who by a kobala dated 23rd April 1859 (19th Ramzan 1275 H.S.) conveyed to his mother-in-law, Hasina, all the properties he had received under the *taksimnama*, together with the property in suit. The plaintiff was an attesting witness to this deed. Five years later by a *mukarrari* pottah dated 16th December 1864 (16th Rajab 1281 H.S.), Hasina granted, or purported to grant, a *mukarrari* of all these properties, at a yearly jama of Rs. 15, to her daughter Masihan, the wife of Abdur Ruzzack. There was a provision in the pottah that if Masihan failed to pay the rent, the *mukarrari* would not be liable to be cancelled, and that she [206] should continue as full proprietor. Hasina died in 1877, and upon her death, Masihan was registered as the owner of the properties conveyed by Abdur Ruzzack to Hasina in 1859.

Abdur Ruzzack died on the 20th July 1888, and on the 9th January 1889 the plaintiff Abdool Karim instituted this suit against his widow Masihan and others for the purposes above mentioned, alleging that for a great many years there had existed at Saseram a *durgah* of Huzrat Dewan Shah Budhan, who was a remote ancestor of the plaintiff, and that mauza Khundwa had been dedicated to meet the expenditure of the *durgah*; that

the income of the mauza had always been under the control of the *sajjadanashin*, and had been applied to meet the expenses on account of the *urs* and the *fakirs* and other expenses of the *durgah*; that it had always been the custom in the family of Huzart Dawan Shah Budhan that the eldest member should become *sajjadanashin*, and upon the death of a *sajjadanashin* the eldest of his surviving brothers or sons should be installed on the *sajjada*; that in accordance with this custom upon the death of his father Rahimuddin in 1855, the plaintiff's elder brother, Abdur Ruzzack, was appointed *sajjadanashin*; that three days after his death, which happened on the 20th July 1888, he, the plaintiff, was appointed *sajjadanashin*; that he had ascertained that Abdur Ruzzack, in order to defraud his creditors, had procured the execution of certain deeds in favour of his mother-in-law Hasina, his wife Masihan (defendant No. 1) and others, purporting to convey to them the properties therein mentioned, which included the dedicated property, but that as a matter of fact Abdur Ruzzack continued in possession of them until the date of his death; and that Abdur Ruzzack had no right or power to alienate property dedicated to the *durgah*. The plaintiff submitted that the deeds were collusive, fraudulent and void.

The contending defendant was Masihan. She denied that the plaintiff was the *sajjadanashin* of the *durgah* of Shah Budhan, and alleged that in conformity with the custom prevailing in the *durgah*, Abdur Ruzzack had in his lifetime appointed his daughter's son Mahbub Alum as his successor, and that Mahbub Alum was the *sajjadanashin*. She also denied that the property in suit was *wakf*, and submitted, that even if it was *wakf* property, the suit [207] would not lie, as the plaintiff had not complied with the provisions of s. 539 of the Civil Procedure Code and s. 18 of Act XX of 1863. She further alleged that the kobala of 23rd April 1859 and the *mukarrari* pottah of 16th December 1864 were *bona fide* deeds and for valuable consideration; that the plaintiff was an attesting witness to the kobala, that he was also a consenting party to it, and had otherwise admitted its validity, and that he was therefore estopped from questioning it and the defendant's title; that the property in suit along with other properties had been conveyed by Rahimuddin to his wife by the deed of *baimokasa*, dated 10th March 1836, that by the *taksimnama* of the 24th June 1855, Rahimuddin did not dedicate the property in suit to the *durgah*, that he had no right or power to dedicate it, and in fact had never dedicated it; that upon the death of Rahimuddin the properties passed into the exclusive possession of Abdur Ruzzack, and that Abdur Ruzzack had conveyed them to his mother-in-law Hasina, who had granted a *mukarrari* of them to her the defendant. She also submitted that the suit was barred by limitation.

The material issues were the following:—

(1) Is the suit barred by limitation?

(3) Whether the hearing of the suit is barred by s. 539 of the Civil Procedure Code and s. 18 of Act XX of 1863, supposing the disputed properties to be *wakf* properties. Are they really valid *wakf* or endowed properties?

(4) Is the plaintiff the *sajjadanashin* of the *durgah* to which the disputed properties are said to appertain?

(5) Supposing the disputed properties were *wakf*, whether the previous *sajjadanashins* could deal with them as if they were their private properties, and transfer them under the deeds set up by the defendants?

1891 AUG. 7. — APPELLATE CIVIL. — 19 C. 203.

(6) Is the plaintiff estopped from questioning the validity of the title-deeds set up by the defendants?

(7) Were these documents fraudulent and collusive or whether they were executed *bona fide*, and whether the defendants have acquired a valid title under them?

[208] Masihan died during the pendency of the suit, and her daughter Piran (the appellant) was substituted in her place.

The Subordinate Judge held, upon the authority of *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan* (1), that s. 18 of Act XX of 1863 did not apply to this case, inasmuch as the *durgah* of Shah Budhan had never been under the control of the Board of Revenue or of local agents under Reg. XIX of 1810, and had never been transferred to trustees under s. 4 of that Act. He also held that as the object of the suit was merely to recover trust property from an outsider, who had no concern in the management of the trust, it did not fall within s. 539 of the Civil Procedure Code. He was further of opinion that this objection of the defendant also failed on the ground that she insisted that the property in suit was not *wakf*, but private property unconnected with any trust. He, therefore, decided the third issue in favour of the plaintiff.

On the fourth issue he found that, on the third day after the death of Abdur Ruzzuck, the last *sajjadanashin*, the plaintiff had been appointed to succeed him by the voice of the people and the fakirs of Saseram, and that since his appointment he had been discharging the duties of *sajjadanashin*, and that the plaintiff's appointment had also been approved of by the Bihar khanka with which the *durgah* of Shah Budhan was said to be in some way connected. He also found that Abdur Ruzzack, a few hours before his death, had gone through some sort of ceremony to indicate his desire that his daughter's son, Mahbub Alum, should be the *sajjadanashin* after him, and that Mahbub Alum was a child of five years of age. He was of opinion (upon the authority of Macnaughten's Precedents, p. 331, case IV, and Mr. Justice Ameer Ali's Tagore Law Lectures, pp. 256-257) that a minor could not be appointed *sajjadanashin*, inasmuch as he was incompetent to make murids or disciples, to instruct and guide them, or to officiate at religious ceremonies, and he could not appoint a deputy to perform the religious duties appertaining to the office of *sajjadanashin*, and such an office could not remain in abeyance until he had attained majority. He therefore came to the conclusion that the appointment of the plaintiff was not invalid, and [209] that whatever might be the right of Mahbub Alum, who was not a party to the suit, the plaintiff as the *de facto sajjadanashin* was entitled to sue for the recovery of the property dedicated to the *durgah* from a trespasser.

With regard to the questions whether mauza Khundwa was *wakf* property, whether the deeds set up by the defendant were real or benami, and whether the plaintiff was estopped from questioning them, he found that although the *parwana* dated 1st Rajab 1171 Fasli, which Rahimuddin had set up in 1835, in support of his claim that mauza Khundwa and the other villages in his possession were rent-free properties, had been found by the Collector to be a spurious document, the fact remained that more than fifty years ago Rahimuddin, while holding the office of *sajjadanashin* and while in possession of mauza Khundwa, had declared it to be

(1) 15 B.L.R. 167.

endowed property; and that on this very ground he had expressly exclud- **1891**
ed it by the *taksimnama* of 24th June 1855 from the partition which he **AUG. 7.**
had made of the family properties among his two sons and daughter; that
the sons and daughter had signed the *taksimnana* to signify their acceptance **APPEL-**
of it, and had thereby agreed to abide by it and never to claim the mauza **LATE**
as private property, but always to allow it to be held by the *sajjadana-* **CIVIL.**
shin on behalf of the *durgah*; that Abdur Ruzzack succeeded his father
as *sajjadanashin*, and as such was in possession of the mauza; that the **19 C. 203.**
defendant was in the same position as Abdur Ruzzack and could not, therefore, claim the property on the strength of the kobala of 23rd April 1859 executed by Abdur Ruzzack in favour of Hasina, and the *mukarrari* pottah of 16th December 1864 granted by Hasina in favour of her daughter Masihan, and that although these two deeds had been executed, Abdur Ruzzack continued in possession of the mauza. The Subordinate Judge came to the conclusion that the kobala and *mukarrari* pottah were mere paper transactions unsupported by any consideration, and that they did not give any title to the defendant. As regards the *baimokasa*, he was of opinion that it was a sham or furzi transaction, as, when the deed was executed, Government had resumed the property and settled it with a third party, and Rahimuddin could not therefore have given a *baimokasa* in favour of his wife Hamida of property **[210]** which did not belong to him; that Rahimuddin was the real owner; and that when he stated in the *taksimnama* that the mauza had been set apart for the expenses of the *durgah*, and had expressed his intention that it should continue to be so, it became *wakf*, since intention was sufficient to constitute *wakf*.

He held that the plaintiff was not estopped from questioning the validity of the *kobala* by the mere fact that he had attested it as a witness since it had not been proved that he had any knowledge of its contents.

The Subordinate Judge therefore held that mauza Khundwa was *wakf*.

He also held that the suit was not barred by limitation, since the *kobala* and *mukarrari* pottah were mere paper transactions, and the suit had been instituted within a year after the death of Abdur Ruzzack, which took place on 20th July 1888.

Accordingly he gave the plaintiff a decree for possession with mesne profits of mauza Khundwa.

The defendant Piran appealed to the High Court.

Moulvie *Mahomed Yusuf* (with him Mr. *Gregory*), for the appellant.—The Subordinate Judge is wrong in holding that the property in suit is *wakf*. The *taksimnama* of 1855 does not constitute it such, because had Rahimuddin intended to create a *wakf* of mauza Khundwa he would have used the word '*wakf*' in the deed when he reserved the property for the expenses of the *durgah*. In the course of the enquiry instituted by Government under Reg. II of 1819, Rahimuddin in the year 1835 while acting as sajjadanashin of the durgah, produced certain documents in support of his allegation that the villages in his possession including mauza Khundwa had been originally granted as *maddad maash* (exempted and rent-free) for the support of the *khankah* of Shah Budhan. These documents were found to be forged documents. The Subordinate Judge was therefore in error in admitting them as evidence and in referring to them and giving any weight to them. He was not justified in his conclusions that the settlement of the lands with Hamida in 1839 did not in any way alter the mode in which the family had dealt with the proceeds of this mauza, and that although the property stood in the name of Hamida, the family had

1891
Aug. 7.
—
Appellate Civil.
—
19 C. 203.

applied some portion at any **[211]** rate of its proceeds in support of the *durgah*. The *baimokasa* of 1836 was not a colourable transaction entered into for the purpose of enabling Rahimuddin to obtain a settlement of the resumed lands in the name of his wife. It was a real transaction in favour of Hamida in lieu of her dower. The kobala of April 1859 and the *mukarrari* pottah of 1864 were not benami but real transactions. There is no evidence of prior dedication. For these reasons the property is not *wakf*.

But assuming that the property in suit is *wakf*, the plaintiff has no right to sue. In the first place the suit is barred by limitation, as Musihan and her mother were in adverse possession of the property for more than 12 years. Secondly, the plaintiff is not the lawful *sajjadanashin*, because his appointment was not made by the kazi, as it ought to have been made in the absence of an appointment by the last holder of the office, and because it was subsequent to the appointment of Mahbub Alum. See Baillie, ed. 1865, pp. 593-594 ; Fatawa-i-Alamgiri, vol. 2, p. 508, and *Moohummud Sadik* v. *Moohummud Ali* (1). Mahbub Alum is the lawful *sajjadanashin*, and the lower Court should have made him a party to the suit. Before the plaintiff can succeed he must establish the validity of his title to be *sajjadanashin* just as if Mahbub Alum was a party to the suit. Under the Mahomedan Law a mutwali has the power on his death-bed of nominating his successor, and in the exercise of this power Abdur Razzack nominated Mahbub Alum *sajjadanashin*. This appointment is valid, see authorities above referred to. The word الصحة (llasuth) refers to the valid discharge of the duties and not to the validity of the appointment; and as Mahbub Alum can discharge his duties by a deputy, his appointment is valid. The appointment of a minor as a *mutwali* is not invalid, but merely remains in abeyance until he attains majority.

Mr. *R. E. Twidale* (with him Babu *Saligram Singh*), for the respondents.—On the question whether the plaintiff has a right to sue, it is clear that he was elected *sajjadanashin*, or the religious superior of the *durgah* by the popular voice and the fakirs; he was therefore the *de facto sajjadanashin*. The fact that the former superior expressed a desire that his minor son should succeed him, even **[212]** if true, might give the minor a right to sue on attaining majority, but meanwhile there must be some competent person who will continue to perform the religious duties attaching to the office, and who is better qualified than the man appointed by the popular voice. On the question as to whether the disputed property was *bona fide wakf*, the *taksimnama* of 24th June 1855, executed by Rahimuddin, and accepted by the other side, is conclusive, as in that deed the disputed property was excluded from partition and kept apart as being wakf property. The Subordinate Judge has very carefully gone into the case and his decision should be upheld.

JUDGMENT.

The judgment of the Court (MACPHERSON and AMEER ALI, JJ.) was delivered by

AMEER ALI, J.—This appeal raises some important questions of Mahomedan law. It appears upon the evidence that the property, which forms the subject-matter of the present suit, has been in the possession of the plaintiff's family from the latter end of the last century; that in the year 1835 it was resumed by Government and settled in 1839 with the plaintiff's mother, Hamida. The proceeds of the property appear

(1) 1 Sel. Rep. (O.S.) 17=6 I.D. (O.S.) 17.

to have been applied in the maintenance of a shrine or *durgah* of a saint called Shah Budhan, from whom the plaintiff's family seems to be descended. In 1855 the father of the plaintiff named Rahimuddin, who at that time held the office of *sajjadanashin* or curator of the shrine, made a division of all the family properties among his two sons, Abdur Ruzzack, now deceased, and the plaintiff, and a daughter named Wasia, expressly reserving the property in suit for the expenses of the *durgah*. Rahimuddin died in 1856 and was succeeded in the office by Abdur Ruzzack, who, in the year 1859, conveyed to his mother-in-law, a lady of the name of Hasina, all the properties he had received under the *taksimnama* together with the property in suit. In 1864 Hasina granted or purported to grant, a *mukarrari* of all these properties to her daughter Masihan, the wife of Abdur Ruzzack. Hasina died in 1877, and upon her death Masihan got herself registered as the owner of the properties conveyed by Abdur Ruzzack to Hasina in 1859. Abdur Ruzzack died in the year 1888, and the plaintiff brings this suit against Masihan to re-cover possession of the property in question on the ground that it is *wakf*, and that [213] consequently Abdur Ruzzack was not entitled to alienate it. And he bases his right to sue upon the allegation that after his brother's death he was appointed *sajjadanashin* of the *durgah*, to which the property is dedicated.

1891 AUG. 7. APPELLATE CIVIL. 19 C. 208.

The contending defendant in this case was Masihan, the widow of Abdur Ruzzack, and she in her written statement denied, *inter alia*, that the property was *wakf*, or that the plaintiff had any title to maintain this suit. She alleged that Abdur Ruzzack before his death nominated his daughter's son Mahbub Alum to the office of *sajjadanashin*, and that therefore plaintiff could not be appointed as alleged by him ; and she also contended that his appointment was invalid.

Upon this state of the pleadings several issues were raised between the parties, but in the main the case proceeded upon the following points :—

First.—Whether the property was *wakf* as alleged by the plaintiff ?

Second.—Whether the plaintiff was validly appointed as *sajjadanashin*, or in other words, was he entitled to maintain the present suit?

Third.—Whether he was estopped from impugning the transaction between Abdur Ruzzack and Hasina ?

Fourth.—Whether the sale to Hasina was a real or *benami* transaction?

Masihan died during the pendency of the suit, and her daughter Piran has been substituted in her place.

The lower Court has made a decree in favour of the plaintiff, holding that the property in suit is *wakf*, and that whatever may be the rights of Mahbub Alum, the plaintiff as the *de facto sajjadanashin* and manager of the *durgah* is entitled to sue for a property wrongfully alienated by the late *sajjadanashin*. It also held that the deeds of 1859 and 1864 were *benami*, and that the plaintiff was not estopped from impugning those transactions.

The defendant has appealed to this Court, and the learned pleader who appears for her contends in the first place that the Subordinate Judge was wrong in holding that the property in suit is *wakf*, for the deed of 1855 does not constitute it *wakf*, nor is there any evidence of prior dedication. He further contends that [214] the Court below was in error in referring to documents which in the year 1835 had been found to be fabricated. Now, what appears to have happened in that year is this. Under Reg. II of 1819, Government had instituted an enquiry into the titles of proprietors of land who professed to hold their properties free

1891
AUG. 7.

APPELLATE CIVIL.

19 C. 203.

from revenue under grants from the former rulers. And, in the course of this enquiry, in 1835 Rahimuddin, who was the then *sajjadanashin*, was called upon to prove his title to hold the villages of which he was in possession free of revenue. He alleged that the villages including the village of Khundwa had been originally granted as *maddad mash* for the support of the *khankah* of Shah Budhan. The documents produced by him in support of his allegation were declared not to be genuine. The property was resumed, and, after a temporary settlement with a Kadira, was permanently settled with Hamida, to whom Rahimuddin had purported to convey the same by a *baimokasa* in lieu of her dower. Hamida died in 1852 or thereabouts, and the names of her sons and daughter were thereupon registered in the Collector's records instead of hers. In 1855, however, Rahimuddin is found dealing with the property as appertaining to the *durgah*. The Subordinate Judge, looking to the declaration contained in the document of 1855 with Rahimuddin's statements in 1835, thinks that the settlement of the lands in 1839 with Hamida did not in any way alter the mode in which the family had dealt with the proceeds of mauza Khundwa. We do not think he was wrong in drawing from those facts the inference that, though the property stood in Hamida's name, the family had applied, more or less, the income derived therefrom for the support of the *durgah*. And this inference seems to us to be warranted by the oral evidence on the record. But in the view we take of the document of 1855, we think it immaterial to consider whether such application of the proceeds amounts to proof of dedication or not. In the *taksimnama* in question, Rahimuddin admittedly deals with three classes of property—(1) property which he says was inherited by his children from their mother (Hamida), (2) property which stood in their names (being apparently property which he had purchased in their names), and (3) property which stood in his own name. And he divided all these properties among his sons and daughter [215] in the usual proportion, *viz.*, one-fifth to the daughter and two-fifths to each of the sons. Mauza Khundwa, the village in suit, is included in neither of these categories, and is expressly excluded from the partition. If the *baimokasa* executed by Rahimuddin in 1836 in favour of Hamida represented a real transaction, and if the settlement in 1839 was taken by Hamida herself and not *benami* for Rahimuddin, the properties settled with her would, upon her death, have devolved upon her husband as well as her children. The Subordinate Judge thinks, not without reason, that the *baimokasa* of 1836 was a mere colourable transaction entered into for the purpose of enabling Rahimuddin to obtain a settlement of the resumed lands in the name of his wife. But whether that be so or not, upon the hypothesis that it was a real transaction, the persons who were entitled to Hamida's estate were Rahimuddin and his children. They chose to divide the rest of the family properties, treating Khundwa as standing upon a different basis from the others. The question, therefore, resolves itself to this, what was the effect of the reservation made by the parties to the deed of 1855. The passage in that document relating to the property in suit runs thus :—

سواے موضع کھندوا پرگنه سہسرام و بست دو خانه رعایا واقع محله
بودهن باري که تفصیل آن بذیل مندرجه است و مختص براے خرچ
درگاه شریف منها کرده متعلق سجاده نشین درگاه دیوان شاه بودهن قدس
سره گردانیده ام ۰

"Excepting mauza Khundwa, pargana Saseram, and 22 houses of *raiyats* situated in Mahulla Budhan Bari (details of which are inserted below) and [which are] set apart specifically for the expenses of the holy shrine [and which] I have made over to the *sajjadanashin* of the *durgah* of Shah Budhan, &c."

That is, he divides all the properties excepting the one herein mentioned.

Towards the end of the document there is an injunction on the heirs :—

نسبت موضع کهندوا و بست دو مکان رعایا متعلق درگاه موصوف است
کدامی ورثاے دعوی و خصومت پیش نیارند ،

[216] "With respect to mauza Khundwa and the 22 houses of *raiyats* made over [or appertaining] to the said *durgah*, none of the heirs shall prefer any claim or make any dispute."

And in the Schedule the property is mentioned thus :—

درست شانزده آنه موضع کهندوا معه خانه و رعایا متعلق درگاه شریف
حضرت دیوان شاه بودهن قدس سره تعلق سجاده نشین باشد ،

"The whole 16 annas of mauza Khundwa and 22 houses of *raiyats* appertaining to the holy *durgah* of Huzrat Dewan Shah Budhan, &c., shall remain in the charge of the *sajjadanashin*."

Does this amount to a dedication or not? Moulvie *Mahomed Yusuf* for the defendant contends that it does not. He says that had Rabimuddin intended to create a *wukf*, he would have used the word *wukf*. Now it is clear upon the authorities that in order to constitute a *wukf*, it is not necessary to use the word *wukf*. So long as it appears that the intention of the donor is to set apart any specific property or the proceeds thereof for the maintenance or support in perpetuity of a specific object or of a series of objects recognized as pious by the Mussulman law, it amounts to a valid and binding dedication (Fatawa-i-Alamgiri, vol. 2, pp. 460, 461 : Kazi Khan, vol. 3, p. 73 ; and Radd-ul-Muhtar, quoted as Shami, vol. 3, p. 560). In the case of *Jewun Dass Sahoo* v. *Shah Kubeeroddeen* (1), the Privy Council, adopting the views of the Sudder Dewani Adawlut in the case of *Mussummat Qadira* v. *Shah Kubeeroddeen Ahmud* (2), held as follows:—

"This decision is in accordance with the doctrine laid down in the Hidaya, book XV, of *wukf* or appropriation, *Hamilton's* translation, Vol. II, p. 334, where it is said, 'wukf' in its primitive sense means 'detention.' In the language of the law (according to *Haneefa*) it signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue, and the advantage of it go to some charitable purpose in the manner of a loan. According to the two disciples, '*wukf*' signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the [217] appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures. The two disciples therefore hold appropriation to be absolute, though differing in this, that *Aboo Yoosaf* holds the appropriation to be absolute from the moment of its execution, whereas *Mahomed* holds it to be absolute only

(1) 2 M. I. A. 390 (421).

(2) 3 Sel. Rep. 407 = 6 I. D. (O. S.) 1079.

1891 AUG. 7. — APPELLATE CIVIL. — 19 C. 203.

on the delivery of it to a *mutwaly* (or procurator), and, consequently, that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it. Thus the term '*wukf*,' in its literal sense, comprehends all that is mentioned both by *Haneefa* and by the two disciples.

"Again (p. 344), it is said, 'upon an appropriation becoming valid or absolute, the sale or transfer of the thing appropriated is unlawful according to all lawyers:' the transfer is unlawful, because of a saying of the Prophet: 'Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable.'"

In the Fatawa-i-Alamgiri it is distinctly laid down that when a property is assigned for a pious purpose and is declared to be inalienable and not subject to "the right of the heirs," that amounts to a *wukf* though the word *wukf* be not used at all by the donor in making the assignment (Fatawa-i-Alamgiri, vol. 2, p. 462). So also it is stated in the Radd-ul-Muhtar that the setting apart of property permanently for the support of a pious object is sufficient to constitute a *wukf*. Having regard to the authorities, I am clearly of opinion that the declaration contained in the *taksimnama* constituted the village of Khundwa, if it was not already dedicated to the *durgah*, a *wukf* in favour of the *durgah*. The fact that the entirety of that mauza came into the hands of Abdur Ruzzack when he succeeded his father in the office of *sajjadanashin*, without any claim on the part of the other heirs, shows to my mind that the family of Rahimuddin took the same view of the matter, and that Abdur Ruzzack received the property and held it as *sajjadanashin* of the *durgah* and not as private property.

That being so, the next question is whether the plaintiff has any title to sue for its recovery from the hands of persons claiming [218] to hold it under a conveyance from Abdur Ruzzack. If it is a *wukf* property, Abdur Ruzzack had no power to alienate it. The lower Court had found upon the evidence that the conveyance in favour of Hasina was *benami*, and that the title to the properties purported to have been conveyed to her thereunder never passed out of Abdur Ruzzack. It seems to me unnecessary, however, for the determination of the present case to go into the question whether the transaction was real or *benami*, for even if it be assumed that the transaction was real, as Abdur Ruzzack had no title to convey in Khundwa, the possession of the defendant is that of a mere trespasser. Limitation does not run against the successor of Abdur Ruzzack in the office of *sajjadanashin* until after the death of Abdur Ruzzack [*Jewun Dass Sahoo* v. *Shah Kubeerooddeen* (1)], and the plaintiff, if he has the title which he alleges, would be entitled to recover the property from the defendant, whether the conveyance to Hasina was *benami* or not. The defendant, however, has pleaded a *jus tertii*. She says, admitting that the property is *wukf*, plaintiff has no right to sue, for Mahbub Alum is the lawful *sajjadanashin*. Mahbub Alum is no party to this suit. And the appellant urges that the Judge was in error in not making him a party. It is not suggested that any application was made to the Judge to bring Mahbub Alum on the record. Having regard to the frame of the suit, it seems to me the plaintiff could not well have made Mahbub Alum a defendant without giving rise to serious objections. Mahbub Alum is not in possession of the *durgah* nor of the property in suit, and to have made him a defendant would have unnecessarily complicated the issues. I think,

(1) 2 M. I. A. 390 (421).

therefore, there is no force in the appellant's contention that Mahbub Alum not being a defendant in the suit, the decree is erroneous. 1891 AUG. 7.

The plaintiff is admittedly in charge of the *durgah*, and is discharging the duties connected with the institution. Upon the evidence there is no doubt that he has been elected to the office by a large number of Mahomedans residing in the locality. The Subordinate Judge upon these facts came to the conclusion [219] that whatever may be the right of Mahbub Alum it was unnecessary to go into it, for the plaintiff as the *de facto sajjadanashin* is entitled to recover the *durgah* property from the hands of a trespasser. The appellant, however, has contended most strenuously in this Court that the plaintiff, before he can succeed, must establish the validity of his title as if Mahbub were a party to this suit. It is argued that under the Mahomedan Law a *mutwali* has the power of nominating his successor on his death-bed, and that in the exercise of this power Abdur Ruzzack had nominated Mahbub Alum as the next *sajjadanashin*; that that appointment being lawful and valid, the subsequent nomination of the plaintiff, however made, was illegal. And Baillie, edition 1865, pp. 593-594, Fatawa-i-Alamgiri, vol. 2, p. 508, and the case of *Moohummud Sadik* v. *Moohummud Ali* (1) have been referred to in support of this argument. There is no doubt that under the Mahomedan Law, in the absence of any provision in the trust deed or of any evidence of usage, the last incumbent can, on his death-bed, nominate his successor, and that such nomination would be valid without any judicial order. But in order that the nomination may be effective, it is necessary that the person so appointed should be adult and possessed of understanding. In the Fatawa-i-Alamgiri the rule is thus stated :—

APPELLATE CIVIL.

19 C. 203.

؛ يشترط للصحة بلوغه و عقله كذا فى البحر الرائق ،

"And it is a condition to the validity (of the appointment of a *mutwali*) that he should be adult and possessed of understanding; and thus it is stated in the Bahr-ur Raik."

Mr Baillie in the first edition of his Digest did not give the meaning of this passage, but it appears in the second edition in the following words :—

"But puberty and understanding are essential in all cases to a valid appointment."

Mahbub Alum is admittedly a mere child, but the learned pleader for the appellant contends that the word للصحة (llasuth) refers to the valid discharge of the duties, and not to the validity of the appointment; and as Mahbub Alum can discharge the duties of [220] the office by a deputy, his appointment is not invalid. But this contention is plainly opposed to the context as well as the phraseology of the passage I have quoted. Besides, the office of *mutwali* is an office of personal trust, and a person who cannot discharge the duties of the trust personally, nor be responsible for their due discharge, cannot appoint a deputy. The same condition is laid down in the Radd-ul-Muhtar and the Fatawa-i-Kazi Khan that a minor cannot be appointed a *mutwali*. The learned pleader, however, contends upon the authority of a passage

(1) 1 Sel. Rep. (O. S.) 17=6 I.D. (O.S.) 17.

1891 AUG. 7. — APPELLATE CIVIL. — 19 C. 203.

in the Alamgiri, that the appointment of a minor *mutwali* is not invalid, but remains in abeyance until he attains his majority. But that passage must be read with the previous condition which insists upon puberty as a *sine qua non*. As a matter of fact, however, it refers not to a case of express appointment, but to the devolution of the office by virtue of some provision in the trust deed or otherwise. For example, a *wakfnama* may provide that the *towliut* should be confined to the male descendants of the *wakf*, or the members of a particular family, and it may happen that at some time the person on whom the office devolves by virtue of this provision is a minor. The law, therefore, provides that in such cases the Kazi should appoint somebody to discharge the duties during the minority of the *mutwali*, who should get the office on attaining majority. But this is not the present case, and Abdur Ruzzack had no power to appoint a minor to succeed him in the office. Besides, it seems to me, having regard to the nature of the office of *sajjadanashin*, that the appointment of a minor would be opposed to the constitution of the thing. The *sajjadanashin* has certain spiritual functions to perform. He is not only a *mutwali* but also a spiritual preceptor. He is the curator of the *durgah* where his ancestor is buried, and in him is supposed to continue the spiritual line (*silsilla*). As is well known, these *durgahs* are the tombs of celebrated *dervishes*, who in their lifetime were regarded as saints. Some of these men had established *khankahs* where they lived and their disciples congregated. Many of them never rose to the imporance of a *khankah*, and when they died their *mausolea* became shrines or *durgahs*. These *dervishes* professed esoteric doctrines and distinct systems of initation. They were either *sufis* or the disciples of [221] Mian Roushan Bayezid, who flourished about the time of Akbar, and who had founded an independent esoteric brotherhood, in which the chief occupied a peculiarly distinctive position. They called themselves fakirs on the hypothesis that they had abjured the world, and were humble servitors of God; by their followers they were honoured with the title of Shah or King. Herklot gives a detailed account of the different brotherhoods and the rules of initiation in force among them. The preceptor is called the *pir*, the disciple the *murid*. On the death of the *pir* his successor assumes the privilege of initiating the disciples into the mysteries of *dervishism* or *sufism*. This privilege of initiation, of making *murids*, of imparting to them spiritual knowledge, is one of the functions which the *sajjadanashin* performs or is supposed to perform. Apart from the question, therefore, whether a minor can or cannot be appointed as a *mutwali*, it seems to me that Mahbub Alum's nomination is opposed to the constitution of the office. The relationship which exists between a *pir* and his *murids*, as I understand the theory and practice of *dervishism*, is a spiritual and personal one. And a deputy can hardly be supposed to impart the same efficacy to his ministrations as the *pir* himself.

For these reasons, I think that the nomination of Mahbub Alum was not valid in law. Of course, this decision can have no binding effect against Mahbub Alum, he being no party to this suit.

The plaintiff says he was appointed to the office on the third day after his brother's death by a number of the disciples and certain other people, two of whom at least are the *sajjadanashins* of other shrines. The learned pleader for the defendant contends that this appointment is invalid, and that in the absence of an appointment by the last holder of the office, the power of nomination devolves on the Kazi. And in support of this contention he cites Baillie, p. 594, and the case of *Moohummud Sadik*

v. Moohummud Ali (1). Neither the passage in Baillie, which declares that in case the *wakif* be dead and have left no executor, the power of nomination vests in the Kazi, nor the ruling in the case referred to, touches the present question. No doubt there **[222]** occur passages in the law books to the effect that the congregation cannot validly appoint a *mutwali*. But as I understand the principle, those dicta refer to endowments of a public nature like a *musjid-i-jamaa* and similar institutions in which the public at large or the Mussalman public generally are interested. But when an institution is dedicated to the inhabitants of a particular locality or to a particular sect or fraternity, the members of which are ascertainable, whatever might have been the case in ancient times, the modern Moslem jurists have recognized the validity of an appointment by the congregation. The Fatawa-i-Alamgiri, after stating the old views concerning such appointments, says—

1891 Aug. 7. — Appellate Civil. — 19 C. 203.

عن شيخ الاسلام ابي الحسن انه قال كان مشائخنا رح يجيبون انهم

اذا نصبوا متوليا يصير متوليا كما لو اذن القاضي بذلك ،

"It is stated from Shaik-ul-Islam Abu'l Hassan that all the *mashaikhs* (jurists) declare that if they [the congregation] do appoint a *mutwali*, it would be as valid as if the appointment was made with the permission of the Kazi."

And in the Radd-ul-Muhtar it is stated that the modern Muhammadan lawyers recognize the validity of an appointment by the congregation. So also in the Wajiz-ul-Muhit. It is clear, therefore, that the election of the plaintiff is not invalid under the Muhammadan law. Besides, it seems to me that the appointment of a *sajjadanashin* of a *durgah* must, to a large extent, be regulated by the practice followed in the particular *durgah* or neighbouring *durgahs*. Herklot describes the custom in vogue in the *durgahs* existing in Southern India. And so far as I am aware, that is consistent with the practice prevailing in other parts of India, *viz.*, that upon the death of the last incumbent, generally on the day of what is called the *sium* or *teja* ceremony (performed on the third day after his decease), the *fakirs* and *murids* of the *durgah*, assisted by the heads of neighbouring *durgahs*, instal a competent person on the *guddi*; generally the person chosen is the son of the deceased or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination **[223]** takes the shape of a formal installation by the electoral body, so to speak, during the lifetime of the incumbent. But in every case the person installed is supposed to be competent to initiate the *murids* into the mysteries of the *tarikat* (*the holy path*). In the present case the evidence is, that in accordance with the general practice and the practice prevailing in the *durgah* in question, the plaintiff was appointed. And I am of opinion that that appointment was valid, and the plaintiff has a title to maintain this suit.

As regards the question of estoppel, I agree with the Subordinate Judge. Upon the evidence, I am by no means satisfied that the plaintiff attested the document in favour of Hasina, nor is there any evidence pointing to the fact that the plaintiff knew, at the time he attested the other

(1) 1 Sel. Rep. (O.S.) 17 = 6 I.D. (O.S.) 17.

1891 AUG. 7. — APPELLATE CIVIL. — 19 C. 203.

documents referred to in argument, that Abdur Ruzzack had purported to deal with Khundwa as his private property.

For these reasons, I am of opinion that this appeal should be dismissed with costs.

C. D. P. *Appeal dismissed.*

---

19 C. 223 (P.C.) = 19 I.A. 15 = 15 Ind. Jur. 750 = 6 Sar. P.C.J. 98.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, and Morris, Sir R. Couch and Lord Shand.

[*On appeal from the Court of the Recorder of Rangoon.*]

KHOO KWAT SIEW AND OTHERS (*Plaintiffs*) *v.* WOOI TAIK HWAT AND OTHERS (*Defendants*). [12th and 13th November, 1891.]

Insolvency of trading partnership—Mortgage by trading partnership of all its assets, when solvent, for advances, present and future—Change of partners with continuance of mortgage liability—Validity of mortgage security.

If a trader assigns all his property, except on some substantial contemporaneous payment, or substantial undertaking to make a subsequent payment, that is an act of insolvency, and is void against the creditors on his insolvency, simply because nothing is left wherewith to carry on the business; whereas, if he receives such assistance, something is left to carry on the business.

[224] A trading partnership, before its insolvency, assigned by mortgage all its assets to a creditor, who simultaneously made a substantial advance to the firm, agreeing to make future advances.

Held, that the mortgage would have covered such assets of the then firm as were in existence at the time of the insolvency, and would not have been void, as against the other creditors, and the Official Assignee, because the assistance was substantial, and the then solvent firm was not left by the assignment without means.

Another question was raised upon the facts that, after the mortgage and before the insolvency, new partners entered the firm, and new stock in-trade was brought in. The new partners were to be under the same liability to the secured creditors, the security continuing with respect to the new firm and the after-acquired stock, as it stood with respect to the old. *Held*, that this arrangement did not invalidate the prior security amounting, as it did, to a mere substitution of persons and goods at the time of the change.

Also the incoming partners received substantial consideration; for, although the obligation, under the former agreement with the old firm, for the rest of the advances, not then made, was remitted, a new obligation was entered into that a sum of money should be provided, which was afterwards supplied. The incoming partners got the benefit of a surety-ship which the mortgagees had entered into for the former firm. These were the considerations to the incoming partners at the time. As the original contract would have been, the new one was, valid against the Official Assignee.

[F., 26 B. 765 (774, 777).]

APPEAL from a decree (24th April 1890) of the Recorder of Rangoon.

The plaintiffs, appellants, were members of the firm of Chen Hoe and Company, merchants in Rangoon. The defendants, respondents, Wooi Taik Hwat, Khoo Bean Poot, Khoo Yin Inn and Khoo Hock Chie, under the style of Pinthong and Friends, carried on business as general dealers in Rangoon. The members of the partnership were subsequently changed, and the business (which had been bought in 1888 for Rs. 54,000) was

carried on till the insolvency of the firm in December 1889. The incoming partners were also defendants, respondents, *viz.*, Khoo Cheng Wah and Saw Pang Lim. And by an order made on 5th March 1890 the Official Assignee was added as a defendant.

The principal questions related to an assignment by mortgage deed, made by the firm of Pinthong and Friends on the 11th March 1889; and were, whether this could be enforced as against other creditors, represented by the Official Assignee, and what effect was to be given to the substitution of new partners.

[225] Before the 11th March 1889 the plaintiffs had either advanced in cash to the firm, or had paid on its account, sums amounting to Rs. 55,000. The mortgage deed of that date recited that the mortgagees were liable for the mortgagors on promissory notes, hundis, and other securities, and "had agreed to lend money to them in like manner hereafter, on being secured in the manner hereinafter." It also stated that the mortgagees had agreed to secure the mortgagors to the amount of a lakh of rupees against all payments which they might at any time be called upon to make, or might become liable for, both in respect of instruments already executed and those which they might execute. The deed then assigned to the mortgagees all the stock-in-trade, fixtures, utensils, and effects of the firm which then were or might at any time during the continuance of the security be brought upon or appertain to the premises of the firm, and the good-will of the business, together with all book-debts and trade outstandings. There was also given a right of entry upon failure to repay.

On the 29th May 1889 the defendants, Khoo Bean Poot and Khoo Yin Inn, sold their shares to Khoo Cheng Choon and Khoo Cheng Wah, and the defendant Khoo Hock Chie sold his share to Saw Pang Lim. The incoming partners were all defendants. The firm paid off Rs. 15,000 of the amount then due. In July 1889 Wooi Taik Hwat retired from the firm, but was re-admitted on the 7th September following, having bought the shares of Khoo Cheng Wah and Saw Pang Lim. In that month the plaintiffs paid Rs. 40,000 on account of the firm to creditors, and after demanding this sum without obtaining payment, they claimed, but were refused, possession of the mortgaged assets. On the 11th September they filed their suit claiming, under the mortgage, possession of the stock and effects in the firm's warehouse, held by Wooi Taik Hwat and Khoo Cheng Choon, and of the book-debts and trade outstandings, together with an injunction restraining these two from interference; also claiming payment of any balance that might remain after the proceeds of the sale of the above should have been credited. On the 12th December 1889 a receiver was appointed. On the 16th of the same month [226] the firm of Pinthong and Friends was adjudicated insolvent on their petition to the Court of the Recorder in its insolvency jurisdiction, that upon their compliance with the provisions of the statute, relating to insolvent debtors in India, the 11th and 12th Vic., c. 21, they might have the benefit of it. Thereupon the Official Assignee was made a defendant in this suit.

Four of the defendants filed their written answer, and three others, including the Official Assignee, filed none. The defence set up by the written statement was in substance that the plaintiffs only held a mortgage over the stock of the firm, as it was constituted at the date of the transaction, but held no mortgage over the assets of the new firm, as it was constituted after the change of partners in May 1889. It was also a

1891 Nov. 13. — PRIVY COUNCIL. — 19 C. 223 (P.C.) = 19 I.A. 15 = 15 Ind. Jur. 750 = 6 Sar. P.C.J. 98.

ground of defence that at the time of the mortgage of the 11th March 1889 the plaintiffs had agreed to lend money to Pinthong and Friends to the amount of a lakh if required; and that when the new partners came in the plaintiffs agreed to postpone calling in a balance of Rs. 40,000 then due to them from Pinthong and Friends, but afterwards refused this accommodation, thus disentitling themselves to possession under the mortgage.

At the hearing it was admitted that the incoming partners took with notice of the mortgage, and accepted what liability might arise under it. The defence then made on behalf of the Official Assignee was the invalidity of the mortgage as against the creditors other than the plaintiffs.

The Recorder dismissed the suit with costs, on the ground that the mortgage deed of the 11th March 1889 was void as against the general body of creditors and the Official Assignee. There was, as he held, no agreement to make further advances on the mortgage, which assigned substantially all the property of the firm securing a past debt only, and not future advances coupled with it. The mortgage, therefore, necessarily had the effect of withdrawing the firm's property from being security for other creditors, and was therefore void as against the Official Assignee. He cited Robson on Bankruptcy, 6th edition, page 145, and thus referred to cases:—

"There are a number of authorities on the point; one in particular, *Lindon* v. *Sharp* (1), appears to me to be very much in **[227]** point. There a trader assigned his goods to a banker to secure £1,000, £864 being the amount due to the banker at the time. Although advances were actually made by the banker after the execution of the assignment on the faith of it, yet as there was no covenant in the deed that future advances should be made, so as to afford an inference that the security was given to enable the trader to carry on his trade, and as the deed placed it in the power of the banker to take possession at any time and to sell in default of payment on demand, it was held an act of bankruptcy, although possession was never taken by the banker under his security. In *Smith* v. *Cannan* (2), the Exchequer Chamber held that a conveyance necessarily delaying a trader's creditors is an act of bankruptcy, although it has not the effect of stopping his trade. In *ex parte Hawker in re Keely* (3), an assignment of all a debtor's property, except a pension, which would not pass to the trustee in bankruptcy, and could not be taken in execution, was held to be an act of bankruptcy. In another case in the same volume, *ex parte Fisher in re Ash* (4), there was an assignment of all the debtor's property to secure a past debt, and a fresh advance which was made on a conditional promise, that if the fresh advance was not paid within ten days, the debtor would make the assignment; and it was held that, having regard to the conditional nature of the promise and the smallness of the fresh advance, the assignment was an act of bankruptcy and void as against the creditors. Mellish, L.J., said:—'We are of opinion that if we were to hold this bill of sale to be valid, we should practically abrogate the rule that the assignment of the whole of a debtor's effects in consideration of a past debt is an act of bankruptcy, and should in every case enable a favoured creditor who can trust his debtor, to give him a bill of sale of all his property when required, to obtain payment of his debt in full to the prejudice of the other creditors.'

---

(1) 6 Man. and G. 895. (2) 2 El. and Bl. 35.
(3) L. R. 7 Ch. Ap. 214. (4) L. R. 7 Ch. Ap. 636.

"In *ex parte King in re King* (1), James, L.J., says :—' In each case, looking at all the circumstances, you have to answer these questions—Does the assignment include all the property, or is there a substantial exception? Is it wholly to secure a pre-existing debt? And if there is a further advance, is it a substantial one ; or only one [228] intended to give colour to a security which is in reality made only for the purpose of recovering a pre-existing debt.' Mellish, L. J., says:—' The numerous cases on the subject have settled the law. The only difficulty is in the application of it. An assignment of all a debtor's property for a past debt is an act of bankruptcy. A merely nominal exception of part of the property will not prevent this, but an exception of a substantial part will prevent it.' In *ex parte Ellis in re Ellis* (2), Mellish, L. J., said :—' The result of the authorities is that where a debtor assigns his whole property as a security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been. If there is a further advance it is not a question whether the further advance is great or small, but whether there was a *bona fide* intention of carrying on the business.' The last case to which I think I need refer is *ex parte Chaplin in re Sinclair* (3), where Cotton, L. J., says:—'If persons will take from a man who is in difficulties a deed of this description, which has the effect of withdrawing, and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him and bankruptcy ensues, the deed is void under the bankruptcy law. It is fraudulent as well as void, whatever may have been the view of those who were engaged in the transaction that it might be the best thing for the debtor, or that it might afford an effectual way of paying the creditors.'"

The plaintiffs having appealed,

Mr. *H. H. Asquith*, Q.C., and Mr. *F. Mellor*, for the appellants, argued that the Recorder had erred in holding the mortgage to be invalid as against the Official Assignee. It was valid, and was binding on the newly constituted firm and its property. This was not a case of the withdrawal of all the assets of a trading firm from the reach of the creditors of the firm other than those whom the latter had attempted to secure. Such a security, for a past debt only, would be invalid ; but here the case was different, there having been a substantial payment by the mortgagee simultaneously with the assignment of all the mortgagors' assets ; and there having been also an undertaking to make future advances. This had been done, with good faith [229] on both sides ; and the security had been given to secure both the then present, and the then contemplated, but subsequent advances, when they should have been made. This had not been done with a view to future probable insolvency. On the contrary, the consideration, consisting of present and subsequent advances, was that the firm should be assisted and supported. This was done by the creditor, who having given this assistance was entitled to have the benefit of the security executed in his favour. An assignment would hold good to bind what would be, at the date of it, as yet not existing stock-in-trade, also book-debts afterwards to be entered and realized, provided always that they were specific property, such as could be made the subject of contract capable of specific performance. No subsequent act of the character of transfer of possession was necessary ; the assignment in equity being complete as soon as the property came into

(1) L.R. 2 Ch. Div. 256. (2) L.R. 2 Ch. Div. 797.
(3) L.R. 26 Ch. Div. 319.

1891 Nov. 13. — PRIVY COUNCIL. — 19 C. 223 (P.C.) = 19 I.A. 15 = 15 Ind. Jur. 750 = 6 Sar. P.C.J. 98.

existence; the only question being one of its identification with the property described in the mortgage. Again, the judgment of the Court below, so far as it was based on the conclusion that there had been no agreement for further advances, was wrong. This had arisen from the want of a clear distinction, which should have been made between the evidence relating to the agreement of the 11th March, and that relating to the agreement of the 29th May 1889. On the latter date the incoming partners took over all the liabilities of the old firm of Pinthong and Friends to the plaintiffs; thus agreeing, in effect, with them that the assets of the new firm should remain as security according to the terms of the mortgage of the 11th of March. Those of the respondents who afterwards joined the firm did so with notice of the mortgage; and the assets of the old firm remained subject to the mortgage in the hands of the partners who came in. Neither the change of persons, nor the change of moveables charged, had any effect to invalidate the mortgage as against the Official Assignee. The issues should have distinguished the rights of the incoming partners from those of the Official Assignee. But it was apparent enough that the mortgage was originally valid as against the old firm; and when subsequently extended, on the 29th May, at the incoming of the new partners it was valid also as against the newly constituted firm, binding it, and its assets; and that the mortgage was first and last valid against the Official Assignee.

[230] Mr. *J. D. Mayne* and Mr. *J. Alderson Foote*, for the respondent Purna Chunder Sein, the Official Assignee of the estate of Pinthong and Friends, argued that the mortgage was substantially an assignment of the firm's property for a past debt, and that there had been no sufficient evidence of any agreement to make further advances after the 11th of March, or of the actual making of any such subsequent advance. So far as the new partners were concerned the debts were past, and the obligations were pre-existing. If when these partners came in, on the 29th May, they had executed a mortgage like that of the 11th March, it would have been in consideration of previous advances and past debts. The arrangement carried out on the 29th May could not put the mortgage into any more effective state as regarded the new partners. Whatever the original arrangement between the plaintiffs and the old firm, the effect of the new arrangement was to rescind and determine the former mortgage, and to render it void as against creditors. There was no new obligation on the part of the mortgagees entered into on or after the 29th May 1889, and the debts at that date were all pre-existing. The stock-in-trade brought in after that date, would not be subject to the original mortgage, nor was there any new arrangement whereby it would be rendered a security in the hands of the new partners. Reference was made, in regard to the rights of the Official Assignee, to *ex-parte Johnson in re Chapman* (1), *ex-parte Wilkinson in re Berry* (2), *ex-parte Dann in re Parker* (3), *ex-parte Baring* (4), and other cases cited in "Williams on the Lal in Bankruptcy," 5th edition, 1891, dealing with s. 4 of the Act of 1883. Also s. 23 of 11 and 12 Vic., c. 21, relating to insolvent debtors in India was referred to.

It having been said, during the argument, that the law relating to the assignment of after-acquired property, should be considered: and that, under the former rulings, a mere license to seize could not divest property, their Lordships referred to *Holroyd* v. *Marshall* (5), where the title of

(1) L.R. 26 Ch. Div. 338. (2) L.R. 22 Ch. Div. 788.
(3) L.R. 17 Ch. Div. 26. (4) 1 Mer. 611. (5) 10 H.L. Ca., 191.

mortgagees (upon a question whether as to machinery, added and substituted after the date of the mortgage, they had acquired the property) prevailed over that of the [231] judgment-creditor. They also referred to the opinions expressed in the House of Lords in *Tailby* v. *The Official Receiver* (1), where it was decided that an assignment, by way of security, of certain book-debts, not existing at the time of the assignment, was valid, so as to give the assignee a good title to them when they came into existence.

Mr. *F. Mellor* was called upon to reply only as to the evidence relating to the future advances. At the end of the arguments, their Lordships' judgment was delivered by—

JUDGMENT.

LORD HOBHOUSE.—The only question in this case is whether the mortgage deed of the 11th March 1889, either originally, or as modified in May 1889, is valid against the assignee in insolvency of the mortgagors. It is better not to use the term "fraudulent" in such a case, though that term has, by rather an unhappy use of language, been applied by Courts of equity to transactions which are not at all dishonest in their nature, but are only such as the law will not allow. In this case there is no suggestion from beginning to end of there being anything dishonest in the transaction. The sole question is as to its legal validity.

The well-known rule of law is, that if a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment *in futuro*, that is an act of bankruptcy, and is void against the creditors and the assignee, simply because nothing is left with which to carry on his business, whereas if he receives substantial assistance something is left to carry on the business.

Prior to the mortgage of the 11th March 1889 the mortgagees had assisted the mortgagors, either by payments or by incurring liabilities on promissory notes for them, to the extent of Rs. 30,000. At the time of the mortgage more assistance was given. Their Lordships take it to be clear beyond dispute, though it has been argued to the contrary at the bar, that simultaneously with the mortgage the defendants' firm did receive, in the form of a joint promissory note signed by themselves, and by the plaintiffs, further assistance to the extent of Rs. 25,000. They also received an undertaking for the further accommodation, amounting in the whole [232] to a lakh of rupees. This promissory note, like at least one, if not more, of the former ones, was payable on demand, but there seems to have been some understanding—it does not appear exactly what—that it should not be presented until some later date. It was in fact presented in the month of September 1889. It was not taken up by the mortgagors, and it was taken up by the mortgagees. There was therefore substantially an advance of Rs. 25,000 simultaneously with the mortgage. The further accommodation to the extent of a lakh of rupees was not made, on account of a subsequent agreement which will be noticed presently.

That being so, their Lordships consider that this deed must be held to be valid. They are not aware of any case in which a simultaneous advance of a large amount being made, and future support being promised of a large amount, the validity of such a deed has been seriously called in question. In this case the simultaneous advance was nearly as much as

(1) L. R. 13 App. Cas. 523.

1891 Nov. 13.

PRIVY COUNCIL.

19 C. 223 (P.C.) = 19 I.A. 15 = 15 Ind. Jur. 750 = 6 Sar. P.C.J. 98.

the pre-existing debt, and the undertaking to give future advances was considerably more.

It has been argued for the assignee that the proper test is, whether it was the intention of the parties that the trader giving such a security should carry on his business. Their Lordships conceive that that question hardly arises except in those cases where the amount of additional assistance given at the time of the mortgage is so small as to create a doubt whether it is substantial; and then comes in the inquiry into the motives of the parties, whether they did really intend that the business should be carried on or not. It is impossible to raise such a question here, where the amount of simultaneous and future advance is very large. Even if their Lordships did enter into that question, which is one of honesty, the receiver's accounts show that the firm was, as late as the 31st August 1889—in fact till the large amounts due on promissory notes were called for—a solvent firm. Striking out from the liabilities the debts due to the partners themselves, which of course cannot be taken into account for this purpose and the sum of Rs. 40,000 which was due to or was to be supplied by the mortgagees, it seems that at that date the firm would have had a surplus of something like Rs. 74,000. It was a solvent firm, and we have it in evidence that it was doing **[233]** a large business, and it must have been the interest, and doubtless was the motive, of all the parties to keep on its legs a firm that was doing a business bringing in profit.

Their Lordships have no doubt whatever about the validity of the mortgage-deed of the 11th March 1889. That would, at all events, cover such assets of the then firm as were in existence at the time of the insolvency; and the receiver's accounts again show that those assets were something substantial.

But then it is argued that as regards the partners who came into the firm on the 29th May 1889, and as regards the new stock-in-trade which was brought into the business after that time, the mortgage-deed cannot operate. First, it was said that there was no arrangement that it should operate on the future stock. But their Lordships consider it to be well established by the evidence that the arrangements made were of the nature which has been succinctly stated by witnesses on both sides. The principal plaintiff says: "I said that if an agreement was made"—that is the agreement for incoming partners—"they would have to pay Rs. 15,000,"—that was paid down—"and Rs. 40,000 on due date." Then he says: "It was secured by the document." What was secured? The sum of Rs. 40,000 was secured. But this sum certainly would not have been secured if the goods of the old firm, which were being exhausted week by week, had been the only security for it, and the goods substituted for them were not to form part of that security. The same witness afterwards says: "When the incoming partners came into the firm it was understood that I should continue to guarantee the Rs. 40,000 until Bugwan Doss and the Chetty's notes became due." One of the outgoing partners says, speaking of the incoming partners: "They undertook to pay all debts contracted by the firm"—that is the old firm—"as well as what was due under the mortgage. The security of the mortgage was to continue, but no further advances were to be made. * * * * It was also said that the amount due on Exhibit A was to be reduced to Rs. 40,000 and that there was to be no more accommodation, and the Rs. 40,000 was to be paid on due date or on demand. The stock was to continue as security."

1891 Nov. 13. — Privy Council. — 19 C. 223 (P.C.) = 19 I.A. 15 = 15 Ind. Jur. 750 = 6 Sar. P.C.J. 98.

On those passages it was argued that that merely meant that the mortgage of the 11th March 1889 was to continue according to its [234] legal operation as it was made, that is its operation on the assets of the old firm. But such an interpretation would be making the parties enter into a nonsensical agreement. It is impossible to suppose that the incoming partners, who were to take all the benefit and the profits of the existing stock, the mortgagees not enforcing their security against it which they could enforce, were not agreeing under these expressions, if those were the expressions used, or that the witnesses did not intend to state that they were agreeing, that the stock for the time being of the firm then constituted was to be the security to the mortgagees. An incoming partner, and one of the defendants, Khoo Cheng Choon, says: "I said" to Khoo Kwat Siew, "I would pay Rs. 15,000,"—that was done—"and for the balance Rs. 40,000 you must stand guarantee. He agreed. If he hadn't done so I wouldn't have entered into the firm." Therefore it seems that the incoming partner entered into the firm on the promise of the plaintiff Khoo Kwat Siew to guarantee these Rs. 40,000 which actually were paid. This statement of Khoo Cheng Choon leads to the same inference in the minds of their Lordships that they have drawn from the preceding evidence. In his cross-examination Khoo Cheng Choon says: "When Taik Hwat,"—the senior partner,—"went out it was arranged that the security should continue." Their Lordships interpret the meaning of this to be that the security should continue with respect to the new firm and the new stock, exactly as it stood with respect to the old firm and the old stock.

Then it is argued by Mr. Mayne that if this new arrangement had been the first arrangement, and if we take the facts as they stood at the time when the new arrangement was made, all the debts then secured were past debts or existing liabilities, and so the security, the mortgage, would fall within the rule which makes void assignments of all a trader's property. It is an ingenious argument, but their Lordships cannot accede to it. In the first place it is impossible to take the case as if the original arrangement did not exist. We find a valid mortgage existing over the assets of the firm, immediately before the arrangement of May 1889. New partners then came in, and the mortgagees' assent has to be obtained, because they could seriously embarrass, probably could break up the firm at any moment. The new [235] partners then have the benefit of the going concern, and they make the reasonable arrangement that the going new concern shall be under the same liabilities to the secured creditors as the going old concern. It is impossible to say that such an arrangement as that would invalidate the prior valid security, because it amounts to a mere substitution of persons and goods at the time of the change. But further, it is not true that substantial consideration in payment did not pass to the incoming partners. It is true that Rs. 15,000 of the debt was then paid off, and that the obligation of the mortgagees to provide accommodation up to a lakh of rupees was then remitted, but there still remained their obligation to provide the Rs 40,000, which was actually provided in the succeeding month of September.

This obligation did not exist as between the mortgagees and the incoming partners till the arrangement of May 1889 was made. Then the incoming partners got the benefit of the suretyship into which the mortgagees had entered for the former partnership.

Their Lordships therefore hold that, even if this had been the original arrangement, it would have been supported by the passing of a

1891 Nov. 13. — PRIVY COUNCIL. — 19 C. 223 (P.C.) = 19 I.A. 15 = 15 Ind. Jur. 750 = 6 Sar. P.C.J. 98.

substantial consideration to the incoming partners at the time of the arrangement.

The result will be that the decree of the Recorder of Rangoon should be reversed, and that the plaintiffs should have a decree substantially in accordance with the plaint. Probably the property has undergone change during the progress of the suit, in a way to vary the precise mode of relief. It will be right to declare that the indenture of the 11th March 1889 is a lawful and valid instrument, and that by virtue thereof the plaintiffs were, at the date of the insolvency of Pinthong and Friends, mortgagees of all the stock-in-trade, fixtures, utensils, and effects then upon or in or appertaining to their premises in Merchant Street, and of the good-will of their business, with all book-debts and trade outstandings then payable to or recoverable by the said firm.

There is some further care required in framing the decree, because the suit was originally brought, and this appeal is brought, against all of the seven persons, who, between the 11th March 1889 and the date of suit, *viz.*, the 11th September 1889, were partners in the firm of Pinthong and Friends. None of those persons have appeared here, and their Lordships must act in their [236] absence. Three of these persons, Khoo Bean Poot, Khoo Hock Chie, and Khoo Yin Inn, do not appear to have made any defence, or to have caused or incurred any costs. The effect of the arrangement of May 1889 was to transfer the liability created by the mortgage of March from the then outgoing partners to the incoming ones. The outgoing partners are the three defendants in question. Against them there should be no costs. The other four, Wooi Taik Hwat, Khoo Cheng Choon, Saw Pang Lim, and Khoo Cheng Wah, put in a written statement denying the validity of the mortgage. In March 1890 the Official Assignee under the insolvency was added as a defendant, and though the individual has been changed, the Official Assignee is a party to this appeal, and has appeared to maintain the Recorder's decree. Whether a decree against the insolvents will be of any value to the plaintiffs their Lordships cannot tell, but they think that the plaintiffs are entitled to it. All the remedies that the mortgage-deed is calculated to give them, they are entitled to against the persons who undertook the obligations, and against the Official Assignee on whom the mortgage property has devolved. The four defendants last mentioned and the present Official Assignee should be ordered to pay the costs of the suit and of this appeal.

Their Lordships will humbly advise Her Majesty accordingly.

Appeal allowed.

Solicitors for the appellants: Messrs. *Bramall* and *White*.

Solicitors for the respondent, the Official Assignee: Messrs. *Prior, Church*, and *Adams*.

C. B.

19 C. 236 (P.C.)=19 I.A. 30=6 Sar. P.C.J. 88.

1891 DEC. 12. — PRIVY COUNCIL. — 19 C. 236 (P.C.)= 19 I.A. 30= 6 Sar. P.C.J. 88.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Morris, Sir R. Couch and Lord Shand.

[*On appeal from the High Court at Calcutta.*]

BEHARI LAL (*Plaintiff*) *v.* MADHO LAL AHIR GAYAWAL AND ANOTHER (*Defendants*). [10th November and 12th December, 1891.]

Hindu widow's estate—Life estate of Hindu widow, surrender of—Acceleration of estate of heir requires absolute conveyance by Hindu widow—Ikrarnama by Hindu widow in favour of heir, when she retains possession of estate, effect of—Reversioners, rights of.

A Hindu widow can accelerate the succession of the heir by conveying absolutely her life-estate to him, but it is essential that she should [237] surrender her estate, so that the whole estate should become at once vested.

A Hindu widow executed an ikrarnama in favour of her daughter's son, then apparently the heir who would ultimately succeed, but adding that she would retain possession for her own life. *Held*, that this could not operate to exclude the daughter, nor after her the son of another (deceased) daughter, not born at the date.

[F., 29 A. 71=3 A.L.J. 755=A.W.N. (1906) 272; 7 Bom.L.R. 622 (633); 11 Ind. Cas. 676 (681)=14 O.C. 170; 15 Ind Cas. 637; 4 M.L.J. 88 (90); 31 M. 366= 18 M.L.J. 309=3 M.L.T. 355 (F.B); Expl., 36 C. 780 (P.C.)=13 C.W.N. 920 =10 C.L.J. 58=19 M.L.J. 548=5 M.L.T. 423=11 Bom. L. R. 833=6 A.L. J. 567=36 I. A. 103=3 Ind Cas. 382=93 P. R. 1909; R., 30 A. 1 (P.C.)=35 I. A. 1=5 A.L.J. 1=9 Bom L R. 1318=6 C.L.J. 766=12 C.W.N. 74=17 M. L.J. 605=3 M.L.T. 1=11 O.C. 78; 25 B. 129; 34 B. 165=11 Bom.L.R 1291 =4 Ind. Cas. 584; 22 C. 354; 19 M. 336 (337); 21 M. 128 (F.B.); 26 M. 143 (154)=12 M.L.J. 197; 30 M. 145 (149)=17 M.L.J. 14; 40 C. 728 (F B)=17 C. L.J. 499=17 C.W.N. 701=19 Ind. Cas. 273; 35 C. 939=12 C.W.N. 837=8 C. L. J. 280; 14 C.W.N. 226=2 Ind. Cas. 660; 8 Ind. Cas. 558 (561)=151 P.L. R. 1910; 25 M.L.J. 8 (14)=13 M.L.T. 445=20 Ind. Cas. 304=1913 M.W. N. 448; 8 O. C. 12 (25); 9 O. C. 104; 17 P.R. 1902=16 P.L.R. 1902.]

APPEAL from a decree (12th August 1886) of the High Court, reversing a decree (23rd December 1882) of the Subordinate Judge of Gaya.

This appeal was commenced by Behari Lal Maherwal Gayawal, who died in 1890, and was now represented by his widow Maina Dai. He brought this suit on the 7th January 1884 against the two respondents, who were his mother and his first cousin, to obtain a declaration of his title to, and possession of, the whole estate of his deceased maternal grandfather Damodhur Mahton, who died in 1845 without leaving a son. Damodhur left two daughters and a widow, their mother, Lachoo Dai, who died in 1878. The younger of the daughters, Phula Dai, died in 1852, leaving a son, Madho Lal, now one of the defendants. The other daughter, Rani Dai, was the mother of Behari Lal, and was a co-defendant with Madho. The only property of Damodhur proved, as the Courts found in this suit, to have belonged to him was land forming a mehal, named Pahra, in the Gaya district. The family belonged to a class of priests officiating at Gaya and known as Gayawal.

Behari Lal alleged an exclusive right in himself to succeed to Damodhur's estate, in virtue of an ikrarnama executed in his favour by his grandmother, the widow Lachoo Dai, in 1849, and the principal question on this appeal related to the effect of this document. The Mitakshara law

1891 DEC. 12. — PRIVY COUNCIL. — 19 C. 236 (P.C.) = 19 I.A. 30 = 6 Sar. P.C.J. 83.

prevailed where the parties lived. Rani Dai came next to Lachoo in succession, for the estate of a daughter, during whose life, as it would appear, the plaintiff would have ranked only as an expectant heir in equal degree with his cousin Madho. But the plaint alleged that the ordinary law was not applicable, asserting that, by the custom of Gayawals at Gaya, the widow of a Gayawal, such as Damodhur was, could absolutely transfer her deceased husband's estate to a male of that [238] class, whether an heir by law or not. This was with a view to provision being made for the continuance of the worship among Gayawals.

Rani Dai did not oppose her son's suit, only claiming that, if dispossessed, she should have maintenance. Madho Lal, among other defences, denied the widow's competence to make the gift of 1849, denying that the custom existed. In prior litigation in 1874 it had been held by the High Court that the ikrarnama was only intended as testamentary. He alleged also that Lachoo, on the 9th January 1877, had executed a document, under which he had held, during the remainder of her life, one half of the mehal, but that, on her death, Rani Dai had, as daughter and heiress of Damodhur, obtained a decree, dated 4th September 1879, upon which he had given up possession to her.

The first Court found that an ikrarnama in favour of Behari Lal had been executed on the 13th September 1849 by Lachoo Dai, and decreed in favour of the plaintiff a declaration of his title, with possession and mesne profits.

On an appeal to the High Court this decision was reversed by a Division Bench (GHOSE and PORTER, JJ.) and the suit was dismissed. The judgment was that the alleged deed of gift did not operate, and was not intended to operate, as a gift, between living persons, but was of a testamentary character and only declared that Behari Lal was then the ultimate reversionary heir of Damodhur Mahton, and that he would, on Lachoo's death, take the inheritance. This, according to Hindu law, was a disposition beyond the power of a widow to make. It was not a family arrangement: the consent of the daughters was not proved. Nor had any custom, authorizing the widow so to dispose of the estate, been proved.

The Judges said that the first question was, what was the true construction of the ikrarnama of the 13th September 1849? They referred to the former decision of the High Court upon the document in 1874, and concurred in the opinion then expressed, giving their reasons thus:—

"We think, considering the document as a whole, that what it purports to do is simply to declare that Behari Lal, who was then performing the Gayawal duties for the lady, was the ultimate [239] reversionary heir, and that as such, upon her death, he would succeed to the estate.

"It does not purport to convey to him as the next reversionary heir even the widow's estate, much less the full estate left by Damodhur Mahton. The estate was to remain with the widow during her lifetime, as the heiress of her husband, and upon her death to go to Behari Lal. That being so, it was not a conveyance *in præsenti*, but was a testamentary disposition, to come into effect upon the death of the widow; and this she had clearly no right to do under the Hindu law, for it was not her own property she was dealing with, but it was the property of her husband; and also because her husband's heirs, whoever might be such heirs when

the succession should open out, would not be bound by any such disposition on her part."

1891 DEC. 12. — PRIVY COUNCIL. — 19 C. 236 (P.C.) = 19 I.A. 30 = 6 Sar. P.C.J. 88.

With regard to the contention that there had been a valid gift *inter vivos*, and to a finding of the Subordinate Judge that Lachoo Dai and this appellant were in possession of the said property in the lifetime of Lachoo Dai, they said that they were not "quite prepared to come to the same conclusion," and proceeded :—

"But, however that may be, it is clear even upon the plaintiff's case as made by the evidence and as found by the lower Court, that there was no complete relinquishment by Lachoo Dai of her possession during her lifetime, and that she did not do all that lay in her power to complete the gift. That being so, no property could pass under the gift to the plaintiff."

They held for these reasons that—

"There was no valid gift *inter vivos* by the lady, that there was no intention on her part that the ikrarnama should operate *in præsenti*, and that it was but a testamentary disposition to come into effect after her death, and as such invalid as against the defendant."

On this appeal—

Mr. *J. Graham, Q.C.*, and Mr. *J.H.A. Branson*, for the appellant, argued, as the principal point, that the effect of the ikrarnama was that the widow transferred to Behari Lal her proprietary right. The surrender of her estate by a Hindu mother to those who, at the time, were the heirs, (and Behari Lal fulfilled this requirement) **[240]** vested in them, by acceleration of their interest, the inheritance which they would take if, at that time, she were to die. This was laid down on *Noferdoss Roy* v. *Modhu Soonduri Burmonia* (1). The grandmother did no more than extinguish her own estate; she did not profess to give possession.

Mr. R. V. Doyne, for the respondents, was not called upon.

JUDGMENT.

On the 12th December their Lordships' judgment was delivered by

LORD MORRIS.—Damodhur Mahton was the owner of the immoveable property, the subject of this suit; he died in the year 1845, leaving his widow, Lachoo Dai, and two daughters, Rani Dai and Phula Dai, him surviving. The plaintiff Behari Lal is the son of Rani Dai by her marriage with Gangabishen Meherwar; the defendant Madho Lal is the son of Phula Dai by her marriage with Sadashid Ahir; the plaintiff and defendant are thus first cousins. On the death of Damodhur Mahton, his widow Lachoo Dai succeeded to the immoveable property as a Hindu widow under the Hindu law. On the 13th September 1849 Lachoo Dai executed an ikrarnama of that date. Lachoo Dai died in 1878; Behari Lal has brought this suit against Madho Lal and Rani Dai, seeking to be declared entitled to the immoveable property left by his grandfather Damodhur Mahton; Rani Dai does not resist the plaintiff's claim, and the question lies between Behari Lal and Madho Lal. The case really depends on what is the construction of the ikrarnama. The material part of it is as follows :—

"Whereas I, the declarant, and my husband have two daughters by me, *viz.*, Mussummat Rani Dai and Mussummat Bhola Dai. My husband died by the will of God (on the 11th Pous 1253 Fusli), leaving me

(1) 5 C. 732.

1891 DEC. 12. — PRIVY COUNCIL. — 19 C. 236 (P.C.)= 19 I.A. 30= 6 Sar. P.C.J. 88.

as heiress. All the mauzas of this district and zillah Tirhut, jatris, houses and household furniture, ready money, grain, ornaments set with precious stones, plates, weapons, woollen stuff, silk, and male and female slaves left by him are held by me, without the partnership and possession of any other individual. Whereas Mussummat Bhola Dai, my daughter, has got no son, and Mussummat Rani Dai, my daughter, has got a son, by name Behari Lal Meherwar, and consequently [241] as I have no son, according to the Shastra the said Behari Lal Meherwar, my daughter's son, is the heir of my husband and myself, and he has been performing the Gayawal duties for the jatris of my husband and myself, who come from Tirhut and other places. Notwithstanding this, with a view to completion, I (with the permission of my husband) do hereby declare and give in writing that all the mauzas lying in this district and zillah Tirhut, houses, household furniture, ready money, grain, ornaments, jewels, plates, weapons, wollen clothes, silk stuff, slaves, and jatris, especially Maharaja Ruder Narain Singh, Bahadur, the Raja of Darbhanga, and his relatives and descendants, and others, left by my husband, and owned and held by me, and debts and dues of my husband and myself, belong to Behari Lal Meherwar, aforesaid. I, the declarant, shall, till the end of my life, hold possession, as I have heretofore done, without the partnership and possession of any other individual, and *shall perform acts of charity* (shall receive my maintenance). After my death Behari Tal Meherwar shall enter into possession and enjoy all the profits of all the mouzahs lying in this district, and in the district of Tirhut, and all the properties moveable and immoveable, *personal and standing in my own name** (cash and household effects) &c., left by my husband and by me, to which no one shall have any right, demand, or dispute."

After the execution of the ikrarnama the widow applied to have Behari Lal's name put on the Collector's records, but with herself as the registered owner.

At the time of the execution of the ikrarnama Madho Lal was not born, so that the plaintiff was then the apparent reversionary heir, subject to the life estate of his grandmother Lachoo Dai; it may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate.

It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances. Now in the ikrarnama in question Lachoo Dai, so far from destroying her life [242] estate, expressly says:—" I shall, till the end of my life, hold possession, as I have heretofore done, without the partnership and possession of any other individual," and again she says "after my death, Behari Lal Meherwar shall enter into possession, &c." The object of Lachoo Dai was to declare the rights of Behari Lal, who was performing the Gayawal ceremonies, and obtaining the fees for her; she wished to leave the management in his hands, but not to surrender her life estate. As to an alleged custom amongst Gayawals, that the widow could, overriding Hindu Law, have an absolute and entire power over the immoveable estate of her husband, it is sufficient to say that no such custom has been proved. Their Lordships will therefore humbly

* The words italicised are not in the original document.

advise Her Majesty to affirm the judgment of the High Court, and dismiss the appeal with costs. 1891 DEC. 12. PRIVY COUNCIL. 19 C. 236 (P.C.)= 19 I.A. 30= 6 Sar. P.C.J. 88.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*
Solicitors for the respondent: Messrs. *Barrow & Rogers.*

C. B.

---

19 C. 242 (P.C.)=19 I.A. 24=6 Sar. P.C.J. 109.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Morris, Sir R. Couch, and Lord Shand.

[*On appeal from the Court of the Recorder of Rangoon.*]

AGA AHMED ISPAHANI (*Plaintiff*) v. JUDITH EMMA CRISP (*Defendant*). [17th November and 5th December, 1891.]

Promissory note—Right of indemnification attendant upon suretyship—Right of endorser who pays a promissory note, or bill of exchange, to benefit of securities deposited—Agent's authority, extent of.

The same rule is applicable to the endorser of a promissory note that applies to the endorser of a bill of exchange, that, if the pays the holder of it, he is entitled to the benefit of the securities, given by the maker in the one case, the acceptor in the other, which the holder has in his hands at the time of the payment, and upon which he has no claim except for the note or bill.

Duncan Fox & Co. v. *North and South Wales Bank* (1) referred to.

Promissory notes made by an agent, acting for himself and for his principal, were secured by the deposit of title deeds of property, [243] belonging to the principal, in the hands of a Bank which discounted the notes, and the latter were paid at maturity by an endorser.

Held, that the endorser was entitled to a transfer of the deeds to him as security, without further assent from the owner.

Held also, that he was entitled to have them transferred to him on the ground that, as a fact, the agent, acting within the principal's authority, had agreed that, in consideration of his paying the amount of the notes to the holder, he should have this security, the Bank assenting.

APPEAL from a decree (29th May 1890) of the Recorder of Rangoon.

This suit was brought by the appellant, a merchant in Rangoon, against the respondent, Judith Emma Crisp, a widow residing there, and against her son, James Favel Crisp, to recover Rs. 15,000 with Rs. 108 for interest; also to establish an equitable mortgage to the plaintiff of land and buildings in Rangoon belonging to the respondent. The plaint stated that the son, for himself, and as his mother's agent, made two promissory notes, dated 30th April 1889, payable in three months to the plaintiff or order for Rs. 15,000, which notes were discounted by the National Bank of India at that place. The title deeds of property belonging to the first defendant were deposited with the Bank to secure payment of the notes, which are renewed at due date, and, in the end, paid by the plaintiff. Against the first defendant a declaration was claimed that the plaintiff was entitled to a charge upon the property of which a sale, upon default, was asked for. The first defendant denied knowledge of the transaction, or that her son had acted with her authority. The second

(1) L.R., 6 App. Cas. 1.

1891 Dec. 5. — Privy Council. — 19 C. 242 (P.C.) = 19 I.A. 24 = 6 Sar. P.C.J. 109.

defendant denied that the whole sum claimed was due, but admitted that part would be found to be due from himself to the plaintiff on accounts being taken between them, they having been, as he alleged, partners, and the money having been taken for their business.

The question now was whether the appellant was entitled to the security of the title-deeds, as against the respondent, upon the state of facts given in their Lordships' judgment.

The Recorder dismissed the suit against the first defendant, making a decree against the second alone for the money claimed. In his judgment he referred to the assent which he found the first to have given to the pledge with the Bank, and her refusal to [244] agree to the transfer, as affecting her liability, concluding as follows:—

"Now from the evidence it is, I think, clear that the first defendant knew that her deeds had been pledged to the Bank and that she assented to the pledge. But she denies that she assented to them being pledged with the plaintiff. The second defendant also says that his mother did not know of the transaction. But, of course I cannot act upon the evidence of a man who must either have committed a fraud by depositing the deeds without authority, or, if he had authority, must have perjured himself by swearing that he had not. I can only, therefore, act upon the evidence of the first defendant. It is of a very unsatisfactory character, for she contradicted herself repeatedly, and as it was taken upon commission, I had no opportunity of observing her demeanour. As it stands, however, I do not think I should be justified in holding that she was aware of the transactions of the 2nd of August. Fraud may be condoned or so acquiesced in that a party is barred from his relief. But such party must have full knowledge of all the facts in order to condone the fraud—*Moxon* v. *Payne* (1). I do not think that such knowledge is brought home to the first defendant by the evidence in this case. The plaintiff knew that the property was the property of the first defendant, and that it was being pledged to secure not her debt, but the debt of the second defendant. Yet having this knowledge he did not take the precaution of ascertaining whether the first defendant assented to the acts of the second defendant, not acting as her agent, but dealing with her property for his own purpose. If a man encounters a loss from the defective authority of the agent, it is properly attributable to his own fault, since he must know that he has no other security than his reliance upon the good faith and credit of the agent—*Attwood* v. *Munnings* (2), s. 142 of the Contract Act, which was relied upon for the plaintiff, does not seem to me to apply to this case, as there was a new arrangement under which the plaintiff became the creditor. I think, therefore, that the suit must be dismissed as against the first defendant, but without costs, as she is to blame for not taking steps to cancel the [245] power and recover the deeds. There will be a decree against the second defendant for the amount claimed with costs."

Mr. *J. D. Mayne* and Mr. *James Fox*, for the appellant argued that the decree was wrong in dismissing the suit against the first defendant, now respondent. They submitted that J. F. Crisp, the son, against whom the decree had been made, had been acting within the scope of his authority in the exercise of powers conferred upon him in the document of the 12th December 1888. He had acted in his capacity of agent for the respondent in signing the promissory notes, in depositing the deeds with

(1) L. R. 8 Ch. Ap. 881. (2) 7 B. & C. 278.

1891 DEC. 5. — PRIVY COUNCIL. — 19 C. 242 (P.C.) = 19 I.A. 24 = 6 Sar. P.C.J. 109.

the Bank, and in agreeing with the plaintiff by letter of the 2nd August in that year that the deeds should be transferred to him. The Recorder had been right in finding that the respondent knew of the deposit of her deeds with the Bank, assenting to that part of the transaction. But he had not gone far enough, for he should have held that the plaintiff's rights when he paid the notes were not affected by the fact, even if it could be treated as a fact, that she had refused to give her assent to the transfer of the securities. At all events, on the evidence, and the right construction of the second defendant's authority from his mother, he could transfer them to the plaintiff, who on payment by him, to the Bank, of the amount for which he was surety, became immediately entitled to the benefit of all the securities for payment of the notes then in the possession of the Bank as creditor. Sections 140 and 141 of the Indian Contract Act, 1872, were referred to.

Mr. *R. Neville*, Q.C., and Mr. *Yarborough Anderson*, for the respondent, contended that the suit as against her had been rightly dismissed. The loan made by the Bank on the promissory notes was not for her benefit, as the appellant knew, or must be taken to have known. The money was taken by her son, who, as the evidence showed, had shared certain joint liabilities with the appellant. The power-of-attorney conferred no express authority on the second defendant, to whom, in the Recorder's decree, liability had rightly been restricted, to mortgage the deeds which the Bank could not have retained against the respondent, had she demanded them. The Bank, accordingly, was unable to transfer to another person, not possessing a title itself. The appellant, knowing to whom the deeds belonged, and knowing [246] that the second defendant was acting under a power-of-attorney, ought to have made enquiry as to his actual authority. He had, upon the true construction of his power, no authority to enter into such an agreement as was expressed in the letter of the 2nd August, to deliver the deeds to the plaintiff. The rights of the respondent could not be affected by the acts of her son as agent, when he was acting beyond the scope of his authority. In the course of the argument reference was made to *Polak* v. *Everett* (1) as to interference with the rights of a surety, and his consequent discharge.

Mr. *J. D. Mayne* was not called upon to reply.

JUDGMENT.

On the 5th December their Lordships' judgment was delivered by

SIR R. COUCH.—The suit in this case was brought by the appellant against the respondent and James F. Crisp, her son, for Rs. 15,000, and Rs. 108-12 for interest thereon, and for a declaration that the plaintiff is entitled to a charge or lien upon the property mentioned in the plaint for or in respect of the amount that might be decreed in the suit; and also for a sale of the premises equitably mortgaged, in the event of the defendants failing to pay the amount decreed. On the 12th December 1888, the respondent, Mrs. Crisp, executed a general power-of-attorney, by which she constituted and appointed her son, J. F. Crisp, her attorney and agent. The only parts of the power-of-attorney which it is necessary to state are the following passages :—" And also to buy, sell, mortgage, let and lease, as the case may be, any houses or lands and to borrow and take loans of money in my name upon such terms and conditions as he shall think proper. . . . . and generally to act for me in all

(1) L. R. 1 Q. B. D. 669.

1891 DEC. 5. — PRIVY COUNCIL. — 19 C. 242 (P.C.) = 19 I.A. 24 = 6 Sar. P.C.J. 109.

matters and things touching or concerning all or any of my affairs as fully and effectually to all intents and purposes as if I were acting therein in person." It was in evidence that Mrs. Crisp had two or three times before April 1889 lent her son money on his promissory note. About the end of April 1889 J. F. Crisp asked the Manager of the National Bank of India if he would advance money on his property. Crisp said it was his mother's, and that he had power to deal with it. The Manager said he would make the [247] advance if Crisp would give him a good name. Crisp then brought to the Manager two joint and several promissory notes, one for Rs. 10,000 and the other for Rs. 5,000, both dated the 30th April 1889, payable three months after date to the appellant or order, signed "J. F. Crisp" and "p.p. J.E. Crisp, J.F. Crisp." The Manager said he must have the title deeds as well, and J. F. Crisp on the same day deposited with the Manager the title deeds of landed property in Phayre Street, Rangoon, belonging to Mrs. Crisp, being the property mentioned in the plaint, and the notes were discounted. J. F. Crisp had not asked his mother's consent to the deposit, but in the evidence she gave in the suit it appeared that, about the time of the loan, he told her that he had signed two promissory notes for his own use in her name, and that to secure the amount borrowed he had pledged her deeds to the Bank, and to that she made no objection; and it is clear that she assented to the deposit with the Bank, but she said she objected to her son pledging the deeds with the appellant. The notes became due on the 2nd August, and on that day J. F. Crisp wrote to the appellant the following letter:—

Rangoon, 2nd August 1889.

"Dear Sir,

"In cosideration of your paying this day the Rs. 15,000 due to the National Bank of India, Limited, I hereby agree to your keeping the papers of the Phayre Street property with you as security, and that I will have the same settled within three months from date, and pay you interest at 9 per cent. per annum."

Upon receiving this letter the appellant wrote a cheque for Rs. 15,000 in favour of the Bank, and sent it to Crisp, who took it to the Bank, and was told by the Head Clerk that they would deliver the documents after the cheque, which was on another Bank, had been passed. The next day, the 3rd August, the title deeds were delivered to Crisp's man. The Head Clerk said in his evidence that he thought the man was the appellant, and it may be inferred that it was intended to deliver the deeds to him. The appellant afterwards applied to the Bank for the deeds, and was told they had been delivered to Crisp's man. On the 5th August Crisp wrote to the appellant:—"I am sorry to say that my mother objects to keep [248] her papers with you pending the settlement of accounts existing between you and me," and the deeds remained in Crisp's hands.

The learned Recorder of Rangoon, from whose decision this appeal is brought, made a decree against J. F. Crisp for the amount claimed, but as to Mrs. Crisp he held that, though she assented to the pledge to the Bank, she did not assent to the deeds being pledged with the appellant, and he dismissed the suit as against her.

It is a rule of equity that if the endorser of a bill of exchange pays the holder of it, he is entitled to the benefit of the securities given by the acceptor, which the holder has in his hands at the time of the payment, and upon which he has no claim except for the bill itself (*Duncan, Fox &*

Co. v. *North and South Wales Bank* (1)). The same rule is applicable to the endorser of a promissory note. It is possible that there may be circumstances which would create an exception to this rule, but this case is not one. Therefore the appellant, when he paid the Rs. 15,000 to the Bank, became entitled to the benefit of the deposit of the title deeds. No further assent by Mrs. Crisp was necessary to entitle him to it. But although in his plaint he stated the fact of the deposit with the Bank as a security for the payment of the loan, he did not rest his claim upon this equity. He founded it upon the letter of the 2nd August alleging that he agreed to the proposal in that letter, and gave the cheque for Rs. 15,000. In their Lordships' opinion Mr. Crisp was bound by that letter, although she did not personally assent to the appellant keeping the title deeds as security. When the notes became due the Bank might have sued her upon them, and have also taken proceedings to have the mortgaged property sold. The letter of the 2nd August was intended to prevent this, and the arrangement for continuing the security in consideration of getting three months' additional credit was, in the opinion of their Lordships, within the general authority given to J.F. Crisp by the words of the power-of attorney before quoted, "and generally to act for me, &c." Their Lordships are therefore of opinion that on both grounds the decree is erroneous in dismissing the suit as against Mrs. Crisp, and they will humbly advise Her Majesty to reverse it, and to make a decree against both defendants according to **[249]** the prayer in the plaint, with costs The respondent will pay the costs of this appeal.

Solicitors for the appellant: Messrs. *Hopgood* and *Dowson*.

Solicitor for the respondent: Mr. *B. R. Heaton*.

C. B.

---

19 C. 249 (P.C.) = 19 I.A. 1 = 6 Sar. P.C.J. 119.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Morris, Sir R. Couch, and Lord Shand.

[*On appeal from the Court of the Judicial Commissioner of the Central Provinces.*]

RAMRATAN SUKAL (*Plaintiff*) *v.* NANDU AND ANOTHER (*Defendants*).
[25th November, 1891.]

Second appeal not allowable on facts—Civil Procedure Code—Act XIV of 1882, *ss.* 584, 585—*Onus probandi—Hindu Widow, execution of bond by—Appellate jurisdiction.*

No Court of second appeal can entertain an appeal upon any question as to the soundness of findings of fact by the Court of first appeal; and if there is evidence to be considered, the decision of that Court, however unsatisfactory it might be, if examined, must stand final.

The plaintiff, to make good his claim against the estate of his deceased debtor, relied upon a document purporting to have been signed by the latter's widow, since then also deceased. The Court of first appeal, however, found that there had been no actual execution of the instrument by the widow, and dismissed the suit.

The burden of proving due execution by the widow lay upon the plaintiff, who relied upon it as binding the estate which she represented (a matter commented

---

(1) L.R. 6 App. Cas. 1.

1891 Nov. 25. — Privy Council. — 19 C. 249 (P.C.) = 19 I.A. 1 = 6 Sar. P.C.J. 119.

on in *Kameswar Pershad* v. *Run Bahadur Singh* (1). After the decision of the second Court no further appeal on the question of fact was allowable.

[R., 21 C. 504 (512); 26 C. 53 = 2 C.W.N. 649; 19 M. 485; 4 C.L.J. 198; 13 C.L.J. 418 = 15 C.W.N. 752 = 10 Ind.Cas. 325; 17 C.W.N. 37 = 15 Ind. Cas. 515; D., 20 C. 93 (99).]

APPEAL from a decree (25th September 1888) of the Judicial Commissioner affirming a decree (19th March 1888) of the Commissioner of the Narbada Division, which reversed a decree (6th June 1887) of the Extra Assistant Commissioner of Hoshangabad.

This suit had passed through three Courts. the first having found the fact of the execution of a document on which the claim rested. This finding was reversed by the Court of first appeal, [250] which dismissed the suit. The third Court rejected the plaintiff's appeal.

The plaintiff brought his suit against Jairam, alleging him to be the son of Khushal, the deceased patel of village Abghan Khurd, who died in 1879, and joining with him, as defendants, two widows of the late Khushal, *viz.*, Mussamut Nandu and Mussamut Sheo. The plaintiff alleged that an elder widow of Khushal, Mussamut Deo, who in 1881 was in possession of her deceased husband's estate, had executed a document on the 7th November in that year, which he filed with his plaint, in the following terms:—"To meet our own requirements, and especially to satisfy the decree passed in your favour against Jairam, under which decree money was due on account of our patel Khushal, zamindar, for the sum of Rs. 3,495, we shall pay with interest at 1 per cent a month on Cartik Sudi 15, Sambat 1940" (corresponding to 14th November 1883). The two widows now sued were alleged to be in possession of Khushal's estate. Deo died before the suit. The defence of Jairam was that, though he had signed the document, he was not liable for Khushal's debts, not having received any of the property of the deceased, he being his adopted son. The widow's defence was that Deo, whose seal the document of 1881 purported to bear, had never executed it, and that if she had done so, it would not bind them. They also alleged that, as purporting to be in satisfaction of a decree, it was void under s. 257-A of the Civil Procedure Code. They denied that Jairam had been adopted by Khushal.

The Extra Assistant Commissioner of Hoshangabad gave a decree against the two widows for Rs. 4,910, with costs, but without interest. He considered that Jairam was not liable. He found that Deo had executed the document; and as it was in respect of a debt due by her late husband, she had a right to bind the estate which she represented. He held that the agreement was not invalid under s. 257-A. The defendants appealed from this decree, and the plaintiff filed objections to the disallowing interest. The Commissioner of the Narbada Division reversed the decree, dismissing the suit with costs. He was of opinion that the bond was invalid under s. 257-A. There was no debt, as he considered, due at the time of its execution, for which Deo was authorized to bind the estate, and there was no substantial [251] execution of it by her, as she had not a full knowledge of the circumstances.

From this decree the plaintiff appealed to the Judicial Commissioner, who dismissed the appeal and affirmed the decree of the lower appellate Court. He also held the bond to be invalid under s. 257-A, and that there was no debt in respect of which Deo could bind her co-widows. He added,

(1) 6 C. 843 = 8 I.A. 8.

however, that he considered it very probable that she intelligently sealed. 1891 Nov. 25.

On this appeal Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for the appellant. Mr. *J. D. Mayne* for the respondent. PRIVY COUNCIL.

For the appellant, among other points, it was argued that, though one of the issues included the question of execution, no express finding upon a distinct issue relating to Mussamut Deo's defective knowledge of the circumstances was given in the Court of first instance. *Anangamanjari Chowdhrani* v. *Tripura Sundare Chowdhrani* (1) ; *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (2), and *Pertab Chunder Ghose* v. *Mohendranath Purkait* (3) were referred to. 19 C. 249 (P.C.) = 19 I.A. 1 = 6 Sar. P.C.J. 119.

Counsel for the respondent was not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD WATSON.—This is an action brought by the appellant in 1886, before the Court of the Deputy Commissioner, Hoshangabad, in which he has obtained a decree against the respondents as widows and heirs of Khushal, a zemindar, who died in 1878. He was survived by three widows—Mussamut Deo, the senior, who died in January 1881, and the respondents Mussamut Nandu and Mussamut Sheo, who are defendants in the Court below.

The action was laid upon a bond dated the 7th November 1881, which appears to have been granted in favour of the appellant by Mussamut Deo, who at that time was the manager of the estate. Various defences were set up by the respondents, which it is unnecessary to notice in this appeal. There was no written statement, but the Deputy Commissioner had the pleaders of the parties before him ; and after hearing them he settled issues for the trial of the cause, the third issue being—"Was it," that is, the **[252]** "bond sued on, executed by Mussamut Deo, patelin ; if so, are defendants 2 and 3," that is, the two respondents, "liable for the money due on the bond ?" Now it was clearly the duty of the appellant to prove, in order to make his claim under the bond good against the estate in the hands of the respondents, that the senior widow duly executed the bond, because it is her intelligent signature in the capacity of a Hindu widow representing the estate, which alone could give validity to such a document.

The Deputy Commissioner found in favour of the appellant on the third issue; but the case was taken by appeal to the Court of the Commissioner, Narbada Division, who found on that issue for the respondents. He intimated an opinion in his judgment, that the case made by the appellant to the effect that the widow executed the bond with her own hand did not stand the test of probability, when the evidence was examined, but he did not embody that view in his finding, which was in these terms :—"I hold, therefore, that the bond was not executed by Mussamut Deo with a full knowledge of all the circumstances of the case, and that there was no *bona fide* execution as far as Mussamut Deo is concerned." It appears to their Lordships that the *onus* of proving due execution lay upon the plaintiff, who relies upon the signature of a Hindu widow as binding the estate which she represented. That point was made the subject of comment by this Committee in the year 1880 in the case of *Kameswar Pershad* v. *Run Bahadur Singh* (4).

(1) 14 C. 740 = 14 I.A. 101.
(2) 18 C. 23 = 17 I.A. 122.
(3) 17 C. 291 = 16 I.A. 233.
(4) 6 C. 843 = 8 I. A. 8.

1891 Nov. 25. — PRIVY COUNCIL. — 19 C. 249 (P.C.) = 19 I.A. 1 = 6 Sar. P.C.J. 119.

The case was appealed to the Judicial Commissioner, who expressed an opinion—their Lordships do not think he meant to pronounce any finding—upon this point. He said: "I may add, however, that it appears to me very probable not only that Mussamut Deo did put her seal to this bond, but also quite understood what she was about." It has now been conclusively settled that the third Court, which was in this case the Court of the Judicial Commissioner, cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court; if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final. If, therefore, the finding of the Commissioner upon the third issue **[253]** cannot be successfully impeached by the appellant, his case must necessarily fail.

The argument of the appellant's counsel satisfied their Lordships that the decision of the third issue one way or another mainly depended upon the credit which ought to be given to oral testimony of a conflicting character; and that the finding of the Commissioner upon that evidence was substantially a finding of fact.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed with costs. The appellant must pay to the respondents their costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs *T. L. Wilson & Co.*
Solicitor for the respondents: Mr. *Thomas Ingle.*

C. B.

---

19 C. 253 (P.C.) = 19 I.A. 48 = 6 Sar. P.C.J. 133.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Herschell and Morris, Sir R. Couch, and Lord Shand.
[*On appeal from the High Court at Calcutta.*]

LACHMESWAR SINGH (*Defendant*) *v.* MANOWAR HOSSEIN AND OTHERS (*Plaintiffs*). [27th November and 18th December, 1891.]

Joint Ownership—Ijmali land, use of, as between co-owners—Rights among themselves of co-owners of joint property, where there is a profitable use of it by some or one of them without the others being excluded—Ferry worked by one of the co-owners of village lands—Second appeal, question of mixed law and fact.

Property does not cease to be joint merely because it is used so as to produce more profit to one of the joint owners, who has incurred expenditure for that purpose, than to the others, where the latter are not excluded.

Joint property being used consistently with the continuance of the joint ownership and possession, without exclusion of the co-sharers who do not join in the work, there is no encroachment on the rights of any of them, as regards common enjoyment, so as to give ground for a suit.

The defendant, a co-sharer in village lands, without claiming to restrain competition, acted upon the right that a ferry may be established in India by a person on his own property; taking toll from strangers, and that he may acquire such a right, by grant or user, over the property of others, **[254]** whether a co-sharer with them or not. He used property that he owned jointly with the plaintiffs, his co-sharers, excluding none of them. As no grant was ever made to him, he

could only have set up an exclusive right by showing that he had either dispossessed them, or had had adverse possession, for twelve years, or that he had used the ferry for twenty years as of right. The question, however, of any exclusive right in the defendant had not arisen. For the parties being co-owners, the defendant had made use of the joint property in a way quite consistent with the continuance of the joint ownership and joint possession.

1891 DEC. 18.

PRIVY COUNCIL.

19 C. 253 (P.C.) = 19 I.A. 48 = 6 Sar. P.C.J. 133.

Watson & Co. v. *Ramchund Dutt* (1) distinguished in regard to the exclusion of co-sharers, which there took place, and referred to as to caution to be exercised by Courts in interfering with the enjoyment of joint estates as between their co-owners.

The decision that the defendant's possession had been adverse having been inference from fact in the Courts below, the correctness of this, as a legal conclusion to be drawn or not, was a question open to second appeal, and the High Court was not precluded from deciding to the contrary.

Costs refused, as the defendant had set up, as his defence, an exclusive title, in which he had failed.

[**F.**, 5 Bom. L.R. 225 (228); 4 Ind. Cas. 298=5 L.B.R. 112; **Rel.**, 9 Ind. Cas. 41=9 M.L.T. 191=(1911) 1 M.W.N. (611); 9 Ind. Cas. 846; **R.**, 21 B. 91; 21 B. 110; 25 B. 202 (205); 25 B. 362 (366); 19 C. 544 (**F.B.**); 21 C. 340 (344); 24 C. 825 (829); 21 M. 153=8 M.L.J. 92; 4 Bom. L.R. 801 (808); 5 Bom. L.R. 174 (176); 5 Bom. L.R. 956 (964); 11 C.L.J. 189=5 Ind. Cas. 171; 4 C.W.N. 788 (789); 15 C.W.N. 188 (190)=7 Ind. Cas. 124; 13 C.P.L.R. 153 (155); 14 C.P. L.R. 76 (79); **Expl.**, 32 C. 837=1 C.L.J. 437; **D.**, 26 C. 553; 33 C. 1201=9 C.W.N. 87; 11 Ind. Cas. 687=7 N.L.R. 82.]

APPEAL from an order (3rd August 1888), reversing a decree (12th September 1887), made on appeal by the Second Subordinate Judge of Muzaffarpur, who affirmed a decree (30th March 1887) of the Munsif of Madhubani.

The suit out of which this appeal arose was brought against the Maharaja of Darbhanga in reference to a ferry over the river Bagmati, near the Kamtowl Indigo Factory, of which the Manager, Mr. M. Halliday, on behalf of the Maharaja who had purchased it, was made a defendant. As purchaser of the factory, the Maharaja had become a proprietor of a two-annas share in village Baigra (which village Kamtowl adjoined) and of the ferry, where the channel and the landing places were on the ijmali lands of Baigra. The plaintiffs were the co-owners of the remaining fourteen annas of this mauza, and they brought this suit, valued at Rs. 500, for a declaration of their right to profits of the ferry proportionate to the amount of their shares in the village; also claiming to have the principal defendant restrained by injunction from "opposing the possession" of the plaintiffs. The defence of the Maharaja was that he had an exclusive right to the ferry by prescription.

[255] The Manager's written statement was, in effect, that he ought not to have been joined in this suit, as he had no personal interest in the subject-matter of it.

The principal question on this appeal was as to the right of co-owners of undivided property, where part of it was profitably used by one of them in regard both to continuance of possession by all, and their right to share in the profits made by the use of the property common to all.

On the ground that the Maharaja and his predecessors in the ownership of the factory, and of the two annas share in mauza Baigra, had for more than twenty years worked the ferry, thus acquiring a prescriptive right to do so, the suit was dismissed in the Munsif's Court.

(1) 18 C. 10=17 I.A. 110.

1891 Dec. 18. — Privy Council. — 19 C. 253 (P.C.) = 19 I.A. 48 = 6 Sar. P.C.J. 183.

This was affirmed by the Second Subordinate Judge, Babu Grish Chunder Banerji, to whose Court both parties appealed. He found that the river and the landings on both sides were on the ijmali land of mauza Baigra; that the owner of the Kamtowl Factory had been in exclusive possession of the profits of the ferry for more than twenty years; and that there had been no express permission on the part of the plaintiffs, neither could implied permission be inferred. Passage free of toll, both in the time of the bridge and of the ferry, had been allowed to the plaintiffs. But this was distinct from the right of ferry itself. It was one thing to ply a ferry taking the full profits, and another thing to be allowed to pass free by it. No act of dominion, exercised by the plaintiffs over the ferry itself, within the last twenty years before the suit, had been shown; and the possession of the defendant was not permissive. It was adverse possession, and the suit was barred by time.

The plaintiffs appealed to the High Court, of which a Division Bench (O'Kinealy and Macpherson, JJ.) gave judgment as follows:—

"In this suit the plaintiffs claimed an account from one of their co-sharers. They stated that they were the fourteen annas share-holders of a certain village in which the defendant owned two annas, and that the owner of the two annas was not content with having a ferry boat himself, but that he had let out the right to levy a toll [256] on a ferry to an ijardar, and it was found that the place from where the ferry started, the river itself, and the land on the other side were joint property. They therefore said, and fairly enough. 'Here is a joint-shareholder of a small share, who, although he is not spending himself any money upon it, gets the whole of the proceeds of a portion of the joint property, while a fair measure of what he ought to get is only his share of the ijara rent.' We do not think that that is a proposition that can be contested. In answer the defendants pleaded that the ferry had been run for a long time by the Kamtowl Factory in the time of Mr. Anderson; that this fact had been practically admitted in the plaint, and that the land on the other side of the river was not joint but separate. That point has been found against them, and so in substance they raised no title to the ferry. Mr. Anderson, whatever rights he may have acquired, left the place and abandoned the ferry, and the property with all its interests went back to the real owners, that is, to the co-sharers in the village; and as the defendants have only run the ferry at most since 1881 they have acquired no right by user to it whatsoever; but apart from that, it is impossible to hold, on the findings of the lower Court, that this ferry was ever held exclusively or adversely to the other co-sharers by Mr. Anderson or by the factory. What the lower Court has found is, that the landing place of the ferry in question is on joint land of mauza Baigra, and that the bed and the western bank of the river Bagmati are also on joint lands of village Baigra; that a bridge was constructed by the Kamtowl Factory some thirty years ago, and when that bridge fell through a ferry was started and tolls levied by the factory, but not to the exclusion of the plaintiffs; but, on the contrary, that the maliks of Baigra and their men were allowed to pass over free of toll; that is, one man established the ferry at his own expense and levied the tolls, but he never assumed that he had exclusive rights over it, and the arrangement was that the other co-sharers and their men should be carried across free of charge. It seems to us that when they had a right to go across as a right and free of toll, the possession of the factory cannot be said to be exclusive.

"We are, therefore, of opinion that the decree of the lower Court should be set aside, and that it should be declared that the [257] river Bagmati and the ghat or ferry of the river at Baigra are within mauza Baigra in pargana Jarail, and that the defendants are only entitled to hold possession and appropriate the profits of the said ferry in proportion to their proprietary right in the said mauza Baigra. We further direct that the said defendants do account for the profits of that ferry from date of suit to the present date, and for this purpose that the record be sent down to the Judge in the lower Court, and that he do assess the profits; and we further direct that the plaintiffs recover their costs in all the Courts. This case will remain on the file of this Court pending the assessment of the profits by the lower Court."

1891 DEC. 18.

PRIVY COUNCIL.

19 C. 253 (P.C.) = 19 I.A. 48 = 6 Sar. P.C.J. 133.

No decree was drawn up, as no assessment of profits was in fact made. But the judgment and order were treated as a judgment and decree, whereupon the appellant obtained leave to appeal.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. H. A. Branson*, for the appellant. The principal points in their argument were that the use of the common property by the defendant, and his predecessors in estate, involved no act on their part entitling the plaintiffs to such a decree as had been made by the High Court, which had limited the defendant to taking profits from the work, in the proportion only of his two annas share, to the plaintiffs fourteen. The Maharaja was entitled to work the ferry, using the common land for that purpose, to take toll from strangers, and to have the profits, whatever claim the respondents might have to be ferried over the river free of expense. From the latter advantage they had not been excluded. The High Court had been in error in stating that the former Manager had abandoned the ferry, and had wrongly inferred that the defendant had only worked it since 1881, and that he had acquired no prescriptive right to the easement by previous long user exercised by the factory. Besides being wrong in their conclusion as to the fact, the High Court, as a Court of second appeal, could not interfere with a finding of fact arrived at in the Court below.

The main point was that the defendant, as co-owner with the plaintiffs, had not "opposed their possession" of the common property, as they said in their plaintiff, and had not acted in denial of their title to the part of it used by him. Therefore, he could contend that in the work which was, though in varying [258] degrees, for the benefit of all the co-owners, he, who alone was at the cost and trouble, was entitled to all the profits. *Watson & Co.* v. *Ramchund Dutt* (1) was an authority showing that where co-owners were not excluded from the common property, they could not put a stop to the use of part of it by one of their number, provided that there was no denial of their title as co-owners, and no exclusion from compensation. Reference was made to the judgment in *Mahomed Ali Khan* v. *Khajah Abdul Gunny* (2) as to the matter of possession, and whether it was permissive or adverse, as between co-owners, upon the evidence. The defendants were not entitled to share in the profits in a work to which they had contributed neither capital nor labour, merely because it involved the use of common land from which they had not been excluded.

The respondents did not appear.

Afterwards, on December 18th, their Lordships' judgment was delivered by—

(1) 18 C. 10 = 17 I. A. 110.

(2) 9 C. 744.

1891
DEC. 18.
PRIVY COUNCIL.
19 C. 253 (P.C.)= 19 I.A. 48= 6 Sar. P.C.J. 133.

JUDGMENT.

LORD HOBHOUSE.—The respondents instituted this suit against the appellant in respect of a ferry worked by him across the river Bagmati, at a point where it flows through the mauza Baigra. The plaintiffs are proprietors of fourteen annas of that mauza, and the other two annas are vested in the defendant, who is also the proprietor of a factory and land in the adjoining mauza of Kamtowl. The lands are held in several pattis, but the river-bed and the landings of the ferry have never been divided, and are still ijmali land of the mauza.

In the plaint it is alleged that a public road lies to the east of the river, and close by the river to the west lies the Kamtowl Factory; that during the rainy season the river is impossible without bridge or boat; that formerly a bridge had been constructed over the river on the part of all the proprietors; that it came down for want of repairs; that a boat was then kept there, and the management and supervision thereof was entrusted by all the proprietors to Mr. Anderson, the former holder of the defendant's share in Baigra; that the ferry did not yield any adequate income or profit, and whatever profit it yielded was applied to the expenses on account of the boat, &c. It then went on to state [259] that the defendant had let out the ferry to ticcadars, had appropriated the rent, and had refused to pay any share to the plaintiffs.

The prayer of the plaintiffs is—

"1st.—That a decree may be passed in favour of your petitioners, plaintiffs, declaring that the river Bagmati and the ferry on the said river lie within the circumference and area of mauza Baigra, pargana, Jarail, and that the first party defendant is entitled to hold possession and appropriate the profits of the said ferry in proportion to the extent of his proprietary right in the said mauza Baigra.

"2nd.—That as a result of the above finding, your petitioners, plaintiffs, may be declared to be entitled to get the profits of the said ferry in proportion to the extent of their share, and the defendant may be restrained from offering opposition to the possession of your petitioners."

By his written statement the defendant alleged that the plaintiffs had been out of possession of the ferry for twelve years, and that he and his predecessors in title had held possession for upwards of twenty years; that the landing place on the west of the river was part of Kamtowl, and the landing place on the east was part of the patti allotted to the defendant in Baigra. He alleged that the bridge and the boat were maintained at the sole expense of the proprietor of the Kamtowl Factory, and the tolls taken by him.

The cause was tried before the Munsif, who, by decree, dated 30th March 1887, dismissed the suit with costs. His reason was that the defendant had established exclusive use and possession by himself and his predecessors in title at least since the year 1856; and that it was adverse to the plaintiffs and their predecessors. Apparently he considered that the case falls within the 26th Section of the Limitation Act of 1877, relating to the acquisition of easements.

Both parties appealed to the Subordinate Judge. The defendant's appeal was entirely misconceived, and, having been dismissed with costs, need not be further noticed now. The plaintiffs' appeal was also dismissed with costs, and it is important to see on what grounds. Their Lordships are now sitting in appeal from a decree of the High Court made on a regular second appeal from that of the Subordinate Judge under s. 584 of

1891 DEC. 18. PRIVY COUNCIL. 19 C. 253 (P.C.) = 19 I.A. 48 = 6 Sar. P.C.J. 133.

[260] the Code. No leave to appeal from the decree of the Subordinate Judge direct to Her Majesty in Council has been asked for, so that the present hearing must be based upon the materials which were open to the High Court, and the finding of the Subordinate Judge on matters not involving questions of law must be taken as conclusive.

After showing that the plaintiffs had failed to make good their allegation with respect to the erection and maintenance of the bridge and boat, and the application of the receipts, the learned Judge proceeds as follows:—

"The facts stand thus: The bed of the river Bagmati is on the ijmali land of the village of Baigra; the road which comes up to the east landing is sirkari or Government road in village Baigra; the jalkar of the river is enjoyed by the maliks of Baigra as a body; the western bank or brink of the river is also village Baigra; the bridge on the river was constructed and laid by the Kamtowl Factory more than thirty years ago; that, when the bridge fell through, a boat was placed on its site and plied, when necessary, by men employed by the kuti; that a toll was levied at the crossing ghat exclusively by the kuti; that the kuti uninterruptedly enjoyed the profit and maintained the ferry to the exclusion of the plaintiffs for more than twenty years, but the maliks of Baigra and their men, &c., were allowed to cross free of tax."

In a subsequent passage he deals with an allegation by the plaintiffs that they had given express permission to the defendant and his predecessors to use the ferry as they did, and finds that there was no such express permission. He also states that the landings of the ferry are the ijmali land of Baigra. On this state of facts the Subordinate Judge came to this conclusion:—

"The owner of the Kamtowl Factory has been in exclusive possession of the profits of the ferry for a period extending over twenty years, and there was no express permission on the part of the defendants. The profits, as the books of the defendants show, were not inconsiderable, and I do not think that the plaintiffs (written defendants by mistake) of their own accord and free will allowed the kuti to derive this profit. This possession by the [261] kuti must have been against the wishes of the defendants, and therefore adverse. There was no express trust; and implied permission cannot, under the circumstances, be inferred."

With regard to the use of the bridge and ferry by the maliks of Baigra, the Subordinate Judge looks upon it as a privilege not affecting the right to the ferry. He says that no act of possession was exercised by the plaintiffs over the ferry itself within the last twenty years before the date of suit. He also takes the view of the Munsif, that the case falls within s. 26 of the Limitation Act.

On the second appeal the High Court differed from the Subordinate Judge on two grounds. The first was that the defendant had only run the ferry since 1881, and therefore could not plead any bar by time against the plaintiffs. On this point, their Lordships are clear that the facts found show a continuity of enjoyment by the owners of the Kamtowl Factory and of the two-anna share in Baigra, which was not broken by the defendant's purchase from the former owners. The plea of limitation or prescription therefore is just as available for the defendant as it would have been for his vendors had their possession continued unchanged. The second ground taken by the High Court is, that the owners of Kamtowl never had exclusive possession, because there was an arrangement that the maliks of Baigra and their men should be carried across free of charge, and they had a right to go across "as a right, and free of toll."

1891 DEC. 18. — PRIVY COUNCIL. — 19 C. 253 (P.C.)= 19 I.A. 48= 6 Sar. P.C.J. 133.

The High Court discharged the decree of the lower Court, and pronounced the following decree :—

"That it should be declared that the river Bagmati and the ghat or ferry of the said river at Baigra are within the said mauza Baigra in pargana Jarail, and that the defendants, 1st party, are only entitled to hold possession and appropriate the profits of the said ferry in proportion to their proprietary right in the said mauza Baigra. We further direct that the said defendants, 1st party, do account for the profits of that ferry from date of suit to the present date, and for this purpose that the record be sent down to the Judge in the lower Court, and that he do assess the profits; and we further direct that the plaintiffs recover their costs in all [262] the Courts. This case will remain on the file of this Court pending the assessment of the profits by the lower Courts."

It appears to their Lordships that, in saying that the maliks of Baigra used the ferry "as a right," the High Court departed from the findings of pure fact by the Subordinate Judge which they appear to be resting on. He only found that the maliks were allowed to cross free of tax. That does not point to any arrangement or to any right. Nor is there any suggestion made by the plaintiffs of such an arrangement, which, indeed, would be contrary to the case of the plaintiffs, who allege that, first the bridge, and afterwards the boat, were set up on their behalf. Still the effect of their actual use of the ferry remains to be considered. And it appears to their Lordships that, though the question appears to be trifling as regards money value it is of a very peculiar kind, and presents considerable difficulties.

Whatever the defendant may think himself entitled to, he has not in this suit claimed to possess a ferry in any such sense as would entitle him to restrain competition. It is recognised law in India that a man may set up a ferry on his own property, and take toll from strangers for carrying them across, and may acquire such a right by grant or by user over the property of others; and, except as affecting the proof of his acquisition of title, it can make no difference whether he is a co-sharer with those others or not. That is common ground to the Munsif, the Subordinate Judge, and the High Court in this case. But the defendant is not using his own property, except that he owns jointly with the plaintiffs; and, as no grant ever was made to him, he can only set up exclusive right against the plaintiffs by showing either that he has dispossessed them for twelve years, or that he has held possession adversely to them for twelve years, or that he has enjoyed what he claims, for twenty years, as an easement and as of right.

It is true that the Subordinate Judge finds that the defendant's possession for twenty years was adverse to the plaintiffs. The question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law, or a mixed question. Their Lordships have no wish to restrict the range of a rule which is designed to lessen the expense of litigation in cases of small value commenced in the Munsif's Court. But in this case the [263] Subordinate Judge himself appears, quite rightly as their Lordships think, to have treated the question of adverse possession apart from his findings on simple fact, and as the proper legal conclusion to be drawn from those findings. Moreover, the Subordinate Judge lays down the right of ferry to be a right in the nature of an easement, and to require an uninterrupted exercise during twenty years for its acquisition. But the terms of his ultimate finding are not fitted to those of the Statute. Section 26 of the Limitation Act says nothing

1891 DEC. 18.

PRIVY COUNCIL.

19 C. 253 (P.C.)= 19 I.A. 48= 6 Sar. P.C.J. 133.

about adverse possession, and the Subordinate Judge does not say that the defendant enjoyed the ferry as an easement, and as of right, which is what the Statute requires. For these reasons their Lordships think that the High Court were at liberty to come to conclusions different from those of the Subordinate Judge on this point.

Their Lordships further concur with the High Court as to the effect of the use of the ferry by the maliks of Baigra and their men. The Subordinate Judge quotes a passage from a decision [*Mahomed Ali Khan* v. *Khajah Abdul Gunny* (1)], in which Mr. Justice Wilson points out that many acts which would be clearly adverse and might amount to dispossession as between a stranger and the true owner of land would between joint owners naturally bear a different construction. Whether the facts found in this case would, as between strangers, raise the inference of adverse possession or of enjoyment of the ferry as an easement and as of right, is a question which need not be discussed. For the parties are co-owners, and the defendant has made use of the joint property in a way quite consistent with the continuance of the joint ownership and possession. He has not excluded any co-sharer. It is not alleged that he has used the river for passage in any such way as to interfere with the passage of other people. It is not alleged that, even in the time of the bridge, there has been any obstruction at the landing places. It is not alleged that the defendant's proceedings have prevented anyone else from setting up a boat for himself or his men, or even from carrying strangers for payment. So far from inflicting any damage upon the joint owners, the defendant has supplied them gratuitously with accommodation for passage. All that is complained of is **[264]** that he has expended money in a certain use of the joint property, and has thereby reaped a profit for himself. But property does not cease to be joint merely because it is used so as to produce more to one of the owners who has incurred expenditure or risk for that purpose.

Their Lordships then agree with the High Court in thinking that the defendant has not acquired any easement or any title by adverse possession. But inasmuch as their conclusion is founded on the view that the joint possession has been continuously maintained, they cannot concur in the decree appealed from. There seems to be but little authority in decided cases to show how far Courts of justice will interfere to control the use of property as between joint owners, or how far they will leave those who are dissatisfied with its use to seek a remedy by partition. The case of *Watson & Co.* v. *Ramchund Dutt* (2) is that which throws the most light on the subject.

In that case Messrs. Waston & Co. were co-owners of a joint estate. They had procured leases of a plot of land from the others, had built a factory, and had produced indigo. After the expiry of their leases they went on in the same way. The other co-owners wished to grow oil-seeds, and they sued for an injunction to restrain the Watsons from growing indigo on ijmali land. The District Judge granted the injunction prayed for. On appeal the High Court varied the form of the injunction by restraining the Watsons from excluding the plaintiffs from the enjoyment of ijmali land. On appeal to Her Majesty in Council this Committee made the following observations:—

"It seems to their Lordships that if there be two or more tenants in common, and one (*A*) be in actual occupation of part of the estate, and

(1) 9 C. 744.

(2) 18 C. 10=17 I. A. 110.

1891 DEC. 18.

PRIVY COUNCIL.

19 C. 253 (P.C.) = 19 I.A. 48 = 6 Sar. P.C.J. 133.

is engaged in cultivating that part in proper course of cultivation as if it were his separate property, and another tenant in common (*B*) attempts to come upon the said part for the purpose of carrying on operations there, inconsistnt with the course of cultivation in which *A* is engaged and the profitable use by him of the said part, and *A* resists and prevents such entry, not in denial of *B's* title, but simply with the object of protecting [265] himself in the profitable enjoyment of the land, such conduct on the part of *A* would not entitle *B* to a decree for joint possession. . . . In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husband-like manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which, in ordinary course in large estates, would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the Courts of justice, in cases where no specific rule exists, are to act according to justice, equity and good conscience, and if in a case of shareholders holding lands in common, it should be found that one share-holder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other share-holder to appropriate to himself the fruits of the other's labour or capital."

The decrees below were discharged, and the decree made in lieu thereof gave the plaintiffs compensation for the exclusive use of the joint land by the Watsons.

Their Lordships have not referred to the case of the Watsons in order to follow the decision, for the facts of that case and of this are very different; but for the purpose of showing authority for the position that the Courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners, though they will do so in proper cases.

Now in this case the High Court has not granted any injunction, but it has made a declaration with respect to the possession and profits of the ferry, and has directed an account of the profits accordingly. But if the defendant's use of the landing places and the river is consistent with joint possession, why should the plaintiffs have any of the profits? They have not earned any, [266] and none have been earned by the exclusion of them from possession, as was done by the Watsons in the case cited. By the defendant's acts they have lost nothing, and have received some substantial convenience. It will be time enough to give them remedies against him when he encroaches on their enjoyment.

But then they ask to have it declared that the river and the ferry are within mauza Baigra, and that the defendant may be restrained from offering opposition to their possession. If the defendant had not denied their title, it would clearly not have been proper to give them any such relief. Should it make any difference in this respect that, when asked to account for the profits of the ferry, the defendant has sought to protect himself by setting up a title in himself to the profits of the ferry and to the landing places? With some doubt their Lordships think not. It does not appear that the plaintiffs, even before the suit, asked for any thing

but a share in the profits, and though they now ask for removal of opposition to their possession, they themselves state, and their Lordships now hold, that all the co-sharers have been in possession all along. No such decree therefore is needed. But the costs of the suit have been seriously aggravated by the defendant's claim of exclusive ownership; and as this claim is unfounded, he ought not to have the costs which otherwise would have been awarded to him. Throughout this litigation the plaintiffs have been asking too much and the defendant conceding too little. There should be no costs in any of the Courts, nor of this appeal.

1891 DEC. 18. — PRIVY COUNCIL. — 19 C. 253 (P.C.) = 19 I.A. 48 = 6 Sar. P.C.J. 133.

The proper course will be to discharge all the decrees below, and to dismiss the suit. Their Lordships will humbly advise Her Majesty accordingly.

Appeal allowed.

Solicitors for the appellant: Messrs. *Sanderson*, *Holland* and *Adkin*.

C.B.

---

19 C. 267.

[267] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

DHUNPUT SINGH (*Plaintiff*) v. SARASWATI MISRAIN AND OTHERS (*Defendants*).* [8th December, 1891.]

Rent Suit—Arrears of rent—Suit for arrears of patni rent for period during which zemindar had been in possession as purchaser at a sale which was subsequently set aside—Trespasser.

In a suit by a zemindar against his patnidars for arrears of patni rent for the years 1294, 1295 and part of 1296, it appeared that the patnidars had been out of possession during a portion of that period when the zemindar himself had been in possession, having purchased the tenure at a sale held in proceedings instituted by him under the Regulation. It appeared, however, that the sale had been set aside owing to the proceedings having been instituted against the predecessor of the patnidars who was then dead, and thereupon the zemindar gave notice to the patnidars to retake possession which they accordingly did. During the time he was in possession the zemindar himself collected some of the rent. The lower Court dismissed the claim for rent for the period during which the plaintiff was so in possession on the ground that he was a wrong-doer and trespasser, and that consequently the defendants could not be held liable for rent during that period.

Held, that this was no reason for refusing the plaintiff a decree for such arrears, as upon the authority of the decision in *Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (1), the plaintiff could not be treated as a trespasser, and that he was entitled to recover the actual arrears outstanding for the period in question, but not the interest thereon.

[**Expl.**, 35 C. 996 = 8 C.L.J. 181 (183) = 13 C.W.N. 15 = 1 Ind. Cas. 157 = 4 M.L.T. 419; **R.**, 3 C.L.J. 182 (185); 16 C.L.J. 135 = 17 Ind. Cas. 121.]

THE facts of this case, as to which there was no dispute at the ultimate hearing in the lower Court, were as follows:—

The plaintiff sued the defendants, who were the patnidars, for arrears of patni rent for the years 1294, 1295, and the first two instalments of 1296. It appeared that in Jeyt 1294, the tenure was sold at the instance of the plaintiff, and purchased by himself, but that on its appearing that

---

* Appeal from Original Decree, No. 289 of 1889, against the decree of F. Taylor, Esq., District Judge of Purnea, dated the 22nd August 1889.

(1) 12 M.I.A 244.

1891 DEC. 8. — APPELLATE CIVIL. — 19 C. 267.

the proceedings under the Regulation had been taken against the predecessor of the patnidars, who [268] was then dead, the sale was set aside in Pous 1295. The plaintiff gave the defendants notice of the reversal of the sale in Falgoon or Cheyt 1295, and called on them to resume possession. There was no dispute as to the rates of the rent claimed, and that the plaintiff had himself collected some rent during 1294 and 1295.

The case first came on for hearing on the 8th February 1889, and the following issues were settled :—

1. Are the defendants liable for the rents sued for ?

2. What is the amount of collection made by the plaintiff in 1294 and up to Sawan 1296 ?

3. Is plaintiff entitled to any collection charges ? If so, how much ?

4. Is the plaintiff entitled to interest upon the arrears of rent ?

On the same day the defendants' pleaders informed the Court that they had no objection to the amount of rent claimed, but that they objected to the interest claimed on the arrears.

On the 19th June the case was referred to two arbitrators for the purpose of ascertaining what amount the plaintiff actually collected during the period he was in *khas* possession, and whether any, and if so what amount of rent claimed by the plaintiff was barred by limitation owing to the negligence or misconduct of the plaintiff.

On the 14th August 1889 the arbitrators made their award, finding that Rs. 2,935-9-7 had been collected by the plaintiff, and as no evidence had been produced by either party on the second point, holding that no portion of the rent claimed was barred by limitation. The case then came on before the District Judge on the 22nd August 1889, for decision upon the issues which had been fixed.

The following is the material portion of his judgment :—

"There is no question about the liability for the rents of 1296. As to the liability for 1294 and 1295, I consider that as the dispossession was by plaintiff's own act, he cannot hold the defendants liable for rent for those years, or for any part of them, as his collections appear to have extended up to the end of 1295. It is no answer on plaintiff's part to say that the defendants will be better able to collect the unrealized balance than he [269] would himself. I do not also think it would be fair to make the defendants liable even for the part not collected by the plaintiff on the ground that it is not barred by limitation. Had defendants been in possession they might have realized it before now; and though plaintiff may have used all diligence in realization, the defendants would be hampered in their attempts to realize for those years, by the very fact that they had not been in possession and had no actual accounts to aid them.

"This is due to plaintiff's own voluntary action, and he must take the consequences.

"The defendants have referred to the case of *Kadumbinee Dossia* v. *Kasheenath Biswas* (1). The principle there enunciated is in favour of the defendants. The plaintiffs have referred to the decision in *Bhyrub Chunder Mojoomdar* v. *Haro Prosunno Bhuttacharjee* (2), the head note of which is in their favour, but it does not appear to me that the head note is in accordance with the facts of the case. The note says : 'An allegation of wrongful ejectment of defendant by plaintiff is no answer to a suit for

(1) 13 W. R. 338. (2) 17 W.R. 258.

rent during the period of dispossession.' It is true that the second paragraph of the judgment at first sight seems to contain the enunciation of this principle; but the sentence is not clear, and the principle is not consistent with the facts of the case. In the case the dispossession was from 1271 to Sawan 1276, and the rent of 1276 was sued for. There is nothing to show that any rent was due during the first three months of 1276, and it does not follow 'that the rent sued for *does* * * relate to the period of dispossession.' The word 'not' seems to have been left out.

1891 DEC. 8. APPELLATE CIVIL. 19 C. 267.

"For the above reasons I find, on the first and fourth issues, that plaintiff is only entitled to the rent with interest thereon, according to the kabuliyat, for the first two instalments of 1296. It will be unnecessary to decide the other issues."

Against the decree drawn up in accordance with this judgment the plaintiff appealed to the High Court.

Babu *Sri Nath Das*, Babu *Sarada Churn Mitter*, and Babu *Dwarka Nath Chuckerbutty*, for the appellant.

Babu *Akhoy Kumar Banerji*, for the respondents.

[270] The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This is an appeal by the plaintiff in the suit.

The suit was to recover arrears of patni rent for the years 1294, 1295, and part of 1296. It seems that the defendants, the patnidars, were out of possession for a part of that period. The patni was sold under the Regulation at the instance of the plaintiff in the month of Jeyt 1294, and the plaintiff himself became the purchaser. That sale was set aside in the month of Pous 1295; and we are told that the reason why the sale was reversed was that the proceedings under the Regulation were taken not against actual living patnidars, but against their predecessor who was then dead. The plaintiff appears to have given notice to the defendants that they were at liberty to resume possession shortly after the reversal of the sale; and it appears that the plaintiff while in possession did collect some portion of the rent of each year.

The issues in the case were settled on the 8th February 1889, and the first issue raised was whether the defendants were or were not liable for the rent claimed.

We find, however, from the order-sheet that on the 8th February the defendants' pleader informed the Court that they did not intend to dispute the amount of the arrears claimed, but they objected only to interest being charged upon those arrears. Subsequently in the month of June, on the application of both parties, the case was referred to arbitration in order that they might ascertain what amount the plaintiff had himself realized during the time he was in possession, and the arbitrators were directed to ascertain whether any portion of the rent due had become barred by limitation through any default on the part of the plaintiff. The arbitrators made their return showing the amount which had been collected by the plaintiff, and reporting that there was nothing to show that any portion of the arrears was barred by limitation owing to any default on the part of the plaintiff. Then on the case coming back to the District Judge, he dismissed the claim altogether for 1294 and 1295, and made a decree in favour of the plaintiff only for the arrears [271] due for 1296 with interest on that amount. The reason why the Judge dismissed the claim for 1294 and 1295 was that he considered that "as

1891 DEC. 8. — APPELLATE CIVIL. — 19 C. 267.

dispossession was plaintiff's own act, he cannot hold the defendants liable for rent for those years, or for any part of them, as his collections appear to have extended up to the end of 1295." The District Judge appears to have considered that the plaintiff must be regarded as a wrong-doer and trespasser in respect of the years 1294 and 1295, because the sale which he had caused to be held under the Regulation was set aside for some defect in the proceedings.

It seems to us that this is not a sufficient reason for refusing the plaintiff the arrears which have been found to be actually due. In the case of *Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (1) the Privy Council held that the zemindar cannot be said to have committed an act of trespass, because when she pursued the remedy, which was clearly competent to her if it had been regularly pursued, she inadvertently omitted one of the formalities prescribed by the Act. Their Lordships say they "cannot treat this as an act of trespass or hold that in bringing this suit she is a person seeking to take advantage of her own wrong." That was a case somewhat similar to this, for the zemindar had caused a patni to be sold under the Regulation, but had by inadvertence omitted the prescribed formalities. We think that in the present case too we ought to follow the decision of the Privy Council, and hold that the plaintiff was not a trespasser in this instance. But we think him still entitled to the actual arrears outstanding for the years in question, but not to interest upon the arrears of 1294 and 1295. Thus what we come to is practically what the defendants themselves expressed their willingness to accept in 1889 just after the issues had been fixed.

We accordingly decree this appeal to that extent, namely, in addition to the amount decreed to the plaintiff for 1296, he will also recover the amount outstanding for 1294 and 1295 and ascertained by the arbitrators, The amount already collected by the plaintiff will be deducted from the gross jama of these two years, and the balance will be paid, without interest, to the [272] plaintiff ; and interest on the amount decreed will run from this date at six per cent.

We notice that one of the respondents in this appeal was not represented by pleader.

The appellant will get costs in proportion to the amount decreed.

H. T. H. *Appeal decreed in part.*

(1) 12 M.I.A. 244.

19 C. 272.

1891 DEC. 18. APPELLATE CIVIL. 19 C. 272.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Banerjee.

LUKHUN CHUNDER ASH (*Plaintiff*) v. KHODA BUKSH MONDAL (*Defendant*).* [18th December, 1891.]

Court-fees—Act VII of 1890, *s.* 16 *and sch. I, art.* 1*—Court-fee payable where partial relief granted—Appeal against decree by instalments, how valued—Valuation of Appeal.*

The Court-fees which an appellant has to pay on a memorandum of appeal from a decree which gives him only partial relief are to be calculated upon the difference between the value of the relief which he claims and the relief granted by the decree appealed against.

Where a decree was made payable by three instalments and the plaintiff appealed on the ground that it should not have been made so payable:

Held that the Court-fee should be calculated upon the difference between the amount claimed in the Court below and the sum of the present values of the three instalments payable on the dates mentioned in the decree.

[R., 14 C.P.L.R. 172 (173).]

THE plaintiff sued to recover the sum of Rs. 1,285-2-7½ gs., being the rent and cesses payable by the defendant in respect of his dur-patni right in certain mauzas for the years 1296 and 1297 B.S. At the hearing the defendant appeared in person and admitted the claim, stating that there had been inundations, in consequence of which the tenants of the mehal in suit had failed to pay rent. The defendant therefore prayed the Court to allow him to pay the amount claimed by three instalments. The Subordinate Judge considered the case a fit one for payment being allowed to be made by instalments, and gave the plaintiff a decree [273] for the sum claimed, with costs, to be paid in three equal instalments—the first in Choitro 1297, the second in Assin 1298, and the third in Choitro 1298; interest to be charged on the instalments at the rate of 4 per cent. per annum on their falling due; the decree further providing that on default of payment of one instalment the rest were to become at once due.

From this decree the plaintiff appealed to the District Judge on the ground that the decretal amount should not have been made payable by instalments, and that the lower Court had not allowed interest during the pendency of the suit, and deposited court-fees upon the sum of Rs. 130 being the amount of interest during the pendency of the suit. The District Judge held that the appellant must pay court-fees on the whole sum originally claimed, and decreed, in addition to the sum of Rs. 130, the interest during the pendency of the suit; and upon the appellant declining to pay the increased fee demanded, the appeal was rejected.

From this decision the plaintiff appealed to the High Court on the ground that the District Judge was in error in requiring an *ad-valorem* fee to be paid on the entire amount claimed in respect of rent and cesses in the Court below.

Babu *Durga Mohun Das* appeared for the appellant.

The respondent did not appear.

* Appeal from Appellate Decree, No. 295 of 1891, against the decree of F. F. Handley, Esq., District Judge of Nuddea, dated the 28th of January 1891, affirming the decree of Babu Brojo Behari Shome, Subordinate Judge of Nuddea, dated the 25th of November 1890.

1891
DEC. 18.
—
APPEL-
LATE
CIVIL.
—
19 C. 272.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by—

BANERJEE, J.—The only question raised in this appeal, which is from an order of the District Judge rejecting an appeal on the ground of the memorandum of appeal not bearing the proper court-fee stamp, is, whether the learned Judge was right in holding that the appellant was bound to pay the whole amount of court-fee demanded, or whether the memorandum of appeal, as presented, bore the proper court-fee stamp.

The facts upon which this question arises are shortly these. The suit was one for arrears of rent. The defendants admitted the claim, but prayed that the amount be made payable by three instalments. The first Court allowed the defendant's prayer, and gave a decree for the sum of Rs. 1,285-2-7½ gs., and costs, Rs. 156, [274] amounting in all to Rs. 1,441-2-7½ gs., to be paid by three equal instalments, payable, respectively, in Choitro 1297, Assin 1298, and Choitro 1298, interest being charged on the instalments, if not paid on due date, at the rate of 4 per cent. per annum. The date of the decree was the 25th November 1890, corresponding with the 10th Augran 1297. The plaintiff appealed against this decree, being dissatisfied with the order making the amount decreed payable by instalments, and he paid the court-fee that would be payable for Rs. 130, which was the amount of interest during the pendency of the suit, but he did not pay any court-fee in respect of Rs. 1,285-2-7½ gs., as he was required by the lower appellate Court to do.

Now, having regard to the provisions of art. 1, sch. I of the Court Fees Act, read with s. 16 of that Act, it is clear that an appellant is bound to pay a court-fee on a memorandum of appeal from a decree which gives him only partial relief, upon the difference between the values of the relief he claims to be entitled to and that granted by the decree appealed against. In the present case the plaintiff got a decree for the amount of rent claimed, only the decree, instead of making the sum payable at once, made it payable by three equal instalments. The amount of court-fee payable upon the memorandum of appeal by the plaintiff, appellant, in such a case was, therefore, clearly not the court-fee payable in respect of the whole sum of Rs. 1,285-2-7½ gs., but was only that payable upon the difference between the value of the relief he claimed which was a decree for the payment of the whole sum immediately, and the value of the relief which he has obtained, that is, the said sum payable by three instalments. The exact difference then will be the difference between Rs. 1,285-2-7½ gs., and the sum of the present values of the three instalments payable on the dates mentioned in the decree, reckoning interest at the rate of 4 pent cent. per annum. On making a rough calculation it appears that this difference is nothing less than Rs. 60. It further appears that the plaintiff was not bound to value his appeal, for purposes of the Court Fees Act, at the sum of Rs. 130, as he has done, that being the amount of interest during the pendency of the suit, which would be allowed as ancillary to the main relief claimed. As the court-fee paid was sufficient to cover a sum of [275] Rs. 130, and as in our opinion the value of the relief claimed in the appeal which was the subject-matter of the appeal is less than that sum, we think the memorandum was sufficiently stamped for the purpose of the Court Fees Act, and that the learned Judge below was wrong in rejecting the appeal. The case must therefore go back to

the lower appellate Court in order that the appeal may be allowed to be registered and proceeded with according to law. Costs will abide the result. 1891 DEC. 18.

APPELLATE CIVIL.

19 C. 272.

A. A. C. *Appeal decreed.*

---

19 C. 275.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

PROTAP CHANDRA MISSER AND OTHERS (*Defendants*) v. BROJO NATH MISSER AND ANOTHER (*Plaintiffs*).*
[8th December, 1891.]

Endowment—Religious trust—Shebaits, removal from office of—Arbitration—Order giving leave to sue under s. 18, *Act XX of* 1863—*Appealable order—Regulation XIX of* 1810—*Act XX of* 1863, ss. 1—12, 14 *and* 18—*Act XII of* 1887, s. 20.

Act XX of 1863 does not apply to an endowment which is not a public one, but which is made for the benefit of an ancestral family idol.

An order passed under s. 18 of that Act, granting leave to institute a suit, is not an appealable order.

Two plaintiffs, members of a Hindu family, applied for and (in the presence of the defendants) obtained leave to institute a suit against the defendants, who were the *shebaits* of a certain idol, for the purpose of having them removed from their office, on the ground of misconduct. In their plaint they alleged that the endowment was a public one, all Hindus having a common right of worshipping the idol. This was denied by the defendants. After issues had been framed, the Court of first instance made an order, under s. 16 of the Act, referring certain of them to arbitration, although the defendants contended that as the endowment was not a public one, the Act had no application, and objected to the reference. The arbitrators made an award, finding, *inter alia*, that the idol was the ancestral family idol of the parties to the suit, and that the endowment was not made for the benefit of the public. They further in their award laid down certain definite rules according to which the *sheba* ought to be conducted and repairs to the temple made. The Court of first instance passed a decree on that award, declaring that the idol was the ancestral [276] idol of both parties, and directing that the defendants should perform the worship in a certain manner, and should execute certain repairs to the temple within six months, and declaring that if the parties did not act as directed, any member of the family should be able to bring a suit for the appointment of a manager. Against that decree the defendants appealed, and contended that the Act did not apply to the case on the finding of fact as to the endowment not being a public one; that the compulsory reference to arbitration was illegal and void, and that the decree was not one authorized by the terms of s. 14 of the Act. On behalf of the plaintiffs it was contended that the defendants were precluded from raising these questions on appeal, as the order passed under s. 18 of the Act was made in their presence and was not appealed against, and that, having regard to the provisions of s. 20 of Act XII of 1887, an appeal to the High Court lay from that order.

Held, that on the facts as found by the arbitrators, Act XX of 1863 did not apply to the case, and that the compulsory reference to arbitration and the decree made thereon were illegal and void.

Held further, that the decree itself was bad on the ground that it was not one coming within the scope of s. 14 of the Act.

Held also, that s. 20 of Act XII of 1887 was intended only to define the Court to which an appeal lies from a decree or order of a District Judge, and was not intended to define the right of appeal or the class of decrees or orders from which appeals shall lie, and that no appeal lay from the order passed under s. 18 of Act XX of 1863 granting the plaintiffs leave to institute the suit.

---

* Appeal from Original Decree, No. 254 of 1890, against the decree of Babu Brojendra Coomar Seal, District Judge of Bankura, dated the 31st of July 1890.

1891 DEC. 8. APPELLATE CIVIL. 19 C. 275.

[R., 18 A. 227 (231); D., 17 Ind. Cas. 270=216 P.L.R. 1912=181 P.W.R. 1912.]

THE plaintiffs, who were the two sons of the first defendant, instituted this suit, under the provisions of s. 14 of Act XX of 1863, for the removal of the defendants from their post of shebaits of an idol named Raghunath Jeo, established at mahalla Rampore within the municipality of Bankura by one Monsharam Panday, a disciple of the predecessor of the defendants and the plaintiffs.

Before instituting the suit the plaintiffs applied for and obtained leave to sue under s. 18 of Act XX of 1863 from the District Judge, and they also applied to the Collector, under s. 539 of the Code of Civil Procedure, for a like permission; but the latter application was refused on the ground that no such permission was necessary.

In their plaint the plaintiffs, amongst other matters, alleged that the idol Raghunath Jeo had certain debottar property, which had been dedicated and made over to Monsharam Panday by the late [277] Raghunath Singh Deb Bahadur (who had caused the temple of the idol to be built). for the purpose of defraying the expenses of its daily worship and periodical festivals, and for the feeding of guests and mendicants, etc., that Monsharam Panday appointed his spiritual guide, one Jitram Misser, the ancestor of the parties to the suit, shebait, and made a gift to him of the idol and the debottar property; that the defendants, who were the present shebaits, had no exclusive rights of their own in the property, nor had any one at any time any such exclusive right or any right to appropriate the profits of the property to anything else than the worship of the idol and the feeding of the guests and mendicants, and that all Hindus had a common right in it; that the defendants had been mismanaging the debottar property and misappropriating its profits, and that the worship was not being duly performed. They accordingly sought to have the defendants removed from their office and fresh shebaits appointed.

The defendant No. 2, Madhusudan Misser (who was the appellant before the High Court), took numerous objections to the suit in his written statement, both legal and on the merits, and, amongst others, alleged that the idol and the debottar properties did not belong to the public, but belonged solely to their family, and that for several generations none except the members of their family had any right or title to the idol or the properties, nor had any member of the public performed the worship of the idol. He accordingly contended that the endowment was not a public one, and that in consequence thereof Act XX of 1863 was inapplicable to the suit, and that it should be dismissed.

The following issues were framed :—

(1) Is it a fact that the property described in the plaint was made over to Monsharam Panday in trust for the public generally, and for the sheba of the idol Raghunath Jeo?

(2) Did Jitram Misser, the ancestor of the parties to the suit, receive the property subject to the said trust?

(3) Have the defendants neglected to carry out the object for which the alleged trust was created, and are they on that account liable to be displaced?

[278] (4) From the nature of the endowment (if it is proved to be an endowment), does the suit, such as is laid in the plaint, lie at the instance of the plaintiffs?

The case came on for hearing before Mr. E. W. Place, the then District Judge, in the month of April 1889, and after considerable argument the pleader for the plaintiffs pointed out that the Court had power under s. 16 of Act XX of 1863, to refer the case to arbitration irrespective of the consent of the parties. The defendants objected to this course, and contended that the suit did not fall under s. 14 of the Act at all, the endowment not being a public one.

By an order made on the 4th April 1889 the District Judge, considering that the property in question had been regarded as debottar rent-free land, and that *prima facie* the Act applied, and as the property was small in value, and the questions to be decided were principally questions turning on points of ceremonial observance of Hindu ritual, referred the first three issues to the arbitration of three Hindu gentlemen.

The arbitrators thereafter proceeded to take evidence, and on the 19th May 1890 made their award. On the first issue they found that the endowment was not made for the benefit of the public; but they found that Jitram Misser, the ancestor of the defendants, had obtained the property and the idol from Monsharam, who had obtained the property as a gift from Raghunath Singh Deb Bahadur, in order that out of its income the sheba of the idol might be conducted and the donee maintained. On the second issue they held that Jitram Misser got the property (which they held was the debottar property of the idol) together with the idol as a gift from Monsharam; and on the third issue they came to the conclusion that the defendants had neglected to carry on the sheba of the idol properly. They further in their award laid down certain definite rules according to which the sheba ought to be conducted, and they proposed that the temple should be repaired within six months; and added that, if the defendants failed to act according to the rules or neglected to repair the temple within the prescribed time, any member of the family would be competent to sue for the appointment of a manager in place of the shebaits.

[279] That award was filed on the 19th May 1890, and notice was given to the parties. The plaintiffs thereupon filed objections to the award on the 30th May, which, however, they withdrew on the 31st July 1890.

On the 5th June 1890 the defendants also filed objections to the effect that, as the arbitrators had held the endowment was not a public one, they had no power to frame the rules and give the directions they had. The Court, however, held that these objections were barred by limitation under art. 158 of sch. II of the Limitation Act of 1877.

The case then came on for hearing on the 31st July 1890 for the trial of the fourth issue before Babu Brojendro Coomar Seal, the then District Judge, who upon that portion of the case delivered the following judgment:—

"Now according to the finding of the arbitrators the property is debottar; that being so, on the authority of *Fakurudin Sahib* v. *Ackeni Sahib* (1) the suit at the instance of any member of the Misser family must lie, and the plaintiffs are two members of the Misser family. The Madras High Court observed: 'We can find nothing to control the generality of the terms of s. 14 which empower any person interested in any mosque, temple or religious endowment or in the performance of the trusts

(1) 2 M. 197.

1891 DEC. 8. — APPELLATE CIVIL. — 19 C. 275.

relating thereto to sue the trustee, manager or superintendent or the members of a committee appointed under the Act for misfeasance, and also empower the Court to order the removal of a trustee, etc. The plaintiffs as resident Muhammadans, apart from any pecuniary interest they may have in the income of the institution, are in our judgment sufficiently interested therein to entitle them to maintain suits if the institution be a religious establishment.'

"Thus there is no doubt that the plaintiffs had the right to sue.

"Now the suit was a suit for the removal of the present shebaits, and the arbitrators propose that if the defendants neglect to act according to the rules for the sheba of the idol proposed by them, and do not get the temple repaired within six months, any member of the Misser family would be competent to sue for their removal and for the appointment of a manager. Acting under the provisions [280] of s. 518 of the Civil Procedure Code, I might amend the award and pass a decree to the effect that if within six months the defendants did not repair the temple or neglect to carry on the sheba according to the rules laid down by the arbitrators, they would be liable to be removed in execution of the decree in this case. The arbitrators have taken rather a lenient view of the conduct of the defendants. Perhaps they thought that though the defendants have been found to be neglectful, if their attention is properly drawn to the matter they would like to do their duty properly, and so the arbitrators are for giving them another trial before recommending their removal. The plaintiffs are satisfied with such recommendation, and to have the shebaits removed in execution of this decree on the terms of the award would give rise to several complicated questions which it is better should be decided in a regular suit. I therefore accept the award as it is, and make a declaratory decree declaring the rights of the parties in the same way as they have been declared by the arbitrators, and leaving it open to the members of the Misser family, including the plaintiffs, to sue for the appointment of a manager in substitution of the defendants should they fail to act in the way the arbitrators wish them to act. I make no order for costs."

Against the decree drawn up on that judgment the defendant No. 2 appealed.

Dr. *Rash Behary Ghose*, Babu *Biprodas Mukerjee*, Babu *Jasada Nandan Pramanik* and Babu *Nalini Ranjan Chatterjee*, for the appellant.

Dr. *Trilokya Nath Mitter* and Babu *Digambur Chatterjee*, for the respondents.

Dr. *Rash Behary Ghose.*—The principal question in the case is whether Act XX of 1863 applies at all. If this suit could not be brought within the purview of the Act, the reference to the arbitrators falls to the ground and the suit must fail. The arbitrators have found that the endowment is not a public but a private one. The course of the decisions in this Court is in my favour—*Delrus Banoo Begum* v. *Kazee Abdur Ruhman* (1); and their Lordships of the Privy Council, though not expressly [281] deciding that point, seem to be of the same opinion—*Ashgar Ali* v. *Delroos Banoo Begum* (2).

Section 14 of Act XX of 1863 appears on the face of it to be rather general, but it must be read in connection with the rest of the Act. The title of the Act shows that it was enacted for the purpose of enabling the Government to divest itself of the management of religious endowments; the Act must therefore mean to provide only for those endowments of

(1) 23 W.R. 453. (2) 3 C. 324 (330).

which charge had been taken under the previous law, *viz.*, Reg. XIX of 1810 [see *Punch Cowrie Mull* v. *Chunnoo Lall* (1), *Kalee Churn Giri* v. *Golabi* (2), *Dhurrum Singh* v. *Kissen Singh* (3), *Jan Ali* v. *Ram Nath Mundul* (4)]. The case of *Fakurudin Sahib* v. *Ackeni Sahib* (5) is clearly distinguishable. I therefore submit that the Act has no application to this case, and that consequently the compulsory reference to arbitration spite of our objection, and the decree made on the footing of the award, are illegal and void, and the suit should be dismissed.

Further, the decree of the lower Court is clearly wrong and is not within the power of the Court to pass, having regard to the provisions of s. 14 of the Act. A declaratory decree could not be passed (see s. 21 of the Specific Relief Act).

On the question of limitation held by the lower Court to apply to our objection to the award, see *Muhammad Abid* v. *Muhammad Asghar*, (6).

Dr. *Trailokya Nath Mitter* (for the respondents).—In order fully to understand the scope of Act XX of 1863 it is necessary to look at the earlier Regulation in place of which it was passed. The preamble to Reg. XIX of 1810 shows that the object of the Legislature was to ensure the proper administration of all rents and produce of all lands granted for the support of Hindu temples, etc. Section 2 of the Regulation vests the general superintendence of all such lands in the Board of Revenue and Board of Commissioners, and no restriction is made in respect of such lands only as shall be actually taken possession [282] of by the Board. If therefore Act XX of 1863 applies to endowments to which that Regulation applied, it must be held to apply to the present case, as there is admittedly a Hindu temple and an endowment of lands for its support. Section 3 of the Act shows that this is the correct view of the law, the words there used being "is vested in or may be exercised by;" so that if this endowment was capable of being actually taken charge of by the authorities, the Act applies to it, and as there is nothing to show that it was not so capable, the Act must be held to apply. Moreover, the provisions of the Act are not so limited as has been contended. A contrary view has been held by this Court in *Dhurrum Singh* v. *Kissen Singh* (3).

The case of *Punch Cowrie Mull* v. *Chunnoo Lall* (1) is in my favour. Their Lordships say at p. 127—"Although the language of s. 14 . . . . . . is general in its terms, yet we do not consider that the legislature had in its contemplation to interfere with the procedure of the Supreme Court," etc. If the Court had been of opinion then that the Act only applies to an endowment actually taken in hand by the Board of Revenue, it would have expressly said so, as that would at once have disposed of the case, the Board of Revenue never having had actual jurisdiction in respect of endowments in the presidency towns. *Kalee Churn Giri* v. *Golabi* (2) merely follows that decision, and is distinguishable from this case; and the remarks of the Judicial Committee in *Ashgar Ali* v. *Delroos Banoo Begum* (7) relied on by the other side are mere *obiter dicta*. *Delrus Banoo Begum* v. *Kazee Abdur Ruhman* (8) is distinguishable; the deed of endowment was there set aside, and it was therefore unnecessary for the decision of that case to go into this question at all. In *Jan Ali* v. *Ram Nath Mundul* (4), the lands subject to the endowment had never been taken charge of by the revenue

(1) 2 C.L.R. 121 = 3 C. 563. (2) 2 C.L.R. 128. (3) 7 C. 767 (770).
(4) 8 C. 32. (5) 2 M. 197. (6) 8 A. 64.
(7) 3 C. 324. (8) 23 W. R., 453.

1891 DEC. 8. — APPELLATE CIVIL. — 19 C. 275.

authorities, and yet the provisions of the Act were held to apply. *Fakurudin Sahib* v. *Ackeni Sahib* (1) also supports this view.

[283] Whatever may be the correct view of the law on that point, the appellants are precluded from succeeding in this appeal, as they allowed the order under s. 18 to become final by not appealing against it. Under the Civil Courts Act of 1876, an appeal lay to the High Court where an appeal was allowed by law. The present Civil Courts Act, XII of 1887, has introduced a distinct change, and an appeal now lies to the High Court against all orders of a District Judge unless barred by any law for the time being in force. The order under s. 18 of Act XX of 1863 has therefore become final, and the appellants cannot now be heard to say that it was an incorrect order.

Dr. *Rash Behary Ghose* (in reply).—The order under s. 18 was not appealable [see *Venkateswara, In re* (2) and *Kazem Ali* v. *Azim Ali Khan* (3)]. The Civil Courts Act only defines the venue of an appeal when an appeal lies. As the arbitrators have held that the endowment is not a public one, and the respondents withdrew their objections to the award, the suit ought to be dismissed.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit brought under s. 14 of Act XX of 1863 for the removal of the present shebaits of a certain religious endowment.

The plaintiffs allege in their plaint that the idol Raghunath Jeo had certain debottar property endowed for its worship and for the feeding of guests; that the present shebaits had no exclusive right of their own in the said property; that all Hindus had a common right of worshipping the idol; that the present shebaits had been mismanaging the debottar property and misappropriating its profits; that the plaintiffs as persons interested in the worship, having obtained the permission of the District Judge under s. 18 of Act XX of 1863, were entitled to maintain this suit; and that they brought this suit for the purpose of having the present shebaits removed from office.

The defendant No. 2, who is the appellant before us, amongst other objections not necessary now to consider, urged that the [284] endowment was not a public one, and that Act XX of 1863 was in consequence not applicable to the present suit.

The Court below thought that the Act was applicable to the case, and it referred the case to arbitration under s. 16 of the Act, though the defendant No. 2 was unwilling to refer the matter to arbitration. The arbitrators, to whom the case was referred, made an award, and the Court below made a decree in modification of the award to the effect that it be declared that the idol Raghunath Jeo is the ancestral idol of both parties, and that the defendants be directed to perform the worship in a certain way, not necessary to specify here, and that they do repair the temple as necessary within six months; and that if the parties do not act as directed, then any member of the Misser family shall be able to take steps for the due performance of the said acts, that is to say, any member of the Paricharak Misser family shall be able to bring a suit for the appointment of a manager.

(1) 2 M. 197. (2) 10 M. 98. (3) 18 C. 382.

The defendant No. 2 has appealed against that decree; and it is contended on his behalf that the decree is bad, *first*, because, upon the fact found in the case and embodied in the decree that the idol is the ancestral idol of both parties, Act XX of 1863 was not applicable to the case, and the compulsory reference to arbitration and the decree made on the footing of the arbitration award are altogether illegal and void; and *secondly*, because the decree that has been made in the case is one that is not authorized by the terms of s. 14 of Act XX of 1863.

We think that both these contentions are valid. Act XX of 1863, as appears from the preamble to the Act and ss. 1 to 12, applies only to endowments to which Reg. XIX of 1810 was applicable; and that Regulation, as appears from s. 16, had application only to endowments for public purposes. This is the view that was taken of the scope of the Act in the case of *Delrus Banoo Begum* v. *Kazee Abdur Ruhman* (1). That case went up on appeal to the Privy Council, and though in consequence of the decision arrived at upon another question raised in the case the Judicial Committee did not think it necessary to decide the present question, yet their Lordships say "that they see no reason for disagreeing with that part of the judgment" of this Court **[285]** which dealt with the question now before us. We think therefore that this case is an authority binding upon us, and we accordingly follow it—*Asgar Ali* v. *Delroos Banoo Begum* (2).

Several other cases, both in this Court and in the other High Courts, have been discussed in the course of the argument; but we do not think it necessary to refer to them in detail, as some of them are not quite in point, and there is no decision of this Court which takes the contrary view; and and though there is one Madras case—*Fakuruddin Sahib* v. *Ackeni Sahib* (3)—which favours the respondents' contention that s. 14 of Act XX of 1863 is general in its application, a different view is taken of the scope of the Act in a later case, *Sathappayyar* v. *Periasami* (4), which is in favour of the restricted construction put upon the Act by this Court in the case to which reference has already been made.

It was contended by the learned vakil for the respondents that whatever may be the true view of the scope of the Act, the defendant, appellant, is precluded from raising the present contention by reason of his having omitted to appeal against the order of the Judge under s. 18 of the Act, which was made in his presence.

We do not think there is any thing in this contention. That order was not appealable under Act XX of 1863, and there is nothing in the Code of Civil Procedure which would allow an appeal from such an order, it not being a decree in any sense. In support of the argument that an appeal lies against such an order, reference was made to s. 20 of the Civil Courts Act, XII of 1887, which says:—"Save as otherwise provided by any enactment for the time being in force, an appeal from a decree or order of a District Judge or Additional Judge shall lie to the High Court." It was argued that the language of this section compared with the language of the corresponding provision of the former Act, VI of 1876, goes to show that whereas by the former provision of the law an appeal lay to the High Court where such an appeal was allowed, the intention of the present law is to allow an appeal to the High Court, except where such an appeal is taken away. We **[286]** do not think that this is the correct interpretation of the law. Section 20 of the Civil Courts Act is intended only to define the Court

(1) 23 W. R. 453. (2) 3 C. 324 (330). (3) 2 M. 197. (4) 14 M. 1.

1891 DEC. 8. — APPELLATE CIVIL. — 19 C. 275.

to which an appeal lies from a decree or order of a District Judge, but it is not intended to define the right of appeal or the class of decrees or orders from which appeals shall lie. In support of our view that no appeal lies from an order under s. 18 of Act XX of 1863, we may refer to the case of *Kazim Ali* v. *Azim Ali Khan* (1), and also to a Full Bench decision of the Madras High Court, *Venkateswara, In re* (2).

In our opinion, therefore, Act XX of 1863 was not applicable to this case upon the findings arrived at by the Court below, and the proceedings had in this case are therefore contrary to law and void.

We are further of opinion that the decree made in this case is not one that comes within the scope of s. 14 of Act XX of 1863.

We accordingly set aside the decree made by the Court below and dismiss the suit with costs of both Courts.

H. T. H. *Appeal allowed and suit dismissed.*

---

19 C. 286.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Banerjee.

TIKUM SINGH AND OTHERS (*Defendants Nos.* 1 *to* 3) *v.* SHEO RAM SINGH (*Plaintiff*) AND SHEO PERSHAD BHAGUT (*Defendant*) *No.* 4).* [11th December, 1891.]

Attachment of property deposited in, or in the custody of a Court—Priority—Title to property in custody of a Court—Code of Civil Procedure—Act XIV of 1882, *ss.* 272 *and* 278—283—*Suit to set aside order under proviso to s.* 272, *Code of Civil Procedure.*

A suit will lie to set aside an order such as is contemplated by the proviso to s. 272 of the Code of Civil Procedure, that is an order determining any question of title or priority as between the decree-holder and any other person in respect of money in deposit in a Court of Justice.

[287] The mode of investigation and the nature of the order to be made under s. 272, and the extent to which such an order is final, are provided for in ss. 278—283 of the Code of Civil Procedure.

THIS was a suit brought under the provisions of s. 283 of the Code of Civil Procedure, praying for a declaration of the plaintiff's right to a certain sum of Rs. 501-14, realized under the plaintiff's decree against defendant No. 4, which sum the plaintiff alleged had been drawn out of Court by defendants Nos. 1, 2 and 3, after attachment of the same by them as monies belonging to their judgment-debtor, defendant No. 4, in execution of their decree against defendant No. 4, and praying for recovery of the same with interest and costs.

The facts were shortly as follows:—By a kobala or deed of sale, dated the 8th June 1887, the defendant No. 4 sold to the plaintiff the arrears of rent for the years 1291 to 1293 due to him by the tenants of mauza Dedour, in which mauza he held a share under defendants Nos. 1, 2 and 3.

---

* Appeal from Appellate Decree No. 1771 of 1890, against the decree of Babu Jadu Nath Das, Subordinate Judge of Patna, dated the 13th of August 1890, reversing the decree of Baboo Purna Chunder Banerjee, Munsif of Patna, dated the 19th of September 1889.

(1) 18 C. 382. (2) 10 M. 98.

The plaintiff brought suits against the tenants and recovered decrees on the 5th March 1888. Upon execution of these decrees the sum of Rs. 505 was realized by sale of the judgment-debtors' properties, out of which sum the plaintiff claimed Rs. 501-14. The defendants Nos. 1, 2 and 3 had, however, a decree for rent against the defendant No. 4, in execution of which they attached the amount realized by the plaintiff under his decrees. The plaintiff preferred a claim under s. 278 of the Code in respect of the sum of Rs. 501-14, but the claim was disallowed by the executing Court upon the ground that the claimant was only a benamidar of the defendant No. 4, and that the purchase of the 8th June 1887 was not a *bona fides* transaction for value.

The plaintiff then brought this suit, asserting his right to the sum of Rs. 501-14, and alleging that he was not the benamidar of the defendant No. 4, and that the kobala, dated the 8th June 1887, was executed *bona fide* and for valuable consideration. The Court of first instance held that the *bona fides* of the sale had not been clearly established, and dismissed the plaintiff's suit. The lower appellate Court reversed that decision, and gave the plaintiff a decree for Rs. 434-10, being the amount taken out of **[288]** Court by the defendants Nos. 1, 2 and 3. These defendants appealed to the High Court.

Dr. *Rash Behary Ghose* appeared for the appellants.

Babu *Bhuban Mohan Das* appeared for the respondents.

Upon the hearing of the appeal the only question argued was whether a regular suit would lie in the present case, the question being as to the title or priority arising between the parties who claimed to be interested in the money deposited in Court, and as such being a question within the proviso to s. 272 of the Code of Civil Procedure. [See *Gopee Nath Acharje* v. *Achcha Bibee* (1).]

JUDGMENT.

The judgment of the Court (PETHERAM), C. J., and BANERJEE, J.) was delivered by

BANERJEE, J.—The only question raised in this case is whether a regular suit would lie for setting aside an order such as is contemplated by the proviso to s. 272 of the Code of Civil Procedure, that is, an order determining any question of title or priority as between the decree-holder and any other person in respect of money in deposit in a Court of justice.

It is contended for the appellant that no such suit would lie, as there is no provision in the Code of Civil Procedure which says that an order of this kind is liable to be questioned by a regular suit, and that the intention of s. 272 is to make the Court, in whose custody the money or property in dispute is, the only Court competent to determine the question.

We do not think this contention is sound. Section 272 is one of a group of sections commencing with s. 272 and ending with s. 285; and all that the proviso to s. 272 intends, when declaring that the Court in which the property or money is deposited shall be the Court that shall determine any question of title or priority, is to make that Court the tribunal for investigating claims, as distinguished from the Court which issues the attachment in execution of decree, which is the Court that in ordinary cases has to investigate and decide upon claims. But the mode of investigation, the nature of the order to be made, and the **[289]** extent to which such an order is final are, we think, provided for in ss. 278 to 283. There

(1) 7 C. 553.

1891 DEC. 11. — APPELLATE CIVIL. — 19 C. 286.

does not appear to us to be any reason why greater finality should be given to an order such as is contemplated in the proviso to s. 272 than is given to an order in any other claim case. The point taken before us therefore fails, and this appeal must be dismissed with costs.

A. A. C. *Appeal dismissed.*

---

19 C. 289 (F.B.).

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Pigot, and Mr. Justice Ghose.

MATUNGINI GUPTA (*Plaintiff*) *v.* RAM RUTTON ROY AND OTHERS (*Defendants*).* [24th November, 1891.]

Hindu widow, re-marriage of—Marriage of Hindu widow—Property inherited by Hindu widow from her first husband, forfeiture of—Hindu Widow's Marriage Act (XV of 1856), *ss.* 1, 2—*Act III of* 1872, *s.* 10.

A Hindu widow inherited the property of her husband, taking therein the estate of a Hindu widow. She afterwards married a second husband, not a Hindu, in the form provided by Act III of 1872, having first made a declaration, as required by s. 10 of that Act, that she was not a Hindu.

Held, by the majority of the FULL BENCH (PRINSEP, J., dissenting) that by her second marriage she forfeited her interest in her first husband's estate in favour of the next heir, all rights which any widow may have in her deceased husband's property by inheritance to her husband being expressly determined by s. 2 of the Hindu Widow's Marriage Act (XV of 1856) upon her re-marriage.

Gopal Singh v. *Dhungazee* (1) overruled.

PRINSEP, J.—Section 2 of Act XV of 1856 does not apply to all Hindu widows re-marrying, but only to Hindu widows re-marrying as Hindus under Hindu law as provided by the Act.

[**Diss.**, 22 B. 321 (329); 9 C.P.L.R. 47 (49); 35 A. 466 (469) = 11 A.L.J. 678 = 20 Ind. Cas. 335; **N F.**, 17 Ind.Cas. 133 (136) = 8 N.L.R. 128; **F.**, 8 C.L.J. 542; **R.**, 31 A. 161 = 6 A.L.J. 107 = 1 Ind.Cas. 761; 24 B. 89 (94); 22 C. 589 (594); 38 C. 862 (871) = 13 C.L.J. 558 = 15 C.W.N. 579 = 10 Ind. Cas. 69; 26 M. 143 (149) = 12 M. L.J. 197; 16 C.P.L.R. 99 (102); 6 N.L.R. 103 = 7 Ind. Cas. 543.]

THIS suit was brought by one Matungini Gupta, the daughter of Bhugwan Chunder Roy, deceased, to recover certain properties **[290]** belonging to his estate, as to which she alleged that the succession had opened out to her by reason of the re-marriage of his childless widow, Harani. The marriage of Harani with her second husband took place under the provisions of Act III of 1872, Harani at that time professing the Brahmo religion and making a declaration to the effect that she did not profess the Hindu religion. The plaintiff relied on the provisions of s. 2, Act XV of 1856, and contended that the effect of the re-marriage of Harani was to open out the succession to her deceased husband's property in the same manner as if her estate in that property had been determined by her death. The defendants urged that the succession had not opened out, and further relied upon a will of the deceased Bhugwan Chunder Roy. The Subordinate Judge decided against the defendants on both

---

* Appeal from Appellate Decree No. 312 of 1890 against the decree of the District Judge of Dacca, dated the 2nd December 1889, reversing the decree of the Second Subordinate Judge of that district, dated the 30th June 1888.

(1) 3 W.R. 206.

1891 NOV. 24. — FULL BENCH. — 19 C. 289 (F.B.).

these points. The District Judge held that the plaintiff had no right to sue, on the ground that Act XV of 1856 did not apply to the case, and relied upon the case of *Moniram Kolita* v. *Keri Kolitani* (1) as an authority that when an estate has once vested in a Hindu widow, it is not liable to be divested by the widow changing her religious creed. He further relied on the case of *Gopal Singh* v. *Dhungazee* (2). From this decision the plaintiff appealed to the High Court.

The Division Bench (PRINSEP, WILSON, and BANERJEE, JJ.) referred the case to a Full Bench with the following opinions :—

WILSON, J.—In this case a Hindu widow inherited the property of her husband, taking therein the estate of a Hindu widow. She afterwards married a second husband, not a Hindu, in the form provided by Act III of 1872, having first made a declaration, as required by s. 10 of the Act, that she was not a Hindu. The question is whether, by that marriage, she forfeited her interest in her first husband's estate in favour of the next heir.

In order to answer that question, we have to consider what is the nature of the estate of a Hindu widow—whether it is an estate during widowhood and subject to forfeiture on re-marriage, or an estate subject to no such restriction ; for it seems clear that, whatever estate the widow took on the death of her husband, she could never enlarge it by any subsequent act of her own.

[291] To simplify the consideration of the question, I propose first to refer to certain matters dwelt upon in argument, but which seem to me to have no real bearing upon the question. *First*, I think Act XXI of 1850 does not affect this case. By virtue of that Act a change of religion does not cause any forfeiture of property ; and therefore the widow's abjuration of Hinduism did not deprive her of her estate. But neither could it enlarge it, nor get rid of any condition or restriction to which it was originally subject. *Secondly*, Act III of 1872 seems to me to have no bearing on the question. That Act is, as its title indicates, " an Act to provide a form of marriage in certain cases." Any provision with regard to capacity to marry, or with regard to rights of property, would have been entirely beyond its scope.

There are really, I think, two points to be considered—*first*, what is the nature of a Hindu widow's estate under the Hindu Law, apart from statutory enactments,—is it an estate during widowhood and liable to forfeiture upon a second marriage, or is it free from any such restriction ; and, *secondly*, what is the effect of the Hindu Widow's Marriage Act (XV of 1856).

It is the general rule of Hindu Law, as stated by the Privy Council in *Moniram Kolita* v. *Keri Kolitani* (1) " that an estate once vested by succession or inheritance is not divested by any act or incapacity which, before succession, would have formed a ground for exclusion from inheritance," and it was therefore held not to have been established that the estate of a widow formed an exception to the rule. But it is equally clear that there were grounds which, under the Hindu Law, caused a forfeiture of a vested estate. Change of religion did so before Act XXI of 1850 and the Regulations that preceded it. Degradation from caste had the same effect as is pointed out by the Privy Council in the case above referred to at p. 792. We have to say whether a second marriage is a circumstance, like those just mentioned, which determines a widow's estate.

---

(1) 5 C. 776 (788). (2) 3 W, R. 206.

1891 Nov. 24. — Full Bench. — 19 C. 289 (F.B.).

We cannot expect to find express texts on this point in the usual authorities on Hindu Law, because second marriage was a thing they did not contemplate. We cannot expect more [292] than an indication of the view they took of the nature of a widow's estate.

That view is clearly expressed in the text of Vrihaspati which Jimutavahana makes the basis of his reasoning on the subject of a widow's estate (Dayabhaga XI, 1) "of him whose wife is not deceased half tho body survives. How then should another take his property while half his person is alive?" This is difficult to reconcile with a right in a widow, who ceases to be the wife or half of the body of her late husband, and becomes the wife and half of the body of another man, to keep the estate of her late husband. The view that on principle a second marriage determines a widow's estate is strengthened by the fact that where second marriages were sanctioned by custom, the further rule seems almost always to have followed, that such re-marriage entailed a forfeiture of the first husband's estate. See the cases cited in Mayne's Hindu Law, s. 512, and in West and Buhler, Bk. I, ch. 2, s. 7, Q. 1 (3rd ed., p. 429): and again the adoption of the rule of forfeiture on second marriage in the Hindu Widow's Marriage Act (XV of 1856) seems to be an indication that the Legislature considered that rule to be in accordance with the principles of Hindu Law. If, therefore, we had to decide this case upon the principles of Hindu Law, and without reference to express legislative enactments, I should be disposed to hold that the widow's estate was determined by her marrying a second time, and I do not think this would be in any way inconsistent with what was held in *Moniram Kolita* v. *Keri Kolitani* (1), namely, that a widow's estate is not forfeited by unchastity during widowhood; for there seems to me to be a very broad distinction between misconduct on the part of a widow, as a widow, and her ceasing to be a widow.

The case is, however, in my opinion governed by s. 2 of the Hindu Widow's Marriage Act (XV of 1856). The preamble to that Act is as follows :—

"Whereas it is known that by the law as administered in the Civil Courts established in the territories in the possession and under the Government of the East India Company, Hindu [293] widows, with certain exceptions, are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property; and whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the Civil Law administered by the Courts of justice shall no longer prevent those Hindus, who may be so minded, from adopting a different custom in accordance with the dictates of their own consciences; and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain; and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and the public welfare."

The words of this preamble show clearly, to my mind, to whom the Act applies, that is to say (upon the narrowest view), to all Hindu widows other than those referred to under the words 'with certain exceptions' who could without the aid of the Act marry according to the custom of their

(1) 5 C. 776.

caste. With the latter class of widows we have no concern in the present case. **1891 NOV. 24.** — **FULL BENCH.** — **19 C. 289 (F.B.).**

Then follows section 1—

1. "No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu Law to the contrary notwithstanding."

Section 2 is—

"All rights and interests which any widow may have in her deceased husband's property by way of maintenance or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her without express permission to re-marry, only a limited interest in such property with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died; and the next heirs of her deceased husband or other persons entitled **[294]** to the property on her death, shall thereupon succeed to the same."

It appears to me that each of these sections applies to the whole class of widows to whom the Act is applicable, and that class I have already pointed out. I think further that each section applies to a Hindu widow from the time she becomes a widow so that s. 1 makes her free to marry again if she pleases, and s. 2 declares one of the conditions on which she takes the estate inherited from her husband, and not only this, but various other interests also. It follows from this that in the case before us, the widow, being a Hindu widow to whom the Act was applicable, took her estate subject to the provisions of s. 2 of the Act.

The argument against this view, and the only argument, I think, that could be used upon the construction of the Act was, that s. 2 should be regarded as a proviso to s. 1, and as if it ran: "Provided that all rights and interests which any widow, who marries by virtue of the preceding section, under such circumstances that, but for that section, her marriage would be valid," &c.

The answer to this seems to me to be that s. 2 is not a proviso to s. 1, and that the language of s. 2 is not restricted in the way proposed. On the contrary, s. 1 speaks of and validates marriages contracted between Hindus—language very likely used because the Legislature were aware that Hindu widows might change their faith and marry again without the aid of the Legislature; while s. 2 speaks of 'any widow,' that is, I think, any widow falling within the class to which the Act applies. As, however, this view is in conflict with the decision of this Court in *Gopal Singh* v. *Dhungazee* (1), I think the question in issue should be referred to a Full Bench.

PRINSEP, J.—I concur in thinking that this case should be referred to a Full Bench. But I have doubts on many points raised in the judgment of Mr. Justice Wilson.

BANERJI.—I also am of opinion that this case should be referred to a Full Bench for the decision of the question raised **[295]** in it, *viz.*, whether the estate which a Hindu widow inherits from her deceased husband ceases on her re-marriage under Act III of 1872. I am unable to accept as correct the decision of this Court in the case of *Gopal Singh* v. *Dhungazee* (1). The widow's right of succession is based according to the *Dayabhaga*, on the ground that she is half the body of

(1) 3 W.R. 206.

1891 NOV. 24. — FULL BENCH. — 19 C. 289 (F.B.).

her deceased husband, and is capable of conferring by her act spiritual benefit on him. The widow takes her husband's estate, not because of past relationship, not because she was the wife of the deceased, but because of the continuing relationship, because she is still the *patni* (wife) of the deceased. This is abundantly clear from chap. XI, s. 1 of the *Dayabhaga*, and in particular from paragraph 2 of that section; and, if that is so, it follows, as a necessary consequence, that the estate of a Hindu widow can last only so long as she continues to be the wife and half the body of her deceased husband; that is, only so long as the relationship, by reason of which she inherits, continues, and the estate must be held to determine when she must cease to be the wife of her late husband and half his body by marrying another person. In other words, the Hindu widow's estate must be taken to be an estate during widowhood. This view has been recognized in the Hindu Widow's Marriage Act (XV of 1856), s. 2, which declares that a widow re-marrying loses all her rights in her deceased husband's estate. It is also recognized in cases where the marriage of Hindu widows is allowed by custom. *Murugayi* v. *Viramakali* (1). See also the case cited in West and Buhler's Digest of Hindu Law, Bk. I, ch. 2, s. 7, Q. 1 (3rd ed., p. 429). The widow's change of religion cannot, I think, in any way affect the present question. It is true that by Act XXI of 1850 adjuration of Hinduism cannot cause forfeiture of the widow's estate, but it can neither, on the other hand, have the effect of enlarging or altering the nature of that estate. The widow Harani, therefore, by re-marrying must, I think, be taken to have lost the estate that she inherited from her deceased husband. I should here add, however, that I am not prepared to hold that s. 2 of Act XV of 1856 governs this case. Though s. 2 taken alone may be general in its terms, it must be read along with the other provisions of the Act, and **[296]** the words 'any widow' occurring in the section must be taken to mean any widow to whom the Act applies and for whom it was intended, that is, any widow who is a Hindu, not only at the time of her succession, but also at the time of her re-marriage; and the word "re-marriage" in the section must be taken as meaning re-marriage contracted under the Act in accordance with Hindu ceremonies. And as the re-marriage in this case was not contracted in accordance with Hindu ceremonials, but under Act III of 1872, and after the widow had ceased to profess the Hindu faith, s. 2 of Act XV of 1856 cannot have any application to her. I think it also necessary to add that the case of *Moniram Kolita* v. *Keri Kolitani* (2), so much relied upon on behalf of the respondents, does not at all touch the present question. All that was decided in that case was that chastity is not a continuing condition for the subsistence of a Hindu widow's estate. That does not show that the continuance of widowhood or of the relationship by reason of which the widow succeeds is not necessary for the continuance of the widow's estate.

Babu *Golap Chunder Sircar* and Babu *Horendro Nath Mukerji* appeared for the appellant.

Dr. *Rash Behari Ghose* and Babu *Nalini Ranjan Chatterji* appeared for the respondents.

Babu *Golap Chunder Sircar*.—The wife as such is not entitled to the inheritance. It is only a *patni* who can inherit—*Mitakshara*, Part II, chap. II, s. 1, ss. 2 and 5. *Patni* signifies a wife espoused in lawful wedlock and associated in sacrifice with her husband. [See *Smriti*

(1) 1 M. 226. (2) 5 C. 776.

1891 Nov. 24. — Full Bench. — 19 C. 289 (F.B.).

Chandrika, chap. XI, ss. 6—10, where the matter is fully explained.] The succession is different where the wife is not married in any of the approved forms. Marriage signifies the union of man and woman into one person: hence *yautuca*, the property given at a marriage, which imports "mingling" [*Dayabhaga*, chap. IV, ss. 2, 14.] The wife becomes *sapinda*. [See West and Buhler, Bk. I, ch. 2, s. 6-A, Q. 6 (2nd ed., p. 120), and *Umaid Bahadur* v. *Udoi Chand* (1).] The wife is a co-owner with her husband, and after his death half his body survives in her [*Dayabhaga*, **[297]** chap. XI, ss. 2, 25 and 26] and she takes as his continuing wife. Re-marriage of widows cannot be classed under the category of unchastity, so *Moniram Kolita* v. *Keri Kolitani* (2) does not apply. By re-marriage the widow's connection with her former husband ceases [Manu, chap. V, verse 161] and she cannot adopt to him [West and Buhler, book III, s. 3, B. 3.29 (3rd ed., p. 999]. By re-marriage she ceases to be a member of her husband's family [*Murugayi* v. *Viramakali* (3), *Parvati* v. *Bhiku* (4)]. The existence of a custom among the lower castes all over the country in which re-marriage is allowed shows what the Hindu law was—[*See* Macnaghten's Hindu Law, volume I, p. 58; *Kally Churn Shaw* v. *Dukhee Bibee* (5), *Hurry Churn Dass* v. *Nimai Chand Keyal* (6); Strange's Hindu Law, volume II, p. 399; Steel's Hindu Law and Custom, pp. 169 and 176; *Ghelajee Nana Bhaee* v. *Umur Singh* (7); *Rahi* v. *Govinda* (8); Tupper's Panjab Customs, volume II, pp. 71 and 72]. The object of Act XV of 1856 appears from the preamble to remove legal obstacles to the marriage of Hindus, and the language of s. 2 cannot be restricted. Section 6 removes the difficulties raised by the orthodox party. The case is governed by s. 2 of the Act [*Har Saran Das* v. *Nandi* (9)] and Act XXI of 1850 has no application [*Bhagwant Sing* v. *Kallu* (10)]. Act III of 1872 is a negative enactment, and only provides a form of marriage. *Gopal Sing* v. *Dhungazee* (11) is a doubtful ruling.

Dr. *Rashbehary Ghose*.—The estate of a Hindu widow is not laid down by any text to be an estate during widowhood. Chastity is not a necessary condition [Dayabhaga, chap. XI, ss. 1, 56, *Moniram Kolita* v. *Keri Kolitani* (2)]. No condition of forfeiture is created by the widow refusing to live in her husband's family. She commits a sin, but does not incur forfeiture. No inference can be drawn from the existence of any custom among the lower castes, and no custom has been shown to prevail in Bengal. *Patni* means a woman espoused in lawful wedlock [*Mitakshara*, Part II, chap. II, ss. 1, 5] and when she has once inherited, it **[298]** is not possible for the estate to become vested in any other person during her lifetime. It cannot become divested by any act or incapacity which before succession would have formed a ground for exclusion from the inheritance. This is established by the Privy Council decision. Then, as regards Act XV of 1856, that was an Act to remove the disabilities of Hindu widows, that is, widows who professed Hinduism at the time of the marriage, and cannot therefore apply to the present case. The word "widow" must be subject to some limitation. When Harani ceased to be a Hindu, she ceased to be a Hindu widow. If she wishes to re-marry and to retain her husband's estate, she has only to change her religion and she enlarges her estate by her own act.

(1) 6 C. 119 (124). (2) 5 C. 776. (3) 1 M. 226.
(4) 4 B.H.C. (A.C.J.) 25. (5) 5 C. 692. (6) 10 C. 138.
(7) Borradaile's Reports, 430. (8) 1 B. 97 (114). (9) 11 A. 330.
(10) 11 A. 100. (11) 3 W. R. 206.

1891 NOV. 24. — FULL BENCH. — 19 C. 289 (F.B.).

Babu *Golap Chunder Sircar* was not heard in reply.

The opinions of the Full Bench (PETHERAM, C.J., PRINSEP, WILSON, PIGOT, and GHOSE, JJ.) were as follows:—

OPINIONS.

PETHERAM, C. J.—The question submitted for the opinion of this Bench, as stated by Mr. Justice Wilson, is as follows:—

"In this case a Hindu widow inherited the property of her husband, taking therein the estate of a Hindu widow. She afterwards married a second husband, not a Hindu, in the form provided by Act III of 1872, having first made a declaration, as required by s. 10 of the Act, that she was not a Hindu. The question is whether, by that marriage, she forfeited her interest in her first husband's estate in favour of the next heir."

I think that the decision in *Gopal Singh* v. *Dhungazee* (1) is wrong, and I agree with the learned Judges who referred the question that it must be answered in the affirmative. It is, I think, concluded by s. 2 of the Hindu Widow's Marriage Act, XV of 1856, and I do not think it necessary to express any opinion on the other points which have been mentioned in argument and which are discussed in the judgment of the Judges who constituted the referring Bench.

The first two sections of the Act are as follow:—

1. "No marriage contracted between Hindus shall be invalid and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any **[299]** custom and any interpretation of Hindu Law to the contrary notwithstanding."

2. "All rights and interests which any widow may have in her deceased husband's property by way of maintenance or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died; and the next heirs of her deceased husband or other persons entitled to the property on her death shall thereupon succeed to the same."

Section 1 no doubt relates to marriages between Hindus, but s. 2 includes all widows who are within the scope of the Act, that is to say, all persons who being Hindus become widows, and it must follow from this that if any such widow marries, she is deprived by the section of the estate which she inherited from her Hindu husband. The words are clear —"All rights which any widow may have in her deceased husband's property by inheritance to her husband;" the estate which a Hindu widow takes upon her husband's death in his property is an estate which she takes by inheritance to him, and such estate is expressly determined by the section.

My answer to the question is, that by marriage the widow forfeited her estate in her first husband's property in favour of the next heir.

The result will be that the appeal must be allowed and the decree of the first Court reinstated with costs of the three hearings in this Court and the costs of the lower appellate Court.

WILSON, J.—I agree. I think it unnecessary to say more, as I expressed my views in making the reference.

---

(1) 3 W. R. 306.

PIGOT, J.—I agree. 1891

GHOSE, J.—I agree in the answer which the Chief Justice has given to the question referred. NOV. 24.

FULL BENCH.

19 C. 289 (F.B.).

PRINSEP, J.—The inclination of my own opinion has been always against the view expressed by my two learned colleagues who joined with me in referring this case to a Full Bench, and I still have doubts which the further argument has failed entirely to remove.

[300] Act XV of 1856 is entitled an Act to remove all legal obstacles to the marriage of Hindu widows, and it provides for such marriages according to the rites and ceremonies current amongst Hindus. The widow in the case before us ceased to be a Hindu by a public declaration abjuring that religion, and her re-marriage was under Act III of 1872, entitled "an Act to provide a form of marriage in certain cases."

That Act was passed by the Legislature expressly for cases of this description. If the widow had merely renounced the Hindu religion, admittedly she would not have ceased to hold her deceased husband's estate. She could not, after her conversion to another religion, confer on him what are known in Hindu Law as spiritual benefits, but it is said she would still be regarded as a part of her husband's body, and as such in possession of his worldly properties. It has been contended that her title is only during her widowhood, *durante viduitate*, in consequence of the principle under which she is recognized as proprietress after her husband's death. It is difficult to understand how that legal fiction can be maintained if after her husband's death the widow were to become Muhammadan or Christian. The Statute, however (Act XXI of 1850), has provided that a change of religion shall not operate as a forfeiture, and according to the opinions, in which I am unable to agree, a re-marriage not as a Hindu would have that effect. We have also the anomaly that, although she may change her religion and cease to be a Hindu, so long as she remains a widow, she continues as a Hindu to hold her husband's estate, that she does not forfeit this by leading a notoriously unchaste life (See *Moniram Kolita* v. *Keri Kolitani*) (1), but that if she re-marries she forfeits, because she ceases to be a widow, and because the conditions under which she retained her husband's estate as part of his body no longer exist. I have the misfortune of being unable to agree that s. 2, Act XV of 1856, is of general application to all Hindu widows remarrying, for I read it as being limited only to the cases provided for by that Act, *viz.*, Hindu widows re-marrying as Hindus under Hindu Law as provided by that Act. Having still these doubts regarding the views expressed by my learned colleagues, I regret to be unable to concur in the judgment delivered.

A. A. C.

---

(1) 5 C. 776.

1891
SEP. 1.
APPELLATE CIVIL.
19 C. 301.

19 C. 301.

[301] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

SHAM KUAR (*Petitioner*), *Appellant* v. MOHANUNDA SAHOY AND ANOTHER (*Objectors*), *Respondents*.* [1st September, 1891.]

Hindu Law—Mitakshara—Minor—Guardianship — The Guardians and Wards Act (VIII of 1890)*—Act XL of* 1858.

Under the Guardians and Wards Act, 1890, a guardian cannot be appointed of the property of a minor, who is a member of a joint Hindu family governed by the Mitakshara law, and possessed of no separate estate.

Difference between the Guardians and Wards Act, 1890, and Act XL of 1858 stated.

Durgapersad v. *Keshopersad Singh* (1) explained.

Narsingrav Ramchandra v. *Venkaji Krishna* (2) and *Appovier* v. *Rama Subba Aiyan* (3) referred to.

[F., 17 A. 529 (530)=14 A.W.N. 119; 32 M. 139=1 Ind. Cas. 999=4 M.L.T. 462; 4 O.C. 269 (272); Appr., 19 B. 309 (317); R., 35 C. 561=12 C.W.N. 598; 6 C.L.J. 383 (394); 17 Ind. Cas. 473=23 M.L.J. 706=12 M.L.T. 585=(1913) M.W.N. 79 (84); 10 P.R. 1904; U.B.R. (1892—1896) 408 (410); D., 27 M. 402 (403).]

THIS was an appeal from an order, refusing an application, under s. 7 of the Guardians and Wards Act, 1890, to appoint a guardian of the property of a minor member of a joint Mitakshara family possessed of no separate estate.

The application was made by the appellant, the mother of the minor. It was admitted that the minor and his three brothers were the members of a joint Hindu family governed by the Mitakshara Law; that the minor possessed no separate property; and that, since the death of his father on the 11th February 1886, the entire joint family property had been under the control and management of the minor's eldest brother, the respondent Mohanunda Sahoy.

The District Judge was of opinion that the principles on which the cases under the old Act had been decided were equally applicable to the Act of 1890, and further that the provisions of the latter Act were quite inconsistent with the idea of a person [302] having the care of an undivided interest in property of a joint Hindu family. He therefore held that under the Guardians and Wards Act, 1890, a guardian of the property of such a minor could not be appointed. He relied upon the following authorities:—

Sheo Nundun Singh v. *Ghunsam Kooeree* (4), *Ajhola Kooeree* v. *Digambur Singh* (5), *Gourah Koeri* v. *Gujadhur Purshad* (6), *Shivji Hasam* v. *Datu Mavji Khoja* (7), *Guracharya* v. *Svamirayacharya* (8) and *Narsingrav Ramchandra* v. *Venkaji Krishna* (2).

He also referred to the following rulings:—

Dhiraj Koer v. *Adjoodhya Bux Singh* (9), *Bhoopendra Narain Roy* v. *Greesh Narain Roy*(10), *Soobanse Singh* v. *Juggesshur Koer*(11), *Durgapersad* v. *Keshopersad Singh* (1), and *Babaji* v. *Sheshgiri* (12).

---

* Appeal from Order, No. 95 of 1891, against the Order, of J. G. Charles, Esq., District Judge of Shahabad, dated the 2nd of March 1891.

(1) 8 C. 656=9 I.A. 27. (2) 8 B. 395. (3) 11 M.I.A. 75.
(4) 21 W.R. 143. (5) 23 W.R. 206. (6) 5 C. 219.
(7) 12 B.H.C.R. 281. (8) 3 B. 431. (9) 3 N.W P. (All.) 91.
(10) 6 C. 539. (11) 13 C.L.R. 86. (12) 6 B. 593.

1891 SEP. 1.

APPELLATE CIVIL.

19 C. 301.

The District Judge having dismissed the application, Sham Kuar appealed to the High Court.

Dr. *Rash Behary Ghose* and Babu *Nalini Ranjan Chatterjee*, for the appellant.

Mr. *Evans* and Babu *Roghu Nandan Pershad*, for the respondents.

Babu *Nalini Ranjan Chatterjee*, for the appellant.—A guardian of the property of a minor member of a joint Mitakshara family can be appointed under Act VIII of 1890. The cases, in which it has been held that no guardian of the property of such a minor could be appointed under Act XL of 1858, and which have been relied on by the Judge in the Court below, have proceeded upon the meaning to be attached to the word "charge" which occurs in that Act, and also upon the principle that the minor has not any such property or interest in property as was capable of being taken charge of. The word "charge" implies actual physical **[303]** possession of property, which is not implied by the word "care," which has been substituted for it in the present Act. These cases, therefore, are not applicable to the present Act; and, moreover, they have been very much weakened, if not virtually set aside, by the Privy Council ruling in *Durgapersad* v. *Keshopersad Singh* (1). In *Soobanse Singh* v. *Juggesshur Koer* (2) the High Court observed:—"It is not clear * * that under Act XXXV of 1858 a manager under no circumstances could be appointed if a lunatic be a member of a joint Hindu family under the Mitakshara law possessed of no separate property." In *Bhoopendra Narain Roy* v. *Greesh Narain Roy* (3) Pontifex, J., said, with reference to this Act:—"It appears to us that there may be cases where it is essentially necessary that a guardian should be appointed for a member of a Mitakshara family as much as for any other family." Under the Bombay Minors' Act of 1864, which is similar in its provisions to Act XL of 1858, the Bombay High Court has held, apparently on the authority of the Privy Council case of *Durgapersad* v. *Keshopersad Singh* (1), that a certificate of administration may be granted for the share of a minor who is a member of an undivided Hindu family—*Babaji* v. *Sheshgiri* (4); and the Allahabad High Court in the case of *Dhiraj Koer* v. *Adjoodhya Bux Singh* (5) held that under Act XL of 1858 a certificate may be granted in the lifetime of the father.

The words in Act VIII of 1890 are different from the words in the Act of 1858. In s. 4, sub-s. 2 of the present Act, guardian is defined as "a person having the care of the person of a minor or of his property, or both his person and property." The substitution of the word "care" for "charge" shows that the Legislature contemplated the appointment of a guardian in a case like the present, and considered actual physical possession was unnecessary, and therefore intended to alter the law [See the Statement of Objects and Reasons, paragraph 12, *Gazette of India*, January to June 1886, Part V, page 76]. In s. 19 of the new Act it is stated in precise terms in what cases no guardian shall be appointed, but there is no mention made of a case like the present one.

[304] [AMEER ALI, J.—But if the minor has no separate property of which actual charge can be taken by the guardian, what will the duties of the guardian be ?]

---

(1) 8 C. 656 = 9 I.A. 27. (2) 13 C.L.R. 86. (3) 6 C. 539.
(4) 6 B. 593. (5) 3 N. W. P. (All.) 91.

1891 SEP. 1. — APPELLATE CIVIL. — 19 C. 301.

The minor has certain rights in respect of the family property which are capable of being protected by a guardian. In such a case the guardian need not have the control of the common property. He need only watch the interests of the minor, and exercise a sort of supervision over the kurta with a right in the last resort to demand a partition.

Dr. *Rash Behary Ghose* on the same side.—A guardian appointed under Act VIII of 1890 has certain rights and privileges (s. 53), and he may protect himself by applying to the Court under s. 33 for its opinion or direction in the management or administration of the property of his ward. Should the eldest managing member of a joint family desire to be the guardian of his minor brother, why should he be deprived of the benefit of the provisions of the Act? There can be no possible objection to the eldest managing member on the ground that the appointment would have the effect of disorganizing the joint family and bringing about a separation without a partition and altering the devolution of property. There is nothing in the law against such an appointment; and if the eldest managing member may be appointed guardian, in the absence of any provision in the Act showing that he has any preference, any other person might as well be appointed guardian.

In addition to the cases cited by the District Judge the following cases were also referred to during the argument on behalf of the appellant.

Sheonundun Pershad Singh v. *Ghunsham Kooeree* (1); *Hoolash Kooer* v. *Kassee Proshad* (2); *Padmakar Vinayak Joshi* v. *Mahadev Krishna Joshi* (3).

Mr. *Evans* for the respondent.—It has been held both by the Calcutta and Bombay High Courts that a guardian could not be appointed under Acts XL of 1858 and XX of 1864 in cases where the minor had no rights except as a member of an undivided Hindu family. The doubt which has been cast on this view by the **[305]** Privy Council ruling in *Durgapersad* v. *Keshopersad Singh* (4) has been removed by the present Act. The only question in that case was whether the minors were properly represented in a suit which has been brought against them and their uncle, who was described as their guardian, and whether the decree obtained by the appellant Durgapersad was binding on them. The Privy Council held that the minors were not properly represented; but no question as to whether a guardian of the property of a minor member of a joint Mitakshara family could or could not be appointed was gone into. This case was fully considered by the Bombay High Court in *Narsingrav Ramchandra* v. *Venkaji Krishna* (5); and, as was there remarked, the observations of their Lordships of the Privy Council should be read strictly with reference to the case then under consideration. *Durgapersad's* case did not change the law as it stood under Act XL of 1858. The result of it is that an infant will not be bound by any decree unless he is properly represented. Nothing turns upon the meaning of the word 'care' in s. 4, sub-s. 2 of the Act. The Bill contained a clause respecting the appointment of guardians for minor members of undivided Hindu families; but that clause was removed by the Select Committee, to which the Bill had been referred for consideration, for the reason that the weight of authority was against its retention, and also on the ground that the appointment of a guardian in such a case would materially interfere

(1) 17 W.R. 237. (2) 7 C. 369. (3) 10 B. 21.
(4) 8 C. 656=9 I.A. 27. (5) 8 B. 395.

with the management of the joint property by the kurta, and such interference could not possibly result in any good, and it was best, therefore, not to disturb the existing law. The present Act, therefore, like the old Act, does not apply to the case of a minor member of an undivided Mitakshara family.

He referred to Sir Andrew Scoble's speech in presenting the report of the Select Committee on the Bill (*Gazette of India*, January to June 1890, Part VI, p. 36); to the report of the Select Committee, para. 2 (*Gazette of India*, January to June 1890, Part V, p. 77); to the Statement of Objects and Reasons, para. 12 (*Gazette of India*, January to June 1886, p. 76); and to ss. 27, 28, 29, and 34 of the Act.

[306] Dr. *Rash Behary Ghose* in reply.

The Court (MACPHERSON and AMEER ALI, JJ.) delivered the following

JUDGMENTS.

AMEER ALI, J.—This is an appeal from the order of the District Judge of Shahabad rejecting an application to appoint a guardian in respect of the property of a minor, who is a member of a joint and undivided Hindu family governed by the Mitakshara law. The minor in question is the youngest of four brothers; the eldest of whom has, since the death of their father in 1886 been managing the entire joint family property. Admittedly the minor has no separate property. The Judge in the Court below has held that Act VIII of 1890 (the Guardians and Wards Act) does not contemplate or authorize the appointment of a guardian in respect of the property of such a minor. And the sole question is whether that view is correct. It is not denied that under Act XL of 1858 it has been uniformly held in this Court that no guardian could be appointed in respect of the property of a minor member of a joint Mitakshara family, owning no separate estate. The learned Judge has referred to and relied on those rulings; but it is contended on the appellant's behalf that in those cases the Courts had proceeded upon the meaning to be attached to the word "charge" in Act XL of 1858; and as that word does not occur in the present Act, the decisions under the old statute are not applicable to the matter in issue in the present appeal. In order to determine whether there is any such substantial difference between the two Acts as is contended for, it is necessary to refer only to ss. 3 and 4 of Act XL of 1858. Section 3 runs thus:—

"Every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin, or otherwise, may apply to the Civil Court for a certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate. Provided that, when the property is of small value, or for any other sufficient reason, any Court having jurisdiction may allow any relative of a minor to institute or defend a suit on his behalf, **[307]** although a certificate of administration has not been granted to such relative."

And s. 4 says:—

"Any relative or friend of a minor in respect of whose property such certificate has not been granted, or, if the property consist in whole or in part of land or any interest in land, the Collector of the district, may apply to the Civil Court to appoint a fit person to take charge of the property and person of such minor."

1891 SEP. 1. — APPELLATE CIVIL. — 19 C. 301.

In the present Act the word "care" has been substituted for the word "charge" in Act XL of 1858. Section 4, sub-s. 2 of Act VIII of 1890 runs thus:—

"'Guardian' means a person having the care of the person of a minor or of his property, or of both his person and property."

It is contended that the word "charge" means an actual and physical possession of the property, which is not implied by the word "care;" and that consequently the decisions referred to by the Judge, in which it was held that a guardian could not be appointed in respect of the property of a minor member of a joint Mitakshara family, and which proceeded entirely on the meaning of the word "charge," are inapplicable to the present Act, the substitution of the word "care" showing the intention of the Legislature that physical possession is not necessary. It seems to me, however, that there is no force in this argument. The preamble of Act XL of 1858 expressly declares that that Act was enacted "to make better provision for the *care* of the persons and property of minors not brought under the superintendence of the Court of Wards." The use of the word "charge" in the body of the Act would imply that the words "care" and "charge" are interchangeable. The charge of a property involves its "care," and its "care" implies its being under the control of the person charged with its care. The duties of the guardian under the *present* Act are substantially the same as under Act XL of 1858.

Section 27 declares:—

"A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of **[308]** this chapter, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property.

How can the guardian "deal" with the property unless it is in his actual control? But s. 41, sub-s. 3, shows clearly that the Act contemplates actual possession or control on the part of the guardian over the minor's property. It runs thus:—

"When for any cause the powers of a guardian cease, the Court may require him or, if he is dead, his representative, to deliver as it directs any property in his possession or control belonging to the ward, or any accounts in his possession or control relating to any past or present property of the ward."

No inference, therefore, can be derived from the mere use of the word "care" in the present Act that the Legislature intended to alter the law so as to affect materially the status of a joint Mitakshara family.

The only difference between the two Acts is that XL of 1858 was imperative, whilst the present enactment is permissive. Under the old Act no person was entitled to institute or defend any suit connected with the estate of a minor unless he had obtained a certificate, or unless the estate was of small value. Under the present Act the Court has the power of appointing a next friend or guardian for any suit for or against a minor, but it is not necessary that the person so appointed should be a guardian under the Act.

It was next contended that the decisions relied on by the Judge had been virtually overruled by the Privy Council in the case of *Durgapersad v. Keshopersad Singh* (1). An examination of that case, however, would show that that is not so. The only question in that case was whether the

(1) 8 C. 656=9 I.A. 27.

minors were properly represented in a suit in which they were sued along with their uncle, who was described as their guardian, and whether the decree obtained by the appellant Durgapersad was binding upon them. Their Lordships decided that they were not properly represented. No question as to whether a guardian of the property of a minor member of a joint Mitakshara family can or cannot be appointed was gone into.

[309] In *Narsingrav Ramchandra* v. *Venkaji Krishna* (1), the Bombay High Court took the same view of the decision of the Privy Council in the case of *Durgapersad.* The learned Judges there said:—"The circumstances of the case before the Judicial Committee were of a peculiar nature. A member of a joint family, who was neither the guardian of certain minors nor the manager of the family estate, had effected to deal with the interests of the minors by executing a money bond in the names of himself and them, and a decree had been obtained by the obligee against the real manager personally and as guardian of the minors in virtue of his being the co-proprietor and manager of the estate; and the object of the suit, by the quondam minors, was to prevent the obligee from executing his decree against them. Their Lordships held that 'the manager, although he may have the power to manage the estate, is not the guardian of infant co-proprietors of that estate for the purpose of binding them by a bond * * or for the purpose of defending suits in respect of money advanced with reference to the estate;' and they proceeded to consider the provisions of the Bengal Minors' Act, XL of 1858, which corresponds in most particulars with the Bombay Minors' Act, XX of 1864. No doubt it would seem, from their Lordships' remarks on the Act, that an application for the appointment of an administrator of the interest of minors in a joint family estate is contemplated, but is obvious that their Lordships were not considering the general principle of the Act with reference to the estate of an undivided Hindu family, and we think their observations must be read strictly with reference to the particular case then under consideration."

It seems to me, therefore, that it is not correct to say that the older cases, on which the Court below has relied, were either expressly or impliedly overruled by the Privy Council, or that, owing to the difference in the phraseology of the two Acts, they cannot be used for the purpose of construing the later statute.

In the view, however, I take of the status of a member of a joint and undivided Hindu family, governed by the Mitakshara [310] law, and of the provisions of Act VIII of 1890, I consider it unnecessary to discuss the rulings referred to by the Judge.

The position of a Mitakshara family, as is well known, is widely different from that of one governed by the Dayabhaga law. In the case of the latter each member owns a particular and defined share in the family property; and although, until partition, his specific share is not capable of identification, he is entitled at any time to claim even without partition the income of his own share from the managing member. A Mitakshara family stands on a different footing. As their Lordships in the Privy Council lay down in clear terms in the case of *Appovier* v. *Rama Subba Aiyan* (2):—"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family

(1) 8 B. 395. (2) 11 M. I. A. 75 (89).

1891 SEP. 1. — APPELLATE CIVIL. — 19 C. 301.

could go to the place of the receipt of rent and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided." Until partition there is absolute unity of ownership. No member can ask for his share of the rents and profits. Every member has an interest in the joint family property; he has a right to use the family property along with the others, and he has a right to demand the ascertainment and allotment of his share by partition. But until it is so ascertained, what is there in the case of a minor to appoint a guardian of? The guardian under the Act has the power of dealing with [311] property, of receiving the rents and profits, and he is accountable for the due administration of the estate of his ward. But how is that possible under the peculiar circumstances of a Mitakshara family? To introduce a guardian of a share which is unascertained and unspecified would be to disorganize the family and to bring about a separation without a partition and to alter in effect the devolution of property. This difficulty was perceived and appreciated by the learned pleader for the appellant, who argued the case with considerable ingenuity. He suggested that a guardian in such a case need not have the control of any property; he would only *watch* the interests of the minor and exercise a sort of supervision over the *kurta*. But the Act contains no warrant for the appointment of such a guardian. A guardian under the Act is one for the "care" of the minor's property for the purposes of due administration; to deal with it as the proprietor would have been able to do had he been *sui juris*, subject to certain restrictions. There is no provision in the Act for the appointment of a person "to watch" the interests of a minor. The *kurta* is, to all intents and purposes, the sole manager on behalf of the minor as well as adult members, if any. If he misuses his position, there is an easy remedy provided by law. But to introduce another person to watch the kurta's dealings, would be productive of serious evil; it would paralyse the proper management of the joint estate and tend to strife and disunion.

For these reasons I am of opinion that the order of the learned Judge is correct, and that this appeal should be dismissed with costs.

MACPHERSON, J.—I agree that the appeal must be dismissed. Act XL of 1858 was held not to apply to the guardianship of the property of a minor who was a member of an undivided family governed by the Mitakshara law. The provisions of Act VIII of 1890, which repeals Act XL of 1858 and consolidates and amends the law relating to guardian and ward, do not seem to be in any way more applicable. I do not think it was intended to alter the law in this respect, or that the Act has the effect of altering it.

C.D.P. *Appeal dismissed.*

19 C. 312 (P.C.)=69 I.A. 19=6 Sar. P.C.J. 113.

1892
FEB. 6.

PRIVY COUNCIL.

19 C. 312 (P.C.)= 19 I.A. 69= 6 Sar. P.C.J. 113.

[312] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, and Morris, Sir R. Couch and Lord Shand.

[*On appeal from the High Court at Calcutta.*]

SECRETARY OF STATE FOR INDIA IN COUNCIL (*Plaintiff*) *v.* DURBIJOY SINGH AND OTHERS (*Defendants*).
[20th November and 2nd December, 1891 and 6th February, 1892.]

Res judicata—Civil Procedure Code, 1882, *ss.* 13, 224—*Decree for land, not effectively defining the boundaries, effect of—Act XIV of* 1882, ss. 13, 224,

The proprietary possession of alluvial land was claimed upon the averment that, having been gained as an accretion to the plaintiffs' village it had been wrongly excluded from settlement with the latter, in consequence of a prior decree which, however, had not decreed the land to the defendants, as they alleged it to have done. In pursuance of that decree which was made in 1865, the land had been, according to the evidence taken by the defendants, in whose possession it was in 1868; from which date till 1883, when the present suit was brought, that land had been treated alike by the Government authorities and by the defendants, as belonging to the latter. Had the question been one of limitation, the possession of the defendants for a period of twelve years would not have been sufficient to execute this claim by the plaintiff, the Government, to recover whatever could have been shown to be its property. The question, however, was not one of limitation; and the fact of the possession having been retained for so long a period was used by the defendants, not to make a title, but to define or identify the land which the decree of 1865 had awarded to them. Although the specification of the boundaries (which had been merely by reference to the plaint which mentioned adjoining villages) had been ineffectual, the acts of the parties had been such as to fix the meaning of the terms used; and it was established by the evidence that the land now claimed was identical with that which had been made over under the decree of 1865, to which it related.

[F., 11 O.C. 30 (39); R., 13 C.L.J. 625=6 Ind. Cas. 392.]

APPEAL from a decree (13th December 1886) of the High Court reversing a decree (30th March 1885) of the Subordinate Judge of Bhagalpur.

The suit out of which this appeal arose related to 2,169 bighas claimed by the Government as belonging to Bhawanundpore, [313] a mauza which it owned in the Monghyr district. This the Government had purchased in the year 1838, at a sale for default of revenue, at a nominal price; there having been no buyers for this village, which was then in immediate danger of being submerged, as it lay near the north bank of the Ganges, with four other mauzas, Simeria, Dumri, Kamraddinpore and Ishakpore, of which last the defendants, thirty-six in number, were the owners.

Between Bhawanundpore on the south and Dumri on the north lay Kamraddinpore. On the west was land of which the designation and ownership were not determined in consequence of changes on the river's course. On the outside line of circumference of all these villages was Ishakpore, mixed up with parts of others of them. The course of the river changed as follows:—"Originally the river appears to have had its course considerably to the south of all these estates. It gradually moved to the north. It was moving northwards in 1843. It was further north still in 1846, and probably remained on the north side of

1892 FEB. 6. — PRIVY COUNCIL. — 19 C. 312 (P.C.) = 19 I.A. 69 = 6 Sar. P.C.J. 113.

the mahals for some time after that. Subsequently it began moving to the south again. In 1858 it was far more southerly than it had been. In later years it was more to the south still, and, as we understand it, is so now." Thus the judgment of the division Bench (Wilson and O'Kinealy, JJ.) dealt with the physical state of things; and intimated that Ishakpore, the defendants' village, having been formerly to the north of the river, and having been washed away before 1848, there were afterwards large alluvial formations in the place where it had been, and upon neighbouring sites, more or less near the above-named group of villages, so that to which of them the new land belonged was not readily ascertained. When the course of the river was again further south, after having been north, the newly-formed land was dealt with by the revenue officers as an accretion to the old mahal Bhawanundpore, which originally contained 1,700 bighas.

This was re-settled by the revenue authorities in 1846, but only for a few years. In the same year 1846 the thakbust survey and the geometrical survey were made. The newly-formed land, treated and re-settled as an accretion to the old mahal Bhawanundpore for ten years, amounted to about 2,169 bighas, and **[314]** was the subject of the present claim by the Government;—without reference to a much larger accretion of land on the river bank, still further south, said to amount to 13,000 bighas.

The High Court, after referring to the maps of 1843 and 1848, and the evidence, concluded that the eastern portion of the land then assessed were substantially the same lands for which the present suit was brought. They added—"From 1848 onwards the Government remained in possession of that land as their own property. The settlement of 1848, though it shows that down to that time the Government had never claimed a proprietary right over the land, was a settlement of the land, as land in which the proprietary right had vested in the Government. That went on down to year 1858, the settlement of 1848 having been a ten years' settlement. In 1858 proceedings were taken to re-settle the same land. During the progress of the re-settlement proceedings of 1858 objections were raised by various persons. The defendants as owners of Ishakpore objected that what it was proposed to settle, or rather to re-settle, as part of Bhawanundpore, was really their property, and in Ishakpore. Objections were also raised by the owners of Simeria, one of the northern properties, that the land then being settled was their land. Others raised objections. All were disallowed by the settlement officers and the higher revenue authorities. The result was that in a suit brought in 1862 the Ishakpore shareholders claimed the land as owners of that village. They were aggrieved at the settlement proceedings of 1858, giving boundaries as to what was their claim. On an appeal to the High Court the suit was remanded on the 17th December 1866 to the Court of the District Judge, who, on the 21st June 1867, gave a decree to the then plaintiffs for the land claimed by them. On the 30th June 1868 there was an application for execution of the decree. A parwana for giving possession was issued on the 7th February 1868; and it would appear that whatever possession was given by the Court officers was given on the 26th April 1868."

The Court then considered the proceedings in execution, and also the arrangements for the re-settlement of Bhawanundpore in 1868-69; and held it perfectly clear that the settlement was made on the basis of the lands, then claimed by the Ishakpore people, being Ishakpore lands, and not part of Bhawanundpore. Therefore **[315]** in the settlement of

1892 FEB. 6. — PRIVY COUNCIL. — 19 C. 312 (P.C.) = 19 I.A. 69 = 6 Sar. P.C.J. 113.

Bhawanundpore those lands were excluded. That was a settlement for two years. It was first intended that it should be for ten years. But the higher authorities limited the settlement to two years only. What happened afterwards with regard to the settlement of the lands of Bhawanundpore was unknown. A series of maps prepared at that time made it clear that the land which was then excluded from the settlement as being Ishakpore land, and not included in Bhawanundpore, was the land which formed the subject of the present suit. And the defendants continued in possession of the land down to the date when the present suit was filed, which was on the 15th February 1883. Upon this the judgment continued thus:—

"In that state of things two questions arose: first, apart from the former suit brought in 1862, has the title of the Secretary of State to these lands been established? And, secondly, if so, are the lands the subject-matter of the present suit the same lands which were recovered by the now defendants in the suit of 1862? For if they were, notwithstanding any title in the Secretary of State existing prior to that date, the suit must fail.

"On the first question the lower Court has found in favour of the Secretary of State, but without giving at any length the reasons for so finding. The only property to which the Secretary of State ever acquired any title by any of the ordinary modes of acquisition of property, such as conveyance or the like, was the original mahal Bhawanundpore, containing 1,700 bighas, and bearing originally a jama of Rs. 1,001. Now, it is perfectly clear that the lands in suit form no part of the original mahal. Again, it is clear that at the earliest date at which we have to deal with the several properties which we have mentioned, they were all lying together, occupying between them the whole of the area included within the outside limits, and that therefore no action of the river could possibly wash away any land except at the cost of some of these mauzas. No land could form except as a reformation upon some of the mauzas. The result is that, under the law as it is now settled by the highest authority, there could be really no title acquired by accretion by anybody to the land now in dispute, or to any land similarly situated. The only title, then, which the Crown can possibly have to this land is a title by **[316]** adverse possession under the Limitation Act. And the only time that they ever were in possession in any sense was from the year 1848 down to the time when they were ousted in consequence of the suit of 1862. Apparently, possession for the period from 1848 down to the time of the bringing of that suit gave the Crown a good title to this land by adverse possession under the Limitation Act. It is not necessary, however, for us to express any opinion decidedly upon that point. There may be some matters bearing upon the question which have not presented themselves to our mind. Had it been necessary, to decide that question, we should have heard Mr. Woodroffe in reply. But we think it unnecessary to do so by reason of the view that we take upon the other question in the case.

"In the Court below it has been held that these lands were not the lands recovered in the fomer suit, and that conclusion has been arrived at in this way. It is said that the parties to that suit all had before them the survey and other maps of the year 1846. They all looked to those maps in preparing their plaint and written statements, and so on. It is assumed, therefore, that that suit was based on the survey maps, that it was decided on the survey maps, and that the decree must be construed

1892 FEB. 6. — PRIVY COUNCIL. — 19 C. 312 (P.C.) = 19 I.A. 69 = 6 Sar. P.C.J. 113.

as intending to give the Ishakpore people what appeared to be Ishakpore on the survey maps. That appears to us to be too summary a mode of disposing of the effect and construction of the decree in that case. It is especially open to this objection, that the settlement of 1848, of which the settlement of 1858 was really a reproduction, was itself based on the survey maps, and it is plain that it was justified by the survey maps. Yet that suit was brought to dispute the settlement of 1858. It seems almost impossible that the suit which disputed the settlement could have been based on the very maps on which the settlement was based. We think it necessary to examine more closely than has been done by the Court below the materials before us, in order to determine what was recovered in the former suit.

"That was a suit brought to question the settlement of 1858, and it was brought because certain claims, which were made by the Ishakpore people during the settlement of 1858, had been overruled by the settlement officers. Now, let us see what was the **[317]** subject-matter of the settlement of 1858, and what were the claims disallowed by the settlement officers. There is no difficulty in ascertaining them. It is clear that the settlement of 1858 was of the same lands as those settled in 1848. And as we have already shown, the settlement of 1848 was of the land lying between Simeria on the north, Kamraddinpore on the east, Bhawanundpore on the south, and some less clearly ascertained boundary on the west."

The Court then referred to maps made during the settlement proceedings of 1858, and to the survey maps of 1846. They found that the boundaries of the land sued for in 1862 fairly corresponded with those of the land now in suit, allowance being made for changes in the course of the river. They also found that possession, whether given by the Civil Court or not, was taken by the defendants after the decree of 13th June 1865, with the deliberate acquiescence of the settlement officers. The Judges, then, having pointed out that there had been nothing adduced to show what, if not this, the land formerly decreed was, concluded that its identity was established.

The appeal of the defendants was allowed, and the plaintiff's suit and cross appeal were dismissed with costs against him in both Courts. The Government having appealed—

Mr. *W. F. Robinson*, Q. C., and Mr. *J. H. A. Branson*, for the appellant, argued that it having been found by the first Court (from which finding the High Court had not dissented), in accordance with fact, that the appellant had been in possession of the land in dispute from the year 1848 to 1862, a *prima facie* title by prescription had thereby been acquired, unless the decree of 1865 had annulled that title. This the decree would not effect, unless it was proved by satisfactory evidence that the land in dispute was identical with that to which the decree related. The contention was, upon an examination of the maps and proceedings, that this was where the respondents' case failed.

The respondents did not appear.

JUDGMENT.

Afterwards, on the 6th February 1892, their Lordships' judgment was delivered by

LORD SHAND.—The Government of India, by their plaint in this case, dated the 30th January 1883, claim possession, as their **[318]** property, of 2,169 bighas of land in the district of Monghyr, described by boundaries and delineated on a plan produced with the plaint. It is not

disputed that the defendants have been in possession of the lands since June 1870, but the plaintiffs allege that this possession was obtained improperly and without title on the defendants' part; that although it has endured for upwards of 12 years, the ordinary law of limitation will not avail the defendants in a question with the Crown; and that the lands remain the property of the Government, being part of the mauza of Bhawanundpore which admittedly belongs to them.

The defendants maintain that the lands claimed are their property and form part of their mauza of Ishakpore. They explain that many years prior to 1862 the river Ganges, which had flowed considerably to the south of Ishakpore, gradually encroached on the land to the north, and that in this way, in the course of time, it encroached on and covered or washed away the lands of Ishakpore prior to 1848; but that subsequently the river receded, taking again a southward course, and that in this way the lands of Ishakpore gradually again emerged on the north of the river, their old situation; and they maintain that their property never was lost, but that in 1862 they had right to these lands, under the Government settlements and surveys of a much earlier date. In addition, however, to this contention they maintain as a defence, which must in the first place be entertained and disposed of, that it is *res judicata* that the lands in question belong to them, for they say that it was so decided in a suit at their instance against the plaintiffs which was raised in 1862, and in which final judgment was given in their favour in 1865, followed by possession taken shortly after the decree, and at all events by possession since June 1870.

The Subordinate Judge held that the plaintiffs were entitled to succeed in their claim to the land in question, with the exception of a triangular area described in his judgment. His view was that the possession obtained by the defendants after the judgment in their favour in the suit of 1862 was not such as could be effectual to them, as the Government officials had been misled in the proceedings relied on, and that the Government settlements and surveys of earlier times sustained the conclusion that the [319] lands in 1862 were not part of Ishakpore but of Bhawanundpore. The High Court, however, reversed this decision and decreed the dismissal of the suit with costs, holding that in a question between the parties "the lands now in dispute must be found to be lands which were recovered by the now defendants against the Government in the suit brought in 1862, and that therefore the claim on behalf of the Secretary of State wholly fails."

It cannot be disputed that if the lands now in question were included in the decree granted in the suit of 1862, the judgment of the High Court must stand, and it becomes necessary therefore in the present appeal to ascertain the facts bearing on this question.

The decree, dated the 13th of June 1865, ordered "that the suit of the plaintiffs be decreed," and "that the plaintiffs be put in possession of the lands in suit." The plaint itself described the lands of Ishakpore (of which a share of 15 annns 5 dams formed the subject-matter of the suit) by general boundaries only, and not by boundaries stated with so much detail or so delineated on a detailed plan, as to admit of the lands being identified and taken possession of in the same way as if they had been demarcated or described in detail. The decree was issued on the 16th June 1865. An execution suit followed, in which an order was granted on the 7th February 1868 directing possession to be given to the decree-holders. A return to this order, dated the 6th May 1868, bears

1892 FEB. 6. PRIVY COUNCIL. 19 C. 312 (P.C.)= 19 I.A. 69= 6 Sar. P.C.J. 113.

that the peon "went to the mufassal and duly delivered possession" to the decree-holders, from whom he took a receipt acknowledging the delivery of possession; and this receipt duly filed in the proceedings of the Court, and dated the 26th April 1868, declares that possession was "awarded by beat of drum," and was obtained. On the face of these proceedings there is nothing to define the lands in suit more exactly than they are defined in the plaint. Some evidence has been adduced to show that the peon who executed the order placed *bullas* or bamboos along the boundaries of the ground to mark off the special lands of which delivery was made, but the evidence as a whole does not support this view.

It is, however, quite clear on the evidence that immediately after the delivery of possession of the 26th April, *bullas* were put into the ground to mark off the land described in the decree—it does [320] not clearly appear by whom—and the evidence shows that the possession since that time, or immediately after it, of the land enclosed by these *bullas* has been with the defendants. Their Lordships hold this to be the result of the evidence because of the following facts proved. On the 29th April 1868, Gundur Singh and others had obtained a renewed lease and settlement of lands of Bhawanundpore, and on the 13th May 1868 they complained to the settlement Officer that the Ishakpore maliks had, in execution of decrees through the nazir of the Court, taken possession of about 2,000 bighas of Bhawanundpore by posting *bullas*. The Collector deferred inquiry into the matter until the next cold season, and in the meantime other persons obtained the settlement from Government, the original settlement-holders having failed to find the requisite security. The order of the Collector on the 16th May, on the complaint made to him, was "that if it should appear on enquiry that some portions of the lands of this mahal" (*i.e.*, Bhawanundpore) "which were settled have been taken possession of by the proprietors of Ishakpore, then, after settlement of the question, the said portions of lands and jama can be deducted, and that they should at present submit a kabuliyat." The proceedings which followed are stated with considerable detail in the judgments of the Subordinate Judge and the High Court, and may be now briefly noticed. By an order proceeding from the Collectorate of zillah Monghyr two amins were sent to the spot, who, on a date prior to the 12th March 1869, measured the lands of which the owners of Ishakpore had taken possession; and again delay occurred before the Collector personally took up the subject of the disputed lands. In June 1870, however, the matter was taken up and investigated by Mr. Lyall, the Collector, who, in the rubokari of the Collectorate, dated the 16th June 1870, after narrating the proceedings which had previously taken place, states:—"This year the papers on the record of this case were sent to this Court under the rubokari of the Collector for measurement, test and enquiry into the rate, and settlement of the boundary disputes;" and he thereupon goes on to say that he went to the mahal and tested the measurement, and found it to be correct. He adds, that "after the necessary enquiries and settlement of the disputed land, a detail of which [321] is given in the English judgment, dated the 25th February 1870," he made a settlement for ten years. While, in a subsequent passage of the rubokari, which deals with the detailed measurements of lands under the heading "The determination and enquiry made by the Settlement Officer regarding the same," occurs this passage:—"Accordingly, for the reasons assigned in the judgment in English, dated the 25th February 1870, the entire quantity of land, the subject-matter of the dispute which was between (the proprietors)

1892
FEB. 6.
PRIVY COUNCIL.
19 C. 312 (P.C.) = 19 I.A. 69 = 6 Sar. P.C.J. 113.

of mauza Mahadeo Simeria, Ishakpore and Siswa, is excluded from this mahal," &c. If the judgment of the 25th Febuary 1870 had been produced, it would probably have thrown light upon the posting of the *bullas*. It is not in the record; but there is enough in the other papers produced to show that the land excluded from Bhawanundpore was that of which the lessees of the Government complained in 1868 that it had been taken by the maliks of Ishakpore. From that time till 1883, when the present suit was instituted, the lands in question have been treated alike by the Government authorities and by the defendants as part of the defendants' mauza of Ishakpore, and not as belonging to the Government mauza at Bhawanundpore.

The question remains, what is the legal effect of these proceedings extending over so long a course of time? The appellants maintain that these preceedings shall have no effect in reference to the settlement of the disputed questions of property which have arisen between the parties, either in the suit of 1862 or in the present case. Their Lordships cannot assent to this view. If the question were one of limitation, the possession of the defendants for a period of 12 years, though it would be sufficient to bar a claim by any other party, would not exclude a claim by the Crown to recover what could be shown to be Government property. The question raised, however, is not one of limitation. The possession given and taken, and retained for so long a period, and in the circumstances stated, is used by the defendants not to make a title, but to define the land which the decree in the action of 1862, followed by the execution order, gave them. The decree gave the defendants the lands they claimed in the suit, and then in the possession of the appellants. It did not contain specific boundaries; but the acts of the parties immediately after the [322] decree are very important to fix the meaning of indefinite terms in the decree. And when we find that the Ishakpore party took possession within a few days of the peon's visit, ostensibly under the nazir's authority, as the petition of Gundir Singh shows; and that the Bhawanundpore party complained to the Collector; and that the Collector supported the action of the Ishakpore party, there is very strong reason to infer that the possession taken was rightfully taken in execution of the decree. It is true the proceedings were not those of a Civil Court. Had they been so, it would not have been possible to maintain the present suit. But the proceedings were taken before the revenue authorities whose duty it was to fix the right boundaries for revenue purposes. It is not suggested that these officials acted otherwise than honestly. The argument submitted by the appellants' counsel was that the officials erred or were misled; that the Government amin too readily accepted the boundaries shown to him as covered by the decree, and that the Collector merely adopted what the amin had reported without any sufficient independent inquiry. Their Lordships can see no sufficient ground for any such inference in the documents and other evidence adduced. They will humbly advise Her Majesty that the appeal should be dismissed, and the judgment of the High Court affirmed. The appeal having been argued *ex parte*, their Lordships make no order as to costs.

Appeal dismissed.

Solicitor for the appellant: *The Solicitor, India Office.*

C. B.

1891
DEC. 18.

PRIVY COUNCIL.

19 C. 322 (P.C.) = 19 I.A. 60 = 6 Sar. P.C.J. 164.

19 C. 322 (P.C.) = 19 I. A. 60 = 6 Sar. P.C.J. 164.

PRIVY COUNCIL.

PRESENT:

Lord Morris, Lord Hannen, Sir R. Couch and Lord Shand.

[*On appeal from the High Court at Calcutta.*]

NECKRAM DOBAY (*Plaintiff*) *v.* THE BANK OF BENGAL (*Defendant*). [1st and 18th December, 1891.]

Pledge—Mutual rights of pledgor and pledgee—Pledgee's taking over the property pledged, crediting the value as if it had been sold to himself, effect of—Wrongful conversion—Absence of proof of damage to the pledgor—Account—Damage to pledgor, proof of.

Where a pledgee, having power to sell for default, takes over, as if upon a sale to himself, the property pledged, without the authority of the [323] pledgor, but crediting its value in account with him, this act, though an unauthorized conversion, does not put an end to the contract of pledge, so as to entitle the pledgor to have the property back without payment.

Government paper having been deposited by a borrower from a Bank as security, part was legally sold upon his failing to comply with the terms between them. As to the rest, the borrower, afterwards on redeeming a part, was led to believe that the paper returned was the whole of that which remained unsold in the Bank's possession. The Bank, however, had taken over part, as if sold to itself, crediting the price.

Held, that the Bank could not, after this, treat the securities as still subject to the pledge; although this transaction had not put an end to the contract of pledge, so as to entitle the pledgor to have back the paper without payment of the loan and interest. The Bank was no longer a pledgee of this paper, but having converted it to the Bank's own use, might have been liable in damages for the value, including the interest thereon. However, had this liability been enforced, the pledgor could not have had credit in the loan account for the proceeds of the paper. The cessation of interest on the loan was more to his advantage than to receive the interest on the paper, the market value of which was also falling, so that the longer the account had been kept open, the greater the balance would have been against the pledgor. It followed that there was no evidence of damage to him resulting from the conversion.

The first Court decreed an account, wrongly deciding that interest could not run upon the loan which the amount of the paper transferred by the Bank to itself purported to wipe off, from the date of the transfer. On this point, as well as because there was no proof of damage to the pledgor, the High Court, reversing that decree, had rightly dismissed the pledgor's suit.

APPEAL from a decree (7th June 1888) of the High Court in its appellate jurisdiction reversing a decree (20th January 1888) of the Court in its ordinary original civil jurisdiction.

The question raised by the plaintiff, a dealer in Government paper, related to the defendant, the Bank of Bengal, having disposed of securities deposited with it by him to secure loans taken in 1883. His case now was that the Bank had converted part of the pledged securities to its own use, and had not duly accounted to him, whereby loss had resulted. But his claim in his plaint (24th January 1887) was that the defendant agreed to advance money to him at one per cent. below the Bank rate on the security of Government paper, not calling upon him for prompt and heavy margins, and nevertheless charged interest [324] at a higher rate and sold off his securities without due notice, and notwithstanding a tender of seven lakhs and an offer of four lakhs more made by him. He complained that the accounts, which he appended, were incorrect, he being debited with interest at the Bank rate, whereby he had sustained damages to Rs. 1,30,000. He claimed damages for the Bank's having sold the paper

1891
DEC. 18.

PRIVY COUNCIL.

19 C. 322 (P.C.) = 19 I.A. 60 = 6 Sar. P.C.J. 164.

without due notice, payment of what might be found due on the accounts, and further relief.

The Bank by its written statement denied the making of the agreement alleged in the plaint, and averred that the reduced rate of interest mentioned by the plaintiff ran only up to 3rd October 1883, and that on that date the plaintiff received due notice that he would have thenceforward to pay interest at the rate of 8 per cent., and that in January the rate of interest was further raised to 9 per cent.; and that according to the usage of the Bank changes also were made as to the amount of margin required on loans, of all which the plaintiff had due notice, and that on such a footing there were three successive renewals of the loans on the 21st November and 14th and 21st December 1883, when the accounts were closed and fresh promissory notes given by the plaintiff. That the plaintiff on the 2nd January 1884 received notice in writing that unless he adjusted his margin and interest, which had fallen into arrear, the Bank would proceed to sell his securities. That the plaintiff then made the adjustment required, but that the Bank margin having been subsequently again advanced, and the plaintiff after due notice not having fully adjusted it, the Bank on the 12th January 1884 gave him notice that if the margin were not adjusted on the 14th, they would proceed to sell his securities, and that the plaintiff having failed so to do, the Bank commenced selling those securities on the 15th, and from that date to the 29th January sold Government notes of the nominal value of Rs. 13,80,500, and that the plaintiff redeemed the then existing balance of Rs. 6,96,500, after which there was a cash balance of Rs. 326-7-4 due to the plaintiff, which he had declined to take and which would be brought into Court. The Bank also denied the alleged tender and offer.

On the 24th November 1887 interrogatories were exhibited to the Bank, among which it was asked who were the purchasers of [325] the securities, at what rate, and whether the Bank itself bought any, and if any, what portion of them. The Bank answered that out of the Government notes for a total of Rs. 13,80,500, sold from the 14th to the 29th January 1884, 4 lakhs in all—*viz.*, 2 lakhs on the 15th, 1 lakh on the 23rd, and 1 lakh on the 29th, had been purchased on behalf of the defendant Bank itself, through a firm of brokers, Messrs. Skinner & Co., and notes for Rs. 55,000 were purchased on the 15th and 29th of January for the Depositors' Department of the Bank.

Interrogatories were also filed by the Bank, one of which asked how the estimate of the plaintiff's damages at Rs. 1,30,000 had been arrived at. This was disallowed by a Judge of the High Court (Macpherson, J.) in the order reported in *Neckram Dobay* v. *The Bank of Bengal* (1).

On the 21st December 1887, at the first hearing, the following issues were fixed, no amendment having been made in reference to these alleged purchases by the Bank itself:—

1. Did the Bank agree to charge on the loans 1 per cent. less than the Bank rate of interest, and not to call for prompt or heavy margins? 2. Was the Bank bound to accept the tender of the 19th of January mentioned in the 33rd and following paragraphs of its written statement? 3. Did the plaintiff make a tender of 4 lakhs of rupees on or about the 23rd of January, and was the Bank bound to accept such tender? 4. Is the plaintiff entitled to an account against the defendant, and if so, on what footing is such account to be taken? 5. Is the plaintiff liable for any and

(1) 14 C. 703.

1891 DEC. 18.

PRIVY COUNCIL.

19 C. 322 (P.C.) = 19 I.A. 60 = 6 Sar. P.C.J. 164.

what interest, upon any and what portion of the loans? 6. Did the Bank wrongfully convert any, and what, portion of the securities deposited with them by the plaintiff? and to what, if any, damages is he entitled in respect of such conversion?

The Judge (TREVELYAN, J.) found, upon the 1st and 5th issues, that the alleged agreement was not proved; and that the Bank was entitled, after notice, to raise the rate of interest, as it had raised it after the 2nd October 1883. On the 2nd and 3rd issues, he found that the Bank was not obliged to accept the tender alleged or the offer of the four lakhs, if made. On the 4th issue he held [326] that the plaintiff was entitled to an account from the Bank of the securities pledged, and parted with; and more especially so, where, as here, there had been "a sham sale to the pledgee himself;" and the opinion was expressed that the attempted purchase by the Bank of the 4 lakhs of paper transferred to itself was absolutely null and void.

As the result the Judge held (and this was what the appellant now sought to have restored) that the plaintiff was entitled to require "the "Bank to replace the paper which it had improperly made away with, "and in the accounts between him and the Bank to treat it as worth "what it had been proved to be worth at the date of plaint filed, or at the "date of hearing, whichever he preferred," and to recover the interest which the 4 lakhs had produced up to the date of final decree; and that the Bank would, in taking the account, be entitled to credit for the amount of the loan but to no interest after the time when the Bank closed the loan, *i. e.*, the 30th January 1884.

In addition to those 4 lakhs the Judge held that as to the two further amounts of Rs. 5,000 and Rs. 50,000, sold to the Depositors' Department of the Bank of Bengal on the 15th and 29th January 1884, the same rule should be applied, but by the decree a further enquiry as to those amounts was directed, and that part of the plaintiff's claim did not appear to have been insisted on in the appellate Court.

The defendant appealed, and the plaintiff filed cross-objections. The appellate Court (PETHERAM, C.J., and TOTTENHAM and PIGOT, JJ.) agreed with the Court below as to the failure of the plaintiff to prove the alleged agreement set up, and any breach of it. The result was that the cross-objections of the plaintiff were rejected, and also that the defendant's appeal was allowed, and the suit dismissed with costs throughout. The judgment of the CHIEF JUSTICE and TOTTENHAM, J., after stating the facts at length, proceeded as follows:—"The real question between the parties "was, whether the plaintiff was entitled, and if to any, to what relief in "respect of the defendants' dealings with the 4 lakhs taken over by them- "selves on the 15th, 23rd, and 29th of January.

"We have caused evidence to be taken before us as to the dealings of "the defendants with the plaintiff's securities, including [327] these 4 lakhs, "and we find as a fact that the annexed account is a correct statement of "such dealings, and shows correctly the prices at which the 4 lakhs were "taken over by the defendants.

"It has further been proved before us, and we find as a fact, that the "whole of the 4 lakhs of securities taken over by the defendants were dis- "posed of by them between January 17th and February 8th, either by "sale or by exchange for other securities, and that the amounts they rea- "lized were in each and every instance less than the prices for which "credit has been given for them to the plaintiff in the defendant's books

"on the dates at which they appear as sold, but were in fact taken over "by the defendants themselves. 1891 DEC. 18.

"Upon this state of facts the question arises, whether assuming that "the securities remained in the hands of the defendants after they had "taken them over in the books, subject to the same rights as before, the "disposal of them some few days after by the defendants by sale and "exchange, was a conversion of them for which they are liable to pay "damages, or whether they were in the position of trustees for their "debtor, and so are liable to replace the fund. In our opinion no such "relation existed with reference to the securities. No doubt, when a cre-"ditor has sold the pledge and paid himself out of the proceeds, he is a "trustee of the balance, if any, which remains in his hands. But we are "not aware that it has ever been held that a pledgee of chattels with a "right to sell on due notice is a trustee for the pledgor of the security, and "we think that the special property, which he undoubtedly has in the "security, is inconsistent with his position being that of a trustee.

PRIVY COUNCIL.

19 C. 322 (P.C.)= 19 I.A. 60= 6 Sar. P.C.J. 164.

"In our opinion the position of the defendants, both before and after "the taking over in their books, was that of pledgee of chattels. Granting, "that when the Bank took over the 4 lakhs, that transaction did not "amount to a sale at all, but that the 4 lakhs still remained as a pledge "in their hands, and their subsequently selling them without further "notice and without further demand was a wrongful conversion of the "securities, for which they are liable to pay damages; still, the only ques-"tion is, what damages has the plaintiff sustained by such wrongful acts "of the defendants, assuming them to be wrongful.

[328] "From this point of view the present case is not distinguish-"able from that of *Johnson* v. *Stear* (1) and many well-known cases of the "same kind, in which it has been held that where the pledgee of chattels "with a power of sale which can only be exercised under certain conditions "sells the chattels without performing the condition, he is guilty of "wrongful conversion, and that the measure of damages is the value of the "chattel at the time of conversion, less the amount for which it was "pledged.

"In the present case the defendants have credited the plaintiff "with the market value of the securities at the time when they were taken "over in their books, and have ceased to charge him with interest on the "sums credited from those dates. Between the time when they were taken "over, and the time when they were disposed of, the market had fallen, "so that at the time of conversion the value was less than that for which "the plaintiff has had credit, and the damage is consequently nominal. "The defendants have paid into Court in this action the sum of "Rs. 326-7-4, which is the amount due to the plaintiff on the balance of "account, giving him credit for the 4 lakhs at their value at the dates "when they were taken over. When they were converted their value "was less, and we find as a fact that the sum paid into Court is enough "to satisfy the entire claim of the plaintiff against the defendants in res-"pect of the causes of action for which this suit is brought, either in its "original or its present form, and accordingly we dismiss the plaintiff's "cross-objections, decree the defendant's appeal, and dismiss the plaint-"iff's suit with all costs in this Court and in the Court below."

PIGOT, J., concurred and added:—

(1) 15 C. B. (N. S.) 330.

1891 DEC. 18. — PRIVY COUNCIL. — 19 C. 322 (P.C.)= 19 I.A. 60= 6 Sar. P.C.J. 164.

"I am of the same opinion, and it may be well to add that the authorities cited from Story on Bailments, chap. 5, s. 319 (8th ed., p. 270), and the passage referred to by us in Pothier's Pandectes, Vol. 7, p. 452—3 B. xx Tit. v. art. II, s. VII, seem to show that, in principle, the pledgee of chattels, selling to a nominee for himself, does not acquire any new character in respect of the pledge sold. He still holds it as a pledgee; entitled, **[329]** however, to interest if interest runs upon the loan up to the time when the pledge is re-demanded, if it be re-demanded from him."

Mr. *R. B. Finlay*, Q.C., and Mr. *J. H. A. Branson*, for the appellant, argued that the appellant was entitled to the decree which he had obtained in the first Court. Both Courts had dealt with the transfer of the paper by the Bank to itself as void and of no effect; but neither Court had adverted to the fact that the Bank at first only informed the plaintiff of the sale of his paper as if it had been sold to third parties, whereas the Bank had already taken over 4 lakhs and 55,000 of the paper. A reply, to the plaintiff's demand to redeem, that sales to the Bank itself had taken place would have been no answer. The owner of the pledged property became, when the so-called sales took place, entitled to immediate possession; there having been a practical refusal to regard his right to redeem. This amounted to a conversion within that term as used in the common law form of action of trover. The action of detinue, however, better showed how the parties stood in relation to one another. Reference was made to *Johnson* v. *Stear* (1), where there was a wrongful, because premature, sale of pledged property; also to *Jones* v. *Dowle* (2), where detinue was not met by the answer that a sale had taken place; and to *Wilkinson* v. *Verity* (3), *Lord Midleton* v. *Eliot* (4), *Donald* v. *Suckling* (5), *Halliday* v. *Holgate* (6), and *James* v. *Rumsey* (7). The plaintiff was entitled to a declaration that what purported to have been sales of the paper to the Bank itself were not sales; also to an account against the Bank as trustees of his securities. He was entitled to redeem according to the terms of his pledge; and the judgment of the first Court was correct in this, that if the relation of creditor and debtor was ended by the act of the defendant, interest could no longer run. There had been an infringement of the plaintiff's right by the act of the Bank; he was entitled to a decree: and in no view of the case ought costs to have been given against him.

[330] Mr. *J. Rigby*, Q C., and Mr. *R. V. Doyne*, for the respondent.—The charge that the Bank, not having the power to put an end to the contract, had attempted so to do, was met by the fact that the plaintiff, no less than the Bank, had contributed to cause the closing of the accounts. Moreover, the account when decreed would show nothing to be due from the Bank, even if taken upon the basis that the securities ought not to have been disposed of in the manner that they had been. The price at which the Bank took over the paper was higher than that at which it afterwards sold the paper in the market, and therefore, even if wrongful conversion had taken place, the proof of damage to the plaintiff was altogether wanting. The measure of damages being the value of the paper at the date of the conversion, and this having been no more than the sum for which the plaintiff had received credit in the accounts rendered, there had been no loss to him. On the contrary, there had been a saving to the plaintiff as regarded the interest that he would have had to pay if the paper had not been disposed of. If the account was to be re-opened,

(1) 15 C.B. (N.S.) 330. (2) 9 M. & W. 19. (3) L.R. 6 C.P. 206.
(4) 15 Sim. 531. (5) L.R. 1 Q.B. 585. (6) L.R. 3 Ex. 299.
(7) L.R. 11 Ch. Div. 398.

1891 DEC. 18. — PRIVY COUNCIL. — 19 C. 322 (P.C.) = 19 I.A. 60 = 6 Sar. P.C.J. 164.

as, according to the first Court's decision, it ought to be, the account should be taken on terms that the appellant should pay interest at the contract rate down to the date of the first account. He could not have the advantage of the interest account having been closed as it had been, and at the same time require the Court to deal with the transaction which brought it to an end as a ground of claim for damages.

Mr. *R. B. Finlay*, Q.C., replied.

JUDGMENT.

Afterwards, on the 18th December, their Lordships' judgment was delivered by—

SIR RICHARD COUCH.—The action which is the subject of this appeal was brought in the High Court at Calcutta by the plaintiff, a dealer in Government securities, against the Bank of Bengal, which carries on business in Calcutta. The plaint alleged that on or about the 19th July 1883 the plaintiff entered into an arrangement with the Bank as to his future dealings, it being agreed that in all future loans taken by him the Bank should charge one per cent. less than the usual Bank rate of interest, and should not call for prompt or heavy margins in respect of Government promissory [331] notes deposited for the purpose of securing loans; that under this agreement the plaintiff took extensive loans from the Bank, giving promissory notes, and depositing Government paper as security; that, notwithstanding the agreement, the Bank called for prompt and heavy margins, and between the 3rd October 1883 and the 31st January 1884, notwithstanding a tender of 7 lakhs of rupees, and an offer of 4 lakhs more, wrongfully and without due and reasonable notice to the plaintiff, sold off at a great loss to him all the Government promissory notes in their possession deposited by the plaintiff as security for the loans, and from the proceeds paid off the loans. The questions raised at the trial were, first, what were the terms of the arrangement, and, secondly, had they been broken by the Bank?

The following are the facts proved. The Bank, through Mr. Gordon, its Chief Accountant and Deputy Secretary in Calcutta, agreed to grant the plaintiff loans at the special loan rate on their usual conditions of business, one of which was "The Bank reserves to itself the option of selling "securities that have been deposited against loans at any time after the "issue of notice of demand," and another, "Interest on securities in depo-"sit against loans or overdrawn accounts will be realized by the Bank "on receipt of written instruction from the borrower." Immediately upon the making of the agreement the plaintiff began to take loans to large amounts from the Bank upon the security of the deposit of Government notes. Some of these loans were consolidated and renewed, the last renewal being under the date of the 21st December 1883.

At that time the market for these securities was falling, and on the 28th December 1883 Mr. Gordon wrote to the plaintiff, requesting him that he would at once either pay off his demand loan or deposit the additional margin of Rs. 24,300, failing which he said the securities deposited against the loans would be sold. Nothing was done on this letter. On the 2nd January 1884 Mr. Gordon again wrote to the plaintiff that unless he made satisfactory arrangements to adjust the margin and interest due on his loan account by noon the next day, the Bank would proceed at once to sell his Government securities. On the 12th January Mr. Gordon again wrote to the plaintiff that unless the margin [332] on the loan account and interest to the 31st December 1883 was

1891 DEC. 18. — PRIVY COUNCIL. — 19 C. 322 (P.C.) = 19 I.A. 60 = 6 Sar. P.C.J. 164.

adjusted on the 14th January, the Bank would at once proceed to sell his securities as advised in the letter of the 2nd. Nothing having been done by the plaintiff, the Bank on the 15th January commenced to sell his securities, crediting the proceeds to the plaintiff's account, and informing him by letter that they had done so. The sales continued during the month of January. On the 30th January the plaintiff paid to the Bank the sum of Rs. 6,74,467, and received from it Government notes of the nominal value of Rs. 7,17,500 which the Bank represented as being, and the plaintiff believed to be, the whole of his securities remaining unsold in the Bank's hands. On the 31st January Mr. Gordon sent the plaintiff an account, showing a balance in the plaintiff's favour of Rs. 326-7-4, which the plaintiff refused to accept, and the Bank paid it into Court.

Previous to the trial it appeared, by the answer of the Bank to interrogatories, that of the securities stated in the account to have been sold, Rs. 4,55,000 had not been in fact sold, but were taken over by the Bank in their books at the market price of the day, Rs. 4,00,000 to the Bank itself and Rs. 55,000 to the Depositors' Department. It appeared at the trial that the Bank had re-sold nearly all, if not all, of these Government notes, and when the case came before the High Court on appeal, further evidence was taken before it as to the dealings of the Bank with the plaintiff's securities. It was then proved that the whole of the securities taken over by the Bank were disposed of by them between the 17th January and the 8th February 1884, either by sale or in exchange for other securities, and that the amounts realized were in every instance less than the price for which credit had been given for them to the plaintiff.

The learned Judge who tried the suit made a decree dismissing the claims of the plaintiff so far as they were included in the plaint, but declaring that the sales by the Bank to itself were null and void against the plaintiff, and that the plaintiff was entitled to recover the value of the Government promissory notes so sold at the market rate on the date when the suit was instituted, or, at the option of the plaintiff, on the date of the hearing, with interest at 4 per cent. on their par value from the [333] respective dates of the sales, and that the Bank was entitled to credit for the advances to the plaintiff, with interest at the rates claimed by the Bank up to the dates when the Bank closed the several loans. In his judgment he said interest could not run as to the sum of money which the amount of the pretended sales purported to wipe off after the dates of them, and an account was ordered to be taken on that footing. The Bank appealed, and the High Court in its appellate jurisdiction allowed the appeal and dismissed the suit.

Their Lordships are of opinion that this decision should be affirmed. The sales by the Bank to itself, though unauthorized, did not put an end to the contract of pledge, so as to entitle the plaintiff to have back the Government notes, without payment of the loans for which they were security, and until the delivery of the account on the 31st January, the loans being unpaid after demand, the Bank was entitled to sell the notes and credit the plaintiff with the proceeds. The plaintiff did not sustain any damage by the sale to the Bank of the notes which were re-sold by it before the 31st January.

As to the notes which were re-sold by the Bank after the 30th January, the position of the Bank was different. It was represented to the plaintiff by the Bank, and believed by him, that the Government notes which he received on the 30th January were the whole of his

securities remaining unsold in the hands of the Bank. He paid the Rs. 6,74,467 in order, as he believed, to redeem the whole of his securities. It would be inequitable to allow the Bank, after this transaction, to treat the securities, which it had sold to itself, and then had in its hands, as still subject to the pledge. In their Lordships' opinion, the Bank should be held to be no longer a pledgee of these notes, and to have converted them to its own use, and to be liable in damages for the value of them, including the interest thereon. But if the Bank is so liable, the plaintiff cannot have credit in the loan account for the proceeds of these notes. He cannot both affirm and disaffirm the sales to the Bank. It appears from the account of the dealings of the Bank with the plaintiff's securities, referred to in the judgment on appeal, that the rate of interest on the loan from the 1st to the 5th January 1884 was 7 per cent., from the **[334]** 5th to the 20th 8 per cent., and from the 20th to the 30th 9 per cent. The rate of interest on the Government notes was 4 per cent., and it is obvious that the longer the account was kept open, the more the balance would be against the plaintiff. If the plaintiff has sustained any special damage by the conduct of the Bank, the evidence of it is not before this Board. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal. The appellant will pay the costs of it.

1891 DEC. 18. — PRIVY COUNCIL. — 19 C. 322 (P.C.) = 19 I.A. 60 = 6 Sar. P.C.J. 164.

Solicitors for the appellant: Messrs. *Barrow* and *Rogers*.

Solicitors for the respondent: Messrs. *Morgan*, *Price* and *Mewburn*.

C. D.

---

19 C. 334.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

IN THE MATTER OF ROMON KISSEN SETT AND OTHERS
v. HURROLOLL SETT AND OTHERS.
[4th April, 1892.]

Arbitration—Submission to arbitration by guardian on behalf of minor—Civil Procedure Code—Act XIV of 1882, s. 525*—Infant—Award—Practice.*

Case in which a natural guardian had on behalf of her minor sons submitted certain matters to arbitration, and in which the Court referred the case to the Registrar to enquire and report whether the submission and the award thereon were for the benefit of the minors.

[F., 14 C.L.J. 198 (202); R., 7 Ind. Cas. 31 (33).]

THIS was an application on notice calling upon certain persons to show cause, under s. 525 of the Civil Procedure Code, why an award should not be filed.

All the parties concerned in the application were descendants of one Radha Churn Bysack, who died possessed of considerable property. Disputes having arisen between such descendants as to the division of the property, they on the 20th July 1889 entered into an agreement amongst themselves, by virtue of which two arbitrators were appointed to decide all matters in dispute, and to divide and allot the immoveable property of the deceased, Radha Churn Bysack. At the date of the agreement two of the persons **[335]** entitled to share in such property were minors, and the agreement above referred to was signed on their behalf by their mother

1892 APRIL 4. — ORIGINAL CIVIL. — 19 C. 334.

and natural guardian. On the 11th April 1890, after the execution of the agreement, another of the persons who had signed it and who was entitled to share in such properties, died, leaving three minor sons and a widow.

On the 16th April 1891 the arbitrators, in pursuance of the agreement, made a partition and division of the immoveable property the subject of the agreement, and on that date published their award.

An application was then made to the Court praying that the award might be filed: the minors in such application being represented by their respective mothers, who, on the application being numbered as a suit, had been appointed their guardians *ad litem*.

Mr. *R. Mittra*, for the applicants.—As to whether a natural guardian can submit to an arbitration on behalf of an infant, it is said in Russell on Arbitrators, 6th ed., p. 18, that an infant may execute or avoid an award, as he may most of his other contracts, and the case of *Harvey* v. *Ashley* (1) is cited as an authority on the point. In *Ramnarain Poramanick* v. *Sreemutty Dossee* (2) the award come to on submission of the minor's guardian was set aside, *so far as it was found to be injurious to the minor.* But in *Temmakal* v. *Subbammal* (3) it was held that all acts of a guardian of a Hindu infant, which are such as the infant, might, if of age, reasonably and prudently do himself, must be upheld when done for him by his guardian, and in that case a reference was made to a *panchayat* by the guardian.

No one appeared to oppose the application.

ORDER.

TREVELYAN, J.—The cases appear to show that a minor can set aside an award on coming of age, and that a natural guardian has power to submit to arbitration. I think the best course to pursue is to make a reference to the Registrar to enquire and report whether the submission to arbitration, and the award is, or is not for the benefit of the infants.

Attorney for applicants: Mr. *E. J. Fink.*

T. A. P.

---

19 C. 336.

[336] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

KANCHAN MODI AND OTHERS (*Plaintiffs*) *v.* BAIJ NATH SINGH AND OTHERS (*Defendants*).* [11th March, 1892.]

Certificate to collect debts—Act VII of 1889, *s.* 4—*Mortgage decree—Suit by assignee of mortgagee for sale.*

The assignee of a property mortgaged is not a debtor within the meaning of s. 4, Act VII of 1889; and a mortgagee praying for the sale of the property, and asking for no relief personally against the mortgagor, is not bound to take out a certificate under that Act before he can obtain a decree.

---

* Appeal from Order No. 191 of 1891, against the order of B. G. Geidt, Esq., Additional District Judge of Bhagalpur, dated the 23rd of April 1891, reversing the order of Babu Lal Gopal Sen, Subordinate Judge of Bhagalpur, dated the 23rd of May 1890.

(1) 3 Atk. 607. (2) 1 W. R. 281. (3) 2 M.H.C. 47.

1892 MARCH 11.

APPELLATE CIVIL.

19 C. 336.

Roghu Nath Shaha v. *Poresh Nath Pundari* (1) applied in principle.
Janaki Ballav Sen v. *Hafiz Mahomed Ali Khan* (2) distinguished.

[Diss., 16 A. 259 = 14 A.W.N. 74; F., 28 B. 630 (632); 26 C. 839 = 4 C.W.N. 558; Appr., 22 C. 143 (150); R., 7 C.L.J. 658 = 12 C.W.N. 145.]

THIS was a suit brought on the 29th April 1889 by the members of a joint Mitakshara family to recover Rs. 1,000 secured on a mortgage bond executed in favour of one Labo Modi, the plaintiffs being the sons of Labo and his cousin. It was alleged that the cousin of Labo and Labo himself were members of a joint Hindu family governed by the Mitakshara law, and that subsequent to the death of Labo the family continued to be joint. The mortgagors were made parties to the suit, but did not appear or contest it, the only relief asked for being the sale of the mortgaged premises. The remaining defendants, who were the assignees of the mortgaged premises amongst other matters contended, relying on s. 4 of Act VII of 1889, that in the absence of a certificate no decree could be obtained by the plaintiffs.

The Subordinate Judge held that the plaintiffs and Labo were members of a joint family, and as such members they were before Labo's death possessed of an interest in the bond executed in favour of Labo, and that therefore a certificate was unnecessary. **[337]** He further held that it was doubtful whether Act VII of 1889 applied to suits and proceedings pending at the time the Act came into force; he therefore gave the plaintiffs a decree.

On appeal by the assignees of the mortgaged premises the Additional District Judge considered that the Legislature had not intended to exempt the members of a joint family from taking out certificates, and that as in his opinion the plaintiffs claimed as being entitled to the effects of Labo, and had not taken out a certificate, he allowed the appeal, and remanded the case to give the plaintiffs an opportunity of taking out a certificate, and directed that the case should be disposed of by the Sub-Judge after that opportunity had been given.

The plaintiffs appealed to the High Court.

Babu *Mohini Mohun Roy* and Babu *Monmotha Nath Mitter*, for the appellants.

Mr. *Sandel* and Babu *Surendra Nath Roy*, for the respondents.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This is an appeal against an order of remand passed by the Additional District Judge of Bhagalpur.

The suit was to enforce a mortgage security executed in favour of Labo Modi on the 10th June 1881; and it was brought by the cousin of Labo Modi and his sons, it being alleged in the plaint that he and the plaintiff No. 1, that is to say, the cousin, were members of a joint undivided Hindu family governed by the Mitakshara law, and that since the death of Labo Modi the plaintiffs have continued to be members of the joint family.

We observe, that although the mortgagors were parties to his suit, no personal decree was asked for against them. The relief that was asked

(1) 15 C. 54. (2) 13 C. 47.

1892 MARCH 11. — APPELLATE CIVIL. — 19 C. 336.

for was that the property hypothecated in the mortgage bond might be sold for the satisfaction of the plaintiffs' claim.

A decree was passed in the plaintiffs' favour by the Court of first instance; the Subordinate Judge, before whom an objection was raised by some of the defendants that by reason of s. 4 of Act VII of 1889, the Succession Certificate Act, no decree could be passed against the defendants unless a certificate as provided by that section was produced, observed as follows: "This suit is based on a mortgage bond, dated the 27th April 1875, [338] and having been instituted after more than six years had elapsed after the money became payable, plaintiffs cannot have any decree against the persons or other property of the executants, and plaintiffs have also sought to recover their money by sale of the mortgaged property (immoveable)." In this view of the matter he negatived the objection of the defendants; and the decree that was pronounced by him was as follows :—"The suit be decreed with costs and interest at 6 per cent. per annum from this day till realized by sale of the property pledged in the bond in suit. The property mortgaged will be liable to be sold unless the decree be otherwise satisfied within three months from this day."

Against this decree the mortgagors did not prefer any appeal; and the only appeal preferred was by the assignees of the mortgaged premises, who were also defendants in the suit. Upon their appeal the learned Additional District Judge was of opinion that a certificate under s. 4 of the Succession Act was necessary before a decree could be pronounced in favour of the plaintiffs ; and being of that opinion he reversed the judgment and decree of the Court of first instance, and remanded the case to that Court in order to give the plaintiffs an opportunity to take out the requisite certificate.

It appears to us, in the first place, that this remand ought not to have been made, because the case had not been decided by the Court of first instance upon any preliminary point. Section 562 of the Code of Civil Procedure provides :—" If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point, and the decree upon such preliminary point is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case, together with a copy of the order in appeal, to the Court against whose decree the appeal is made, with directions to re-admit the suit under its original number in the register, and proceed to determine the suit on the merits." Now, there can be no doubt that this order of remand was made by the District Judge under s. 562, because he directs that the case be restored to the file of the Subordinate Judge in order to give the plaintiffs an opportunity to take out the requisite certificate, and that it be disposed of after such opportunity has been given to the plaintiffs. It seems to be clear that s. 562 has no application ; and if s. 562 does not apply, there is, so far as we can [339] see, no other section under which the order of remand could have been made. We think that the Judge, if he thought that the production of a certificate under s. 4 of the Certificate Act was essentially necessary, should have retained the case on his own file, and required the plaintiffs to produce a certificate within a given time.

However that may be, we are of opinion that the Judge is in error in holding that s. 4 of the Succession Certificate Act has any application to the facts of the present case. As already mentioned, no personal decree was asked for by the plaintiffs against the debtors ; and the only parties before the appellate Court being the plaintiffs on the one hand, and the assignees of the mortgaged premises on the other hand, no question

whatever could arise before the District Judge in terms of s. 4 of the Succession Certificate Act as to any decree being passed against the debtors of the deceased person for payment of the debt to the persons claiming to be entitled to the effects of the deceased person. The assignees of the mortgaged premises could not in any sense of the word be regarded as debtors. The plaintiffs have an equitable claim against them by reason of their being in possession of the property mortgaged; and upon that equitable right the plaintiffs brought their suit against them to sell the mortgaged property and to realize the money due to them.

This point was considered in the case of *Roghu Nath Shaha* v. *Poresh Nath Pundari* (1), decided by a Division Bench of this Court (Wilson and O'Kinealy, JJ.), and the learned Judges distinctly held that in a case like this no certificate was required under the provisions of Act XXVII of 1860, s. 2. The wording of that section is very similar to that of s. 4 of the Succession Certificate Act, so far as the particular matter before us is concerned.

A case, however, has been quoted before us by one of the learned pleaders for the respondents, *Janaki Ballav Sen* v. *Hafiz Mahomed Ali Khan* (2). But the distinction between that case and a case like the one before us has been pointed out by the learned Judges who decided the case of *Roghu Nath Shaha* v. *Poresh Nath Pundari* (1) and that distinction lies in this: that in the case of *Janaki Ballav* [340] *Sen* v. *Hafiz Mahomed Ali Khan* (2) a personal decree was asked for, but here no personal decree was asked for and no personal decree was given by the Court of first instance. Section 4 says:—"No Court shall pass a decree against a debtor for payment of his debt," and so on. A mortgagee might ask for a decree against the person of the debtor; but the Court is not bound to make a personal decree: it might, if the facts permit, make a decree only against the property mortgaged by the defendant; and in the circumstances of the present case it was quite open to the Court of first instance—in fact, it was its duty—to refrain from making a personal decree and to pass a decree charging the property in the hands of the defendants, second party, for satisfaction of the claim of the plaintiffs. The relief that the plaintiffs asked for in this suit was not for recovery of the debt, but, as observed by Sir Barnes Peacock in the Full Bench decision in *Surwan Hossein* v. *Shahazdah Golam Mahomed* (3) it was a suit for the recovery of an interest in immoveable property. The question that the learned Judges had to decide in that case was no doubt a different question; it was one of limitation, but we take it, as it has always been understood in this Court, that a suit to enforce a charge against immoveable property is a suit for the recovery of an interest in immoveable property; and if that be the correct view to take, it seems to be obvious that the plaintiffs were entitled, notwithstanding the absence of a certificate under the Succession Certificate Act, to sustain the decree that had been pronounced in their favour by the Court of first instance, that being a decree charging the immoveable property in the hands of the second party defendants.

In the view we have just expressed it is unnecessary to decide the other questions which have been raised in this appeal; one of them being whether Labo Modi and the plaintiffs having been members of a joint Mitakshara family, any certificate as provided by s. 4 of the Certificate Act was necessary.

---

(1) 15 C. 54. (2) 13 C. 47. (3) 9 W.R. 170.

1892
MARCH 11.
APPELLATE CIVIL.
19 C. 336.

The result is that the decree of the lower appellate Court must be set aside, and the case remanded to that Court for trial of the other issues in the case.

Costs will abide the result.

T. A. P. *Case remanded.*

---

19 C. 341.

[341] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

JAGAN NATH GORAI AND OTHERS (*Plaintiffs*) *v.* WATSON AND COMPANY (*Defendants*).* [22nd January, 1892.]

Sale in execution of decree—Fraud—Suit to set aside sale on ground of fraud—Civil Procedure Code (Act XIV of 1882), *ss.* 244 *and* 311.

A and *B* were two tenants whose names were registered in the landlord's *sherista*. *B* died, leaving *C*, *D* and *E*, his sons and heirs, but no application for mutation of names in the *sherista* was made. Disputes as to rent having arisen, *A* and *C* proceeded to make deposits in Court in respect thereof, and the landlord instituted a suit against *A*, joining *C* as a party defendant to recover the amount of rent he claimed, and obtained an *ex parte* decree which *inter alia*, directed that it should be satisfied out of the amount so deposited in Court. That amount according to the landlord's case, proving insufficient to satisfy his demands, he proceeded to execute the decree and brought the holding to sale and purchased it himself. *A* and *C* then applied under s. 311 of the Code to have the sale set aside, alleging that the decree had been fraudulently executed, the sale proclamation suppressed and that the decree was incapable of execution in the manner adopted, and contending that it could only be executed against the amounts so deposited in Court, which were more than ample to satisfy the full amount justly due under it. That application was unsuccessful.

A, *C*, *D*, and *E*, then instituted a suit to have the sale set aside on the ground of fraud.

Held, as regards *A* and *C*, following the decision in *Mohendro Narain Chatura* v. *Gopal Mondul* (1), that the questions as to the propriety of the execution of the rent decree by sale and as to the suppression of the sale proclamation were questions which could and ought to have been decided under s. 244, and that, so far as they were concerned the suit would not lie.

Held, however, as regards *D* and *E*, that as they were not parties to the rent suit or proceedings had therein, and although as heirs of a deceased tenant who had not got their names registered in the landlord's *sherista*, they might not be able to question the decree obtained for arrears of rent they were not thereby precluded from contesting a sale on the ground that [342] it had been fraudulently obtained under colour of such a decree, and that it was competent to them at any rate to sue for a declaration that the sale in question did not in any way affect their rights.

[R., 1 Bom. L. R. 743 ; D., 21 C. 605 (608).]

IN this case Jagan Nath Gorai and his brother Radha Nath Gorai, were the recorded tenants, of certain holdings in the *sherista* of the defendants, Messrs. Robert Watson & Co. Radha Nath Gorai died, leaving his three sons, the plaintiffs Nos. 2, 3, and 4, his heirs, but on his death no application was made to the defendants for mutation of names in respect of the holding.

---

* Appeal from Appellate Decree, No. 1434 of 1890, against the decree of J. Pratt, Esq., District Judge of Midnapore, dated the 15th of August 1890, reversing the decree of Babu Jogendro Nath Mookhopadhya, Munsif of Garbetta, dated the 27th of November 1889.

(1) 17 C. 769.

Disputes having arisen with reference to the rents of the holdings, Messrs. Watson & Co. instituted three suits against Jagan Nath Gorai in respect thereof, and joined Sibu Nath, the plaintiff No. 2 in this case, who was the eldest son of Radha Nath, as a party defendant therein. In these suits Messrs. Watson & Co. obtained *ex parte* decrees, and in execution of those decrees brought the holdings to sale and purchased them themselves. After the sales the two judgment-debtors applied, under s. 311 of the Code of Civil Procedure, to have them set aside. They alleged, amongst other things, that on the disputes arising they had deposited the full amount of rent in Court, that the decrees obtained provided that the amount decreed be satisfied from the amount so deposited by them, and that, notwithstanding that provision in the decrees, the judgment-creditor had fraudulently brought the holdings to sale and purchased them at ridiculously low figures. It appeared that the decrees had been executed for a balance claimed over and above the amount deposited, but the judgment-debtors' contention was that the amount deposited was more than ample to meet the full amount of rent and costs. They further alleged that the sale proclamations had been suppressed. These applications having failed, the two judgment-debtors, together with the other two sons of Radha Nath who were not parties to these suits and proceedings, instituted three suits to have the sales set aside as fraudulent and illegal, and to be confirmed in possession of the holdings of which they were still in possession; and in the alternative they prayed for damages if the sales could not be set aside.

The principal contention on the part of the defendants was that, having regard to the provisions of s. 244, the suits would not [343] lie, and that the question of whether the sales had been fraudulently obtained or not was *res judicata* under s. 13.

All three suits were tried together and were governed by the same judgment in both the lower Courts.

The first Court gave the plaintiffs decrees setting aside the sales and confirming them in possession.

The lower appellate Court reversed those decrees, holding that the cases were governed by the Full Bench ruling in *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1). As regards the contention that plaintiffs Nos. 3 and 4, being no parties to the rent suits, were not bound by the proceedings therein, that Court held that the landlords were not bound to make them parties, as their names were not registered in the *sherista* and they had not been recognized as tenants. The suits were accordingly dismissed.

The plaintiffs now appealed to the High Court in all three cases.

Mr. *R. E. Twidale*, for the appellants.

Babu *Jogesh Chundra Roy* (for Babu *Bhobani Churn Dutt*), for the respondents.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was as follows :—

JUDGMENT.

This and two similar appeals between the same parties have been heard together; the suits having been governed by one judgment in the lower appellate Court. That Court dismissed the suits as being barred by s. 244 of the Code of Civil Procedure under a ruling by a Full Bench of

(1) 17 C. 769.

1892 JAN. 22. — APPELLATE CIVIL. — 19 C. 341.

this Court in the case of *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1). This second appeal is based on the contention that the Full Bench ruling is not applicable to this case, because the ground on which this suit was brought is not within the scope of ss. 244 and 312 of the Code. By s. 312 the appellants probably meant 311.

And as regards two of the plaintiff-appellants, it is contended that they were not parties to the previous suit and decree, and cannot be barred from this suit by the section quoted by the lower appellate Court.

The suit was brought to set aside a sale held in execution of a decree for arrears of rent against two of the plaintiffs. The other **[344]** two plaintiffs are brothers of plaintiff No. 2, but were not made parties to the suit for rent.

After the sale had taken place the two judgment-debtors made an application under s. 311 to have it set aside, but failed to obtain an order, and this suit was consequently instituted by all the plaintiffs as being all interested in the land sold. The decree-holders in the rent suit were themselves the purchasers at the sale in execution; and we think therefore that as between them and the plaintiffs 1 and 2 the questions now raised as to the propriety of the execution of the decree by sale of the property and as to the suppression of the sale proclamation were questions which could, and ought to, have been decided under s. 244. The principal contention now made on behalf of the plaintiff-appellants is that the decree did not warrant any sale at all, as it provided for its satisfaction out of money already deposited in Court by the judgment-debtors. It is clear that this is a matter which comes within the purview of s. 244, and that that section prohibits a separate suit by parties to that decree. At one time it was not clearly understood that after a decree had been fully executed the Court could re-open the matter under s. 244 and set aside a sale already confirmed, in which the decree-holder was purchaser; but the Full Bench case of *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1) seems to us to lay down that there is no other remedy open by separate suit to the judgment-debtor, even though by fraud he may have been kept from knowledge of the execution proceedings until after the confirmation of a sale improperly obtained. We think that the lower appellate Court took a correct view of the Full Bench ruling, and that, following it, as he was bound to do, the District Judge was right in holding that as regards plaintiffs 1 and 2 this suit was barred by s. 244.

But in our opinion the District Judge was wrong in holding that the plaintiffs 3 and 4 were not competent to sue, at least to have it declared that the sale in question did not affect their rights.

It is true that as heirs of a deceased registered tenant, who had not got themselves registered in the landlord's *sherista*, they may not be able to question the decree obtained for **[345]** arrears of rent, yet that fact does not preclude them from contesting a sale fraudulently obtained under colour of that decree, if it be true that the decree did not warrant any sale at all in execution of it.

We think, then, that the appeal of plaintiffs 1 and 2 must fail, and that plaintiffs 3 and 4 are entitled to succeed in this appeal.

We were asked to treat the suit as an application under s. 244 so far as regards plaintiffs 1 and 2; but we cannot make it an application under that section as to two of the plaintiffs and a regular suit as to the other two.

(1) 17 C. 769.

The result is that, so far as the appellants 1 and 2 are concerned, the appeal is dismissed with costs; and that we make a decree in favour of the appellants 3 and 4, setting aside the decree of the lower appellate Court as against them, and sending the case back to that Court that it may decide the case upon the merits as regards these plaintiffs. Costs will abide the result.

1892 JAN. 22. — APPELLATE CIVIL. — 19 C. 341.

This order will apply also to appeals 1435 and 1436.

H. T. H. *Appeal allowed in part and case remanded.*

---

19 C. 345.

CRIMINAL MOTION.

Before Mr. Justice Norris and Mr. Justice Beverley.

SHASHI KUMAR DEY OF PAIKPARAH (*Petitioner*) v. SHASHI KUMAR DEY OF KHILPARAH (*Opposite-Party*).*
[27th January, 1892.]

Sanction to prosecute—Case settled without evidence—Jurisdiction to give sanction—Enquiry by Court prior to granting sanction—Criminal Procedure Code (Act X of 1882), *ss.* 195, 476.

It is competent for a Civil Court before which a case may have been settled without any evidence being gone into, and which has grounds for supposing the offence of the nature referred to in s. 195 of the Code of Criminal Procedure has been committed before it during the pendency of such case, to make a preliminary enquiry, and thus satisfy itself whether [346] a *prima facie* case has been made out for granting sanction, and if so satisfied, to grant sanction for the prosecution of the person alleged to have committed such offence. A sanction granted after such preliminary enquiry and based thereon is not illegal.

In re Kasi Chunder Mozumdar (1) and *Zamindar of Sivagiri* v. *The Queen* (2) dissented from on this point.

[F., 20 M. 339=7 M.L.J. 311 (314)=2 Weir 177; 7 Cr. L.J. 495=4 L.B.R. 234 (237); R., Rat. Unr. Cr. Rul. 895 (896).]

THIS was a rule to show cause why a sanction granted by the Registrar of the Court of Small Causes, Sealdah, to prosecute the petitioner, Shashi Kumar Dey of Paikparah, for offences under ss. 199 and 205, and for abetting one Chandra Kishore Dutt (for whose prosecution sanction was also given at the same time) in the commission of the offences under ss. 196, 209, and 471 of the Penal Code, should not be set aside.

The circumstances and proceedings which gave rise to the rule being granted were as follows:—

It appeared that in the district of Dacca there were two neighbouring villages called Khilparah and Paikparah. On the 4th Pous 1296, corresponding to the 18th December 1889, one Sohar Bibee executed a deed of sale of certain immoveable property in favour of one Sharfunnissa, the mother of one Peer Mahomed, who was the partner of Shashi Kumar Dey of Khilparah, for a consideration of Rs. 4,500. The deed of sale was written by Shashi Kumar Dey of Khilparah at Bairagali in the district of Dacca on the above date.

---

* Criminal Motion, No. 552 of 1891, against the order passed by R. F. Rampini, Esq., Sessions Judge of Alipore, dated the 19th of September 1891, affirming the order passed by H. Ryper, Esq., Registrar, Court of Small Causes, Sealdah, dated the 6th of of August 1891.

(1) 6 C. 440. (2) 6 M. 29.

1892
JAN. 27.
CRIMINAL MOTION.
19 C. 345.

On the 3rd Chaitra 1296, corresponding to the 15th March 1890, Sohar Bibee executed a second deed of sale in respect of the same property in favour of Gopal Krishna Sarkar, father of Shashi Kumar Dey of Paikparah, for a consideration of Rs. 5,000.

Gopal Krishna Sarkar impeached the genuineness of the first deed of sale, alleging it to be a forgery. An enquiry was held by the Sub-Registrar of Munshigunge, who came to the conclusion that the allegation was false.

In 1890 a suit was instituted in the Sealdah Small Cause Court, in which one Chandra Kishore Dutt was the plaintiff and Shashi Kumar Dey of Khilparah and Shama Churn Guha were the defendants. The defendant Shama Churn Guha was a nephew by [347] marriage of Gopal Krishna Sarkar, the purchaser under the second deed of sale; and the plaintiff was a friend of Shama Churn.

The suit was based on a hathchitta for Rs. 15, alleged to have been signed by the defendants in Calcutta on the 4th Pous 1296, corresponding with the 18th December 1889. The hathchitta was filed with the plaint.

After the plaint was filed a summons was issued, which was served on the defendant, Shashi Kumar Dey of Khilparah, by leaving it at his residence at Khilparah in the district of Dacca, he being at the time absent in Calcutta. The witnesses to the service of the summons were Kalibar Ghose of Paikparah and Prosunno Kumar Mittra; the former was a grandson of Gopal Krishna Sarkar.

Three days after the service of the summons three Muhammadans came to the residence of Shashi Kumar Dey of Khilparah and informed his mother, he being still absent in Calcutta, that Shaikh Ali Buksh, brother of Peer Mahomed, had sent them to take a copy of the summons and do what was necessary to be done on his, Shashi Kumar's, behalf in the matter of the suit. The mother thereupon handed them the summons.

On the 1st August 1890 the suit came on for hearing, and on that day the plaintiffs Chandra Kishore Dutt and Shashi Kumar Dey of Paikparah, and the defendant, Shama Churn Guha, appeared before the Registrar of the Sealdah Small Cause Court; and on the case being called on, it was alleged that Shashi Kumar Dey of Paikparah represented himself to be Shashi Kumar Dey of Khilparah, and he and Shama Churn Guha confessed judgment.

The case was called on shortly before the Registrar retired for lunch, and as he was leaving the Court, Babu Kedar Nath Ghose, a pleader who was watching the case on behalf of Shashi Kumar Dey of Khilparah, called his attention to the fact that Shashi Kumar Dey of Paikparah was not the real defendant. The Registrar said he would make enquiries after lunch. On his return from lunch the plaintiff and Shashi Kumar Dey of Paikparah and Shama Churn Guha had vanished; and on looking at the plaint the Registrar found that the defendants were therein described as residing in Dacca, and as the leave of the Court had not been [348] obtained when the plaint was filed, he dismissed the suit, notwithstanding the fact that a person alleging himself to be Shashi Kumar Dey of Khilparah and Shama Churn Guha had confessed judgment.

On the 13th August 1890 Shashi Kumar Dey of Kilparah presented a petition to the Registrar of the Sealdah Small Cause Court, asking for sanction to prosecute Gopal Krishna Sarkar of Paikparah, his son Shashi Kumar Dey of Paikparah, Chundra Kishore Dutt, the plaintiff in the

suit, and Shama Churn Guha, the second defendant in the suit, for offences under various sections of the Penal Code. The petition alleged that the hathchitta was a forgery; that the institution of the suit and the confession of judgment were fraudulent and collusive, the result of a conspiracy to obtain a decree against the petitioner, which could be used in evidence to show that he was not at Bairagali on the 4th Pous 1296, and consequently could not on that day and at that place have written the deed of sale.

On 29th January 1891 the Registrar refused the application, holding that he was *functus officio*. From this refusal the petitioner appealed to the District Judge, who, on 17th February 1891, held that the Registrar was not *functus officio*, and directed him to enquire into the case and decide whether the sanction asked for should be given.

On 25th July 1891 the Registrar held an enquiry, when Shashi Kumar Dey of Khilparah, Babu Kedar Nath Ghose, the pleader, Callybur Bose, Haro Mohun Mittra, and Peer Mahomed were examined, and cross-examined by a pleader who appeared on behalf of Shashi Kumar Dey of Paikparah and his father, and in the result he sanctioned the prosecution of Chundra Kishore Dutt, the plaintiff in the suit, for offences under ss. 196, 209, and 471 of the Indian Penal Code, and of Shashi Kumar Dey of Paikparah for offences under ss. 195 and 205, Indian Penal Code, and for abetting Chunder Kishore Dutt in the commission of offences under ss. 196, 209, and 471 of the Indian Penal Code. Shashi Kumar Dey of Paikparah then applied to the Sessions Judge to have that order set aside, but the Sessions Judge on the 19th September 1891 rejected the application, as he saw no ground to revoke it or in any way interfere with it.

[349] The petitioner then applied to the High Court to have the sanction revoked, on amongst others the following grounds:—

(1) That the sanction should not have been granted, because the original suit had been disposed of without any evidence being taken, and therefore there was nothing on the record to give rise to any suspicion of an offence having been committed before the Court.

(2) That the sanction should not have been granted, as there was no conclusion come to nor any decision arrived at in respect of the guilt of the petitioner or the truth or otherwise of the document or evidence recorded by the Court when trying the original suit.

(3) That s. 195, read with s. 476 of the Code of Criminal Procedure, contemplates there being sufficient materials before the Court trying the original case on which to found charges, and in this case there were no materials whatever.

(4) That the Registrar should not have gone beyond the record in the original case and was in error in acting solely upon extraneous facts in giving the sanction.

On the 26th November 1891 a rule was granted by a Bench of the High Court, consisting of O'KINEALY and BEVERLEY, JJ., to show cause why the sanction should not be set aside.

The rule now came on to be heard.

Babu *Haresh Chunder Chakravati*, for the petitioner.

Munshi *Syed Shamsul Huda*, for the opposite party.

The nature of the arguments appears sufficiently in the judgment of the High Court (NORRIS and BEVERLEY, JJ.), which, after setting out the above facts, continued as follows:—

1892 JAN. 27. — CRIMINAL MOTION. — 19 C. 345.

JUDGMENT.

The rule was argued before us on the 14th December 1891, and we took time to consider our judgment.

In support of the rule it was argued that the sanction was illegal, because the Registrar ought not to have travelled outside the record of the Small Cause Court case, which disclosed no foundation for the charges made. In other words, it was argued that the Registrar ought not to have made any enquiry; and in support of [350] the argument the following cases were relied upon:—*Hurro Nath Roy and others* (*Petitioners*) (1), *In re Kasi Chunder Mozumdar* (2) and *Zemindar of Sivagiri* v. *The Queen* (3).

The facts of the case of *Hurro Nath Roy and others* are as follows:—Sristeedhur Dass, alleging himself to be a mokuraridar, sued Hurro Nath Roy and others to have his mokurari right declared, and obtained a decree. On special appeal to this Court the case was remanded to the lower appellate Court in order to determine whether a document filed by the plaintiff was a forgery. The lower appellate Court, without hearing the appeal, instituted an inquiry as to the genuineness of the document and as to whether the defendant's written statement was untrue, and he required the personal attendance of the mukhtear who had verified the written statement. The mukhtear did not appear: thereupon the appeal was struck off the file, and the defendants were required to appear in person. The defendants filed a special appeal against the order striking the appeal off the file, and also moved this Court to have the order for their personal attendance quashed. L.S. Jackson, J., after reading ss. 16 and 19 of Act XXIII of 1861, says:—"Under these two sections Civil Courts have power to refer to the Magistrate, or to make commitments to the Sessions in cases coming under the XIth or the XVIIIth chapters of the Indian Penal Code, but they are to make orders of that kind when a witness or other person 'shall appear to the Court' to have been guilty of any offence, or when there shall 'appear to the Court sufficient ground for an investigation.' It seems quite clearly, I think, the meaning of these sections that the Civil Court must come to some conclusion in respect of the guilt of the party concerned, or the truth or otherwise of the document or evidence."

When the learned Judge says "that the Civil Court must come to some conclusion in respect of the guilt of the party concerned, or the truth or otherwise of the document or evidence," it is clear that he means to say that such conclusion must be arrived at from something that transpires during the hearing of the case; that the Civil Court cannot enter upon an altogether independent inquiry as to whether a *prima facie* case of an offence under the sections of the [351] Indian Penal Code, enumerated in ss. 16 and 19 of Act XXIII of 1861, is made out, for he goes on to say:—"If on hearing the appeal in this case the Principal Sudder Amin had been of opinion that the plaintiff had produced a forged document, or that the defendants had knowingly tendered a false written statement, he might have proceeded under the 16th or 19th section as the case might be."

The decision in that case turned upon the construction to be put upon ss. 16 and 19 of Act XXIII of 1861, the provisions of which have been reproduced in s. 643 of the present Code of Civil Procedure. Those provisions deal with a case in which a Civil Court of its own motion during the pendency of a case is of opinion that one of the offences therein referred to has been committed before it. It is no authority in respect

(1) 7 W. R. 482. (2) 6 C. 440. (3) 6 M. 29.

of proceedings which are authorized to be taken by the Code of Criminal Procedure. 1892 JAN. 27.

We shall examine these provisions later on.

CRIMINAL MOTION.

19 C. 345.

In the case of *In re Kasi Chunder Mozumdar* (1) the facts were as follows:—In July 1868 Juggut Chunder Mozumdar mortgaged certain property to Kasi Chunder Mozumdar to secure a certain sum of money with interest. In October 1878 the mortgagee presented under Reg. XVII of 1806 a verified petition to the Court of Rajshahi for the foreclosure of the mortgage. Subsequently to the date of the petition, the Rajshahi district was divided, and the land, the subject of the mortgage, was included in the newly-formed district of Pabna. In December 1879 the mortgagor presented a counter-petition to the Rajshahi Court, alleging that the mortgage money had been paid in full, and in support thereof filed a registered receipt which, on the face of it, purported to show that the repayment had been made in 1869, and prayed that the property might be declared free from the mortgage charge. The mortgagee denied the truth of these statements. In February 1880 the mortgagee presented a second petition to the Rajshahi Court, stating that matters had been amicably settled, and praying that the first petition might be taken off the file. A decree by consent was accordingly drawn up and filed. In July 1880 the mortgagor applied to the District [352] Judge of Pabna for sanction to prosecute the mortgagee under s. 193, Indian Penal Code, for the statements contained in the petition of October 1878, and the Judge gave the sanction. The Court (GARTH, C. J., and MACLEAN, J.) set aside the sanction upon the ground that the application for it should have been made to the District Judge of Rajshahi and not to the District Judge of Pabna.

In the course of his judgment Garth, C.J., made the following observations :—" It seems to me that the reason of the rule laid down in s. 468 consists in this, that suitors in a Court of justice ought to be allowed the fullest liberty of speech and action in support of their respective contentions, and so long as they use that liberty in good faith and honestly, they ought not to be subjected to malicious prosecutions.

" The Court which has the best means of forming an opinion upon the *bona fides* of the parties and the truthfulness of the witnesses is the Judge who hears the evidence, and therefore, upon that Court, or upon some superior Court which has the power of looking into the proceedings, the law imposes the duty of sanctioning or refusing to sanction criminal proceedings against the parties or their witnesses.

"But if a case is settled without any evidence being gone into, it seems to me that the Court in which the suit was brought has no opportunity of judging of the *bona fides* of the claim or defence ; and if it has any power at all under such circumstances, which I very much doubt, to give its sanction to criminal proceedings against either party, I think it would be guilty of a great impropriety and indiscretion in so doing. In this particular case no evidence was gone into. The proceedings taken by the mortgagee in 1878 were instituted under Reg. XVII of 1806, which does not make it necessary that his petition should even be verified in the ordinary way. The suit was subsequently compromised by consent, each party paying his own costs ; and it seems to me that as no evidence was given on either side, it was quite impossible for them to form anything like a correct

(1) 6 C. 440.

1892 JAN. 27. — CRIMINAL MOTION. — 19 C. 345.

judgment as to whether the mortgage money had or had not been paid when the proceedings were instituted in 1878."

[353] These observations are entirely *obiter*; they were in no way necessary for the decision of the case; they were apparently not concurred in by Maclean, J., who based his judgment simply "on the ground that the Court of the Judge of Pabna and Bogra was not the Court before which the alleged offence was committed."

We are unable to agree with the observations of Garth, C.J. It appears to us that the provisions of s. 471 of Act X of 1872, the Code of Criminal Procedure then in force, escaped the attention of the learned Judge, as it does not appear to have been referred to either in the argument or in the judgment. That section runs as follows:—" When any Court, Civil or Criminal, is of opinion that there is sufficient ground for inquiring into any charge mentioned in ss. 467, 468, and 469, such Court, after making such preliminary inquiry as may be necessary, may either commit the case itself or may send the case for enquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged."

That section seems to us clearly to contemplate the making of a preliminary inquiry when the materials already before the Court are in themselves insufficient to establish a *prima facie* case, or when the Court is sought to be put in motion after the termination of the original proceedings. It seems difficult to imagine why the Legislature should have distinctly recognized the possibility of a preliminary inquiry being necessary if it intended a Court to act only upon materials presented to it during the hearing of the case.

The decision in *Zamindar of Sivagiri* v. *The Queen* (1) followed the *obiter dicta* of Garth, C. J., in *Kasi Chunder Mozumdar's* case, and we are unable to agree with it.

Since these cases were decided the provisions of the Code of Criminal Procedure upon the point under consideration have been altered and enlarged. Section 468 of Act X of 1872 provided that " a complaint of an offence against public justice described in (certain sections) of the Indian Penal Code, *when such offence is committed before or against* a Civil or Criminal Court, shall not be entertained in the Criminal Courts, except with the sanction of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate." Section [354] 195 of Act X of 1882 provides that " no Court shall take cognizance of any offence punishable under" the same sections " *when such offence is committed in or in relation to any proceeding in any Court*, except with the previous sanction, or on the complaint of such Court, or of some other Court to which such Court is subordinate."

Then s. 476 of Act X of 1882 provides that " when any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in s. 195, and committed before it, or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate, and may bind over any person to appear and give evidence on such enquiry or trial." The powers conferred by this section are much more extensive than those conferred by s. 471 of Act X of 1872.

(1) 6 M. 29.

1892 JAN. 27. — CRIMINAL MOTION. — 19 C. 345.

Now, upon the facts as above stated, we think that it is clear that a Civil Court, *viz.*, the Registrar of the Sealdah Small Cause Court, had ground for inquiring into an offence referred to in s. 195, Code of Criminal Procedure, and committed before it, *viz.*, an offence by Shashi Kumar Dey of Paikparah under s. 205 of Indian Penal Code of falsely personating Shashi Kumar Dey of Khilparah, and in such assumed character confessing judgment; and we are further of opinion that it was competent to such Court to make a preliminary inquiry and thus satisfy itself whether a *prima facie* case had been made out for granting a sanction.

It is clear that the alleged personation and confession of judgment took place in the Small Cause Court, and under s. 195 of the Code of Criminal Procedure no Court could take cognizance of that offence except with the previous sanction or on the complaint of that Court. It is equally clear that upon the record of the suit as it stands no sanction could properly have been given, inasmuch as it does not disclose either the personation or the confession of judgment. Unless, therefore, the Court was at liberty to make a preliminary inquiry and travel outside the record, the charge against the petitioner could never have been tried.

[355] Whether sanction was necessary for the proceedings against the petitioner for an offence under s. 195, Indian Penal Code, and for abetment of offences under ss. 196, 209, and 471 we express no opinion. Supposing that sanction was necessary, we think it was rightly given. Neither do we express any opinion as to the legality or otherwise of the sanction accorded for the prosecution of Chunder Kishore Dutt, as his case is not before us.

We are thus of opinion that the rule should be discharged.

H. T. H. *Rule discharged.*

---

19 C. 355.

CRIMINAL MOTION.

Before Mr. Justice Norris and Mr. Justice Beverley.

GOBIND CHANDRA SEAL (*Petitioner*) *v.* QUEEN-EMPRESS (*Opposite Party*).* [15th February, 1892.]

False evidence—Omission to prove that accused was sworn or affirmed before giving his evidence—Penal Code (Act XLV of 1860), ss. 191-193—*Oaths Act (X of* 1873), ss. 6, 13 *and* 14.

The offence of intentionally giving false evidence, referred to in s. 193 of the Penal Code, may be committed, although the person giving evidence has neither been sworn nor affirmed.

THE petitioner in this case was tried by the Deputy Magistrate of Faridpur for an offence under s. 193 of the Penal Code, and convicted and sentenced to two years' rigorous imprisonment. The charge arose out of certain evidence given by the petitioner in a trial before the Sessions Judge of Faridpur, when he contradicted the evidence he had given in the same case when under enquiry before the Deputy Magistrate of Madaripur. It was proved that before giving his evidence before the latter Court the petitioner was duly affirmed, and his deposition before that Court was

---

* Criminal Motion, No. 53 of 1892, against the order passed by J. Posford, Esq., Sessions Judge of Faridpur, dated the 28th of November 1891, affirming the order passed by Bábu Jnanendra Nath Lahiri, Deputy Magistrate of Faridpur, dated the 12th of November 1891.

1892 FEB. 15. — CRIMINAL MOTION. — 19 C. 355.

put in, but there was no evidence to show that he had been affirmed or any oath administered to him before giving his evidence in the Sessions Court.

Before the Deputy Magistrate of Faridpur it was urged on behalf of the petitioner that the want of that evidence was fatal to [356] the case, but this objection was overruled, as the Magistrate considered that, having regard to the provisions of s. 13 of the Oaths Act and s. 114 of the Evidence Act, he might presume that the oath or affirmation was duly administered to the accused in the Sessions Court, and as he found that it was clearly proved that the accused had made the two contradictory statements, he convicted him and passed the sentence referred to above.

Against that conviction and sentence the accused appealed to the Sessions Judge, and on that appeal being rejected, he moved the High Court, and a rule was issued which now came on to be heard.

Babu *Grija Sunkur Mozoomdar*, for the petitioner in support of the rule.

Mr. *Kilby* (Deputy Legal Remembrancer) for the Crown, *contra*.

The only ground upon which the rule was issued, and argued at the hearing, was that the conviction could not be sustained in the absence of evidence that the accused had been duly affirmed before the Sessions Judge before giving his evidence.

Mr. *Kilby* (showing cause).—The offence punishable under s. 193 of the Penal Code is intentionally giving false evidence in any stage of a judicial proceeding. By s. 191 whoever, being legally bound by an oath (which is not the case before the Court, as the accused, being a Hindu, could not be legally bound by an oath,—see Oaths Act, s. 6), or by any express provision of law to state the truth, makes any statement which is false, is said to give false evidence. By s. 14 of the Oaths Act every person giving evidence on any subject, before any Court, is bound to state the truth. The idea of the oath, *viz.*, that the person swearing renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth, the idea of binding the conscience of the witness, which still prevails in England, and which in former times led to the swearing of Hindus on the Tulsi and Ganges water, and of Muhammadans on the Koran, finds no place in the Oaths Act. The superstitious or religious sanction has been disregarded and the legal sanction alone is relied upon. The law in effect says to the witness (s. 13) whether or not you have made an oath [357] or affirmation, and notwithstanding any irregularity in the form of such oath or affirmation, if you give evidence in a Court of justice, you must speak the truth (s. 14) or be punished.

The difference between the English and Indian law on the subject appears in a striking manner, by comparing an indictment for perjury with the form of charge laid down in the Criminal Procedure Code. The latter is merely to the effect that the accused in the course of the trial made a statement while giving evidence which he knew or believed to be false or did not believe to be true, and it is unnecessary even to allege that he had been sworn or affirmed, whereas in England the due taking of the oath is a material part of the indictment, and must be proved. Here, therefore, it is, I submit, not necessary to prove that the accused was either sworn or affirmed, the mere fact of his having given false evidence being sufficient to justify a conviction under s. 193.

In England, again, no person can give testimony upon any trial until he has given an outward pledge that he considers himself responsible to God for the truth of what he is about to narrate, and, if he be

insensible to the obligations of an oath, whether from irreligious opinions or weakness of understanding, because he is an atheist or a child, he cannot be sworn; whereas by s. 118 of the Evidence Act, all that is necessary is that the witness shall be able to understand the questions put to him and be capable of giving rational answers to those questions. Matters of religious belief or disbelief are completely disregarded.

In this case the person called to prove the making of the affirmation in the Sessions Court says that it is the invariable practice of the Court to affirm all witnesses, but he cannot remember whether the accused in this case was affirmed or not. In *The Queen* v. *Sewa Bhogta* (1), a Full Bench have held that the *intentional* omission to affirm a witness did not affect his testimony.

Babu *Grija Sunkur Mozoomdar* (in support of the rule).—The words in s. 191 of the Penal Code "being legally bound by an oath" must be read as including an affirmation, and must be read as distinct from the rest of the section, which, it must be taken, was framed to meet cases other than that of giving evidence during the course of a trial. Section 13 of the Oaths Act only **[358]** provides that the omission to administer, or irregularity in administering an oath or affirmation, should not invalidate the proceedings (that is, the proceedings in which the evidence is given), or render the evidence given inadmissible, or affect the obligation of the witness to state the truth, and does not in any way affect this question. It could never have been the intention of the Legislature to provide that evidence should be given on oath or solemn affirmation, and yet that to sustain a conviction under s. 193 it is unnecessary to prove that the law has been complied with.

The judgment of the Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

It seems clear that the offence of giving false evidence may be committed, although the person giving evidence has been neither sworn nor affirmed.

The rule must therefore be discharged.

H. T. H. *Rule discharged and conviction upheld.*

---

19 C. 358.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

LAND MORTGAGE BANK (*Plaintiff*) *v.* SUDURUDEEN AHMED (*Defendant*).* [6th April, 1892.]

Jurisdiction—Specific performance—Letters Patent, 1865, *cl.* 12—*Suit for land—Land situate without local limits of jurisdiction.*

A vendor, having obtained leave to sue under cl. 12 of the Letters Patent of 1865, sued in the High Court to enforce *inter alia* the specific performance of a contract entered into by the defendant for the purchase of certain land situated in the district of Burdwan, and in the alternative for damages. *Held*, that, as far as the above-mentioned objects of the suit were concerned, the suit was not one for land within the meaning of that clause.

* Original Civil Suit No. 342 of 1891.

(1) 14 B. L. R. 294.

1892 APRIL 6. — ORIGINAL CIVIL. — 19 C. 358.

[F., 26 C. 204=2 C.W.N. 718; 33 C. 1065=4 C L.J. 238; R., 22 B. 701; 23 B. 22 (31); 27 M. 157; 33 M 131=3 Ind. Cas. 930=20 M.L.J. 103=6 M.L.T. 263; D., 28 M. 226 (227).]

THIS suit was brought to enforce specific performance of an alleged contract for the purchase of a certain patni taluk situated in the district of Burdwan.

The plaintiff Bank alleged that on the 16th September 1890 an agreement was entered into in Calcutta by and between the [359] Bank and the defendant for the sale by the plaintiff Bank to the defendant of a patni taluk (Satsaykea) situate in the district of Burdwan for the sum of Rs. 85,000, and certain other sums set out in a certain letter of the 12th September 1890. This agreement was alleged to be embodied in two letters—one from the defendant to the plaintiff Bank, the other from the plaintiff Bank to the defendant, dated respectively the 12th and 16th September 1890, such letters having been, on those dates respectively, written in Calcutta and interchanged between the parties; the letter of the 16th September having been posted and registered at Calcutta on the 18th September 1890 to the address of the defendant at Satgachia in the district of Burdwan.

The plaintiff Bank obtained the usual leave under cl. 12 of the Letters Patent of 1865, and prayed (*a*) for specific performance of the contract; and (*b*) in the alternative that the property might be sold by the Court, and the sale proceeds applied in compensating and making good to the plaintiff Bank the amount of the purchase money, and other moneys payable under the contract; and that if the proceeds of such sale should be insufficient to cover the plaintiff Bank's claim, then that the defendant should be ordered to pay any deficiency to the plaintiff Bank with interest; or (*c*) that the defendant might be directed to pay such sum as the Court should consider reasonable as compensation for breach of contract.

The defendant denied having entered into the contract, and, amongst other matters (to which it is unnecessary to refer), pleaded that the suit, being one for land situated in the district of Burdwan, could not be tried in the High Court.

The suit came on for settlement of issues, and amongst the issues framed was the following:—Whether this Court has jurisdiction to try the case?

The Officiating Standing Counsel, Mr. *Pugh* (with him Mr. *Hill*), for the plaintiff.—I contend that the Court has jurisdiction—*Holkar* (*H. H. Shrimant Maharaj Yashvantrav*) v. *Dadabhai Cursetji Ashburner* (1). In *Sreenath Roy* v. *Cally Doss Ghose* (2) no decree was asked for for specific performance of the agreement, or with regard to the mufassal properties. In *Kellie* v. *Fraser* (3) the Chief [360] Justice distinguishes the authorities cited, and particularly *The Delhi and London Bank* v. *Wordie* (4) from the case before him. A direct authority is to be found in *Ramdhone Shaw* v. *Sreemutty Nobumoney Dossee* (5). There is no question of title in this suit. I do not ask for possession of land, nor of any interest in land, but having entered into a contract in Calcutta, I am entitled to have it specifically performed in Calcutta.

Mr. *Jackson* (with him Mr. *Evans*, and Mr. *Abdur Rahman*), for the defendant.—The case is concluded by authority for the defendant. In *Sreenath Roy* v. *Cally Doss Ghose* (2) it was hardly alleged that it was a suit for

(1) 14 B. 353. (2) 5 C. 82. (3) 2 C. 445 (463).
(4) 1 C. 249. (5) Bourke, 218 (223).

land; all that was sued for was to compel the specific performance of a contract—the execution of a piece of paper. Pontifex, J., however, said that, "so far as the suit is a suit for specific performance of the agreement with respect to land, the defendant's contention is correct. I have no jurisdiction to make a decree in that respect."

1892 APRIL 6. — ORIGINAL CIVIL. — 19 C. 358.

Kellie v. *Fraser* (1) is not cited in the Bombay decision, and does not alter the law as laid down in *The Delhi and London Bank* v. *Wordie* (2); that case is directly in point, on the question whether this suit is "a suit for land" within the meaning of clause 12 of the Letters Patent. It has been contended that that ruling on this point is a *dictum* only, but I say it is a direct decision: Mr. Justice Pontifex was a party to both the decisions in *Kellie* v. *Fraser* (1) and *The Delhi and London Bank* v. *Wordie* (2).

The plaintiff here wants a sale of the property, and further asks to bid at such sale. The whole intent of the Letters Patent. cl. 12, is to prevent such suits as the present being brought. A suit for land is a suit for, or concerning, land. In *The Delhi and London Bank* v. *Wordie* (2) the Court, after taking into consideration the two sides of the question, considered that, having regard to the object of the suit, it was impossible to say it was not a suit for land. As to the Bombay case, the Court does not put the ground of its decision on cl. 12, but on the ground that the suit was one which the Courts of Equity in England would entertain, and on the fact that the High Courts in India have all the powers of a Court of Equity in England for enforcing their decrees *in* **[361]** *personam*. But the tendency of the Courts in England at the present time is not to grant relief out of their jurisdiction,—see *De Sousa* v. *British South African Company* (3) decided on the 20th February 1892 by Lawrence and Wright, JJ., where all the late cases on the subject are cited. What is intended by the words "suit for land" in cl. 12 of the Letters Patent is the sole question.

In *In re Hawthorne, Graham* v. *Massey* (4) the Court held that a contested claim to land situated in a foreign country, the parties being resident in England, could not be heard for want of jurisdiction.

TREVELYAN, J.—A similar question was, I think, raised before me in the case of *Kanti Chunder Pal Chaudhry* v. *Kissory Mohun Roy** and there argued.

---

* Regular Suit No. 298 of 1886.

19 C. 361-N.

Before Mr. Justice Trevelyan.

KANTI CHUNDER PAL CHAUDHRY *v.* KISSORY MOHUN ROY.

THIS suit came on for hearing on settlement of issues on January 12th, 1887. The facts of the case, in so far as they have any bearing upon the question of jurisdiction, are sufficiently stated in the judgment of the Court, which, omitting the immaterial portion, was as follows:—

JUDGMENT.

TREVELYAN, J.— In this case there was an application to take the plaint off the file, and at my suggestion the suit was set down for settlement of issues.

As originally framed, the plaint recited a mortgage to secure the sum of Rs. 10,000 with interest at 36 per cent. per annum. The 3rd paragraph alleged, that of that sum of Rs. 10,000 the plaintiff received Rs. 1,000 only from the defendant, and the defendant refused to pay the balance to the plaintiff or spend the same on his behalf, though frequently requested so to do. The 4th and last paragraph stated that the plaintiff was willing to repay the said sum of Rs. 1,000 received from the defendant, together with such interest as the Court might order.

(1) 2 C. 445.
(2) 1 C. 249.
(3) *Times'* Law Reports, Vol. VIII, p. 369.
(4) L.R. 23 Ch. Div. 743.

1892 APRIL 6. — ORIGINAL CIVIL. — 19 C. 358.

[362] Mr. *Jackson.*—The case of *Rumdhone Shaw* v. *Sreemutty Nobumoney Dossee* (1) completely fails to bear out what is said about it by Mr. Bourke; such a suit ought not to lie here.

TREVELYAN, J.—In that case there was an appeal which was heard before Morgan and Phear, JJ., and the latter said that the proper Court to sue in was the Zillah Court, but did not say that such a suit could not be brought in the High Court. He dismisses the suit as against Sumboo Chandra, the person outside the jurisdiction.

Mr. *Jackson.*—In *Bagram* v. *Moses* (2) Morgan, J., doubted if there was jurisdiction at all, and in *Juggodumba Dossee* v. *Puddomoney Dossee* (3) where the land was outside Calcutta, the parties dwelling

---

The 1st paragraph of the prayer of the plaint asked that the defendant be ordered, on the payment of the sum of Rs. 1,000, together with interest, to re-convey the mortgaged premises to the plaintiff at the cost of the defendant. The 2nd paragraph asked that the defendant be ordered to pay such compensation to the plaintiff as to this Court shall seem right. There were then prayers for cost and for further and other relief.

When the first application was made to take the plaint off the file, I gave the plaintiff leave to amend the plaint. He has altered the 3rd paragraph by charging collusion between the defendant and some persons who are not parties to the suit. He has altered the 4th paragraph by submitting his willingness to pay the Rs. 1,000 and interest, "should the Court so order," and he has added a 5th paragraph in the following words;—

"That the plaintiff would not have executed the said mortgage deed but for various false representations and inducements by the said defendant that the said rupees ten thousand would be paid to him or spent on his behalf for the purposes of the said appeal, and the release of his said attached properties, but the said money has not been so paid or spent."

He has also substituted for the 1st paragraph of the prayer the following:—

"1. That the mortgage contract be declared void and the mortgage deed of the 13th of October 1885 be cancelled and set aside."

(His Lordship then proceeded to deal with other questions raised at the hearing and continued)—Two other questions have been argued before me. The first raises a question of jurisdiction; the second has reference to another suit which was filed before this suit, and raises the question whether a portion of this suit should not await the decision of the other suit.

The 1st of those questions is whether this is a "suit for land" within the meaning of the Charter.

The land which was charged by the mortgage is outside the limits of Calcutta. The decision of this question of jurisdiction does not, however, dispose of the suit, as the only issue of fact, *viz.*—"What sum was advanced by defendant to plaintiff on the security of the mortgage deed mentioned in the plaint" must be tried.

There is in the mortgage deed a covenant for the repayment of the money, and as the defendant resides in Calcutta, and also as the contract was made in Calcutta, this Court has jurisdiction to try this issue and, with reference to the personal covenant to make a declaration as to the amount of money advanced. The following issue must be tried, namely:—

What sum was advanced to the plaintiff by the defendant on the security of the mortgage deed mentioned in the plaint?

If the plaintiff failed in this issue, it would become unnecessary to try the question of jurisdiction, but as it has been fully argued before me, I think that I ought to decide it now.

The plaintiff's case is that he executed in favour of the defendant a deed charging his property with a sum of Rs. 10,000, yet that the defendant only advanced him Rs. 1,000. The relief that the plaintiff would be entitled to would be a declaration releasing the property from the charge of Rs. 9,000 and the interest thereon. He is not entitled to sue for redemption, as the time fixed for the payment of the money has not yet expired. As there has been a default in payment of interest, the mortgagee can enforce payment of the principal, but I think it is clear that the plaintiff cannot take advantage of his own default and sue for redemption.

There have been, as I have pointed out, certain amendments in the prayer of the plaint, but those amendments are not, I think, very material, and they do not alter the real object of the suit.

(1) Bourke. 218. (2) 1 Hyde, 284. (3) 15 B. L. R. 318.

1892
APRIL 6.

ORIGINAL CIVIL.

19 C. 358.

in Calcutta, the Court held that it had jurisdiction, and that it was not a suit for land. You cannot create jurisdiction so as to bring a case within the principle of the Chancery **[363]** cases in England. Both Markby and Pontifex, JJ., in *Juggodumba Dossee* v. *Puddomoney Dossee* (1) say that every suit with reference to land is a suit for land within the meaning of cl. 12. In *Juggernauth Doss* v. *Brijnath Doss* (2) it is said that a suit to recover title-deeds, although it may involve a question of title, is not a suit for land; but this is contrary to Wright, J.'s case reported in the *Times*' Law Reports, in which he says "wherever you get a question of title to land at once the jurisdiction is gone." In *Jairam Narāyan Raje* v. *Atmaram Narayan Raje* (3) a suit for partition was held to be a suit for land.

TREVELYAN, J.—In cl. 12 the words "or in all other cases if the cause of action shall have arisen" should be treated as being in brackets.

Mr. *Jackson.*—The words of the clause are to be construed in the ordinary way. A suit "for land" means a suit "for or **[364]** concerning land." Here the suit is for the purpose of compelling the defendant to fulfil an agreement to buy land. The case of *Kellie* v. *Fraser* (4) is put upon the ground of *Paget* v. *Ede* (5) and *Pen* v. *Lord Baltimore* (6), but the authors of White and Tudor's Leading Cases in Equity (6th ed.), vol. 2, p. 1075, say that "the claim to affect foreign lands through the person

---

The leading cases on the construction of cl. 12 of the Charter have been cited. It is, I think, settled law that suits for foreclosure or sale and suits for redemption are suits for land within the meaning of cl. 12.

The present suit has been compared to a suit for specific performance of an agreement to sell land, which, according to Mr. Justice Norman in a case reported in Bourke's reports, is not a suit for land, but according to Pontifex, J., in the case of *Sreenath Roy* v. *Cally Doss Ghose*, (7) is a suit for land, but I do not think that this suit is on the same footing as a suit for specific performance. It seems to me that a suit of this kind, although in form not a suit for redemption, has much in common with a suit for redemption. A suit for redemption is brought to relieve the property from a charge and to obtain a reconveyance of the property. The object of this suit is to release mortgaged property from the effect of a mortgage deed, and this suit in reality seeks to re-transfer property to the mortgagor freed from the charge.

In *The Delhi and London Bank* v. *Wordie* (8), a suit for land is defined as being a suit for the purpose of acquiring title or control over land. In the latter case of *Kellie* v. *Fraser* (4), the then Chief Justice, Sir Richard Garth, says:—"It will be observed, however, that in all, or almost all, the cases upon which the appellant relies, the suit was brought for the purpose of acquiring the possession of, or of establishing a title to, or an interest in, the property which was the subject of dispute, more particularly in the case of *The Delhi and London Bank* v. *Wordie* (8) where the object of the petitioner was to establish the title of certain trustees to a share in a portion of the trust property claimed by a person of the name of Lightfoot, and the establishment of this title was an essential element of the entire claim." Macpherson, J. also points out that in *The Delhi and London Bank* v. *Wordie* (8) the question of title arose and the suit was held to be for land.

A suit for the purpose of declaring an interest in land is a suit for land, and that is in reality the object of this suit.

I must hold here that, so far as the suit seeks to discharge the land from the obligations imposed on it, it is a suit for land, and that I can only deal with this suit so far as it seeks to obtain a declaration with regard to the covenant to pay the money.

(His Lordship then dealt with the remaining questions raised in the suit, and directed the case to be set down in due course for trial of the issue of fact.) [This case is referred to in 22 B. 701; 19 C. 358.]

(1) 15 B.L.R. 318. (2) 4 C. 322. (3) 4 B. 482.
(4) 2 C. 445 (463). (5) L. R. 18 Eq. 118. (6) 1 Ves. Sen. 444.
(7) 5 C. 82. (8) 1 C. 249 (263).

1892 APRIL 6. — ORIGINAL CIVIL. — 19 C. 358.

of the party must be strictly limited to those cases in which the relief decreed can be entirely obtained through the party's personal obedience."

Mr. *Pugh*, in reply.

DECISION.

TREVELYAN, J.—This case has come before me on settlement of issues. The issue which I have now to decide is as to whether this Court has any jurisdiction to try this suit. The remaining issues will have to be determined hereafter.

[365] The suit is brought by the vendor of a patni taluk situate in the Burdwan district to enforce specific performance of the contract. A portion of the contract was made in Calcutta, and leave to sue has been obtained. The title is accepted in the contract. All the plaintiff really wants is the money for which he has contracted to sell the patni, though of course the relief is more complicated than in a mere suit for money. I will only now consider the (*a*) and (*c*) portions of the prayer of the plaint. The first seeks the ordinary relief in a suit for specific performance, *viz.*, that the agreement may be specifically performed, that a proper transfer may be settled, and that upon the execution and registration of the transfer the defendant may be ordered to pay the money. The (*c*) portion asks for damages.

The question is whether this is a suit for " land" within the meaning of the Letters Patent.

[366] A great many authorities have been cited to me, but I do not think that, so far as their application to the present case is concerned, there is any difference between them. The chief cases cited before me were *Ramdhone Shaw* v. *Sreemutty Nobumoney Dossee* (1), *The Delhi and London Bank* v. *Wordie* (2), *Kellie* v. *Fraser* (3), *Sreenath Roy* v. *Cally Doss Ghose* (4), and *Holkar* (*H. H. Srimant Maharaj Yashvantrav*) v. *Dadabhai Cursetji Ashburner* (5). *Ramdhone Shaw* v. *Nobumoney Dossee* (1) has not been very accurately reported, but I have referred to the original judgment, and I think it clear that in that case Mr. Justice Norman held that a suit for specific performance would lie. That was a purchaser's suit.

It seems to me that, having regard to the expressions used in *Kellie* v. *Fraser* (3) and *The Delhi and London Bank* v. *Wordie* (2) as to the meaning of a "suit for land," that there is a distinction between a vendor's suit and a purchaser's suit for specific performance.

The question as to whether a purchaser's suit would lie is one which I need not decide here.

In *The Delhi and London Bank* v. *Wordie* (2), Garth, C.J., at p. 263 of the Report, defines a " suit for land " as a suit for the purpose of acquiring title to or control over land. In *Kellie* v. *Fraser* (3) the same learned Judge says :—" It will be observed, however, that in all, or almost all, the cases upon which the appellant relies, the suit was brought for the purpose of acquiring possession of, or establishing a title to, or an interest in, property which is subject to dispute."

In *Sreenath Roy* v. *Cally Doss Ghose* (4), Mr. Justice Pontifex held that a suit for specific performance was a suit for land within the meaning of the Letters Patent. But that was a purchaser's suit, and as the object of a purchaser's suit is to get possession of the land, it might be properly described as a suit for land.

(1) Bourke. 218. (2) 1 C. 249. (3) 2 C. 445.
(4) 5 C. 82. (5) 14 B. 353.

1892 APRIL 6. — ORIGINAL CIVIL. — 19 C. 358.

The Bombay case to which I have been referred goes much further than it is necessary for me to go in this case. That was practically a purchaser's suit and was put upon the authority of [367] *Paget* v. *Ede* (1). Mr. Jackson has cited a decision of Mr. Justice Lawrance and Mr. Justice Wright, decided on the 20th of February last [*DeSousa* v. *British South African Company* (2)]. That case, there is no doubt, shows the present tendency of the English Courts to abstain from interfering even *in personam* where the matter concerns land outside their jurisdiction. But I do not think, myself, that this case depends on those English cases. It depends entirely on what is a "suit for land" within the meaning of the Letters Patent.

So far as the paragraphs of the prayer of the plaint in this case under the headings (*a*) and (*c*), I do not think that this is a suit for land. It is not a suit to sell or acquire possession of or title to land in any sense. Clearly it does not come within the definitions given by Sir R. Garth. I decline to hold that wherever land has anything to do with a suit it is therefore a "suit for land." I must go so far as that to accept Mr. Jackson's argument.

If the framers of the Letters Patent had intended to exclude the jurisdiction of the Court in the way suggested, they would have used different words.

I hold that, having regard to everything except paragraph (*b*) of the prayer of the plaint, this is not a suit for land. I am inclined to hold that, so far as that paragraph is concerned, this is a suit for land, but it is not necessary to determine that question now, as the right to relief under that prayer cannot be determined until the facts are found.

The case must be set down for final disposal for determination of the remaining issues, which are—

(1) Was there a concluded and binding arrangement for the sale of the property mentioned in the plaint?

(2) If so, what is the legal effect thereof?

(3) To what relief, if any, is the plaintiff entitled?

The case must go to the bottom of the remanet list. The costs of the settlement of issues will be costs in the cause.

Attorneys for plaintiff : Messrs. *Sanderson & Co.*

Attorney for defendant : Babu *G. C. Dhur.*

T. A. P.

---

19 C. 368.

[368] SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep and Mr. Justice Norris.

ORR *v.* NORENDRA NATH SEN AND OTHERS.*
[18th March, 1892.]

Attorney's lien—Costs—Change of attorneys during a pending suit—Costs of both attorneys realised by the second attorney—Lien, Attorney's.

Case in which, upon a change of attorneys during the pendency of a suit, there being no express agreement as to the first attorney's costs, it was *held* that the

---

* Small Cause Court Reference No. 4 of 1891, made by G. C. Sconce, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 18th of April 1891.

(1) L.R. 18 Eq. 118. (2) *Times* Law Reports, Vol. VIII, p. 369.

1892 MARCH 18.

SMALL CAUSE COURT REFERENCE.

19 C. 368.

second attorney, on recovering the costs of both attorneys from the client after notice that the costs of the first attorney were unpaid, did so on behalf of the first attorney to the extent of his share of the costs.

THIS was a reference to the High Court made by the Chief Judge of the Small Cause Court. The material facts and findings were as follows:—

The plaintiff, Mr. Orr, was the attorney for Thakamoney Dassee in a suit of Thakamoney Dassee *v.* The Secretary of State, in respect of which Thakamoney owed to Mr. Orr a certain sum for costs. While the suit was pending, Thakamoney, with Mr. Orr's consent, changed her attorney and engaged Messrs. Sen & Co., the members of that firm being Norendra Nath Sen and Kamini Kumar Guhu. The order for change of attorneys made no mention of any undertaking on the part of Messrs. Sen & Co. to secure the payment of Mr. Orr's costs, and no such undertaking was found to be proved. On Thakamoney Dassee obtaining a decree against the Secretary of State in the above suit, Mr. Orr sent his bill of costs to Messrs. Sen & Co., with the words "no advance" written at the foot, and it was proved that Messrs. Sen & Co. understood by these words that no part of Mr. Orr's costs had been paid. Subsequently, Messrs. Sen & Co. had their own, and also Mr. Orr's bill, taxed as one bill, and received the whole amount due thereon, and on learning (as they alleged) from Thakamoney's manager that Mr. Orr had been paid his costs, they made over the amount of Mr. Orr's bill to the manager.

[369] Mr. Orr now sued to recover from Messrs. Sen & Co. and Thakamoney the sum of Rs. 673-8, his taxed costs, and prayed for a declaration that the defendants, Messrs. Sen & Co., were trustees for him. The Chief Judge was of opinion that the words "no advance" constituted notice to Messrs. Sen & Co. that the plaintiff's costs had not been paid, and that they were not justified in paying the money over as they did, and thus defeating the plaintiff's lien, and that the case fell within the principle of *Read* v. *Dupper* (1) and *Ormerod* v. *Tate* (2). He therefore gave judgment against Messrs. Sen & Co. and Thakamoney Dassee, but at the request of the defendants Messrs. Sen & Co. made such judgment contingent upon the opinion of the High Court, to whom he referred the case setting out the above facts.

The reference now came on for hearing.

Mr. *Hill* appeared for the defendants Norendra Nath Sen and Kamini Kumar Guhu. The defendant Thakomoney Dassee did not appear or contest the suit in either Court.

Mr. *Ormond* appeared for the plaintiff.

Mr. *Hill.*—The referring Judge has found there is no evidence of an arrangement or undertaking on the part of Messrs. Sen & Co., but decides in favour of the plaintiff on the authority of *Read* v. *Dupper* (1) and *Ormerod* v. *Tate* (2). In the later case of *Brunsdon* v. *Allard* (3) the previous cases are noticed, and it was held that Lord Mansfield's doctrine in *Welsh* v. *Hole* (4) had been pressed too far. This is not a case of attorney's lien at all. The plaintiff in handing over the cause papers to the defendants Messrs. Sen & Co. unconditionally abandoned his lien. Messrs. Sen & Co. were his client's agents, and when the amount of the costs in question came to their hands, it thereby came into possession of the client, which effectually destroyed any lien the plaintiff might have had. Messrs. Sen & Co. would not have been justified in parting with this sum to the plaintiff without their client's consent.

(1) 6 T.R. 361. (2) 1 East. 463. (3) 2 E. & E. 19. (4) 1 Doug. 238.

Mr. *Ormond.*—The case of *Brunsdon* v. *Allard* (1) merely decides that parties are entitled to compromise suits without the leave of their attorneys, and is therefore not in point. Solicitors' **[370]** liens for unpaid costs are of two kinds—(*i*) a lien on the papers, which exists so long as the papers remain in the solicitor's hands, and (*ii*) a lien on the proceeds of a judgment obtained through his labour, which exists until such proceeds have actually come into the hands of his client. Messrs. Sen & Co. received both sets of costs in the same manner, not as money to be paid over to Thakamoney, but as unpaid costs due to her attorneys. *Mason* v. *Whitehouse* (2) shows that although a plaintiff has been ordered to pay the costs to the defendant, the defendant's solicitor, in preference to his client, is entitled to be paid such costs. The principle is that the solicitor has a prior right to his client to be paid his costs out of the fund recovered; and it makes no difference whether he has to receive this money from an opposing solicitor or from a solicitor engaged in the same interests with himself. *Read* v. *Dupper* (3) lays down that a party may not run away with the fruits of the cause without satisfying the legal demands of his attorney. In *Bozon* v. *Bolland* (4), which is a case in point, the two kinds of liens are explained, and it was there held that a solicitor discharged during a cause retains his lien for costs upon the fund which is recovered partly through his efforts. The judgment in Thakamoney's case was the result in the first place of Mr. Orr's labours, and his lien for costs should rank in priority to Messrs. Sen & Co.'s lien.

1892 MARCH 18.

SMALL CAUSE COURT REFERENCE.

19 C. 368.

Then as to Mr. Orr's lien on the papers. Although at law this lien no longer existed when he parted with the papers, yet I submit, on the authority of *Swan* v. *Barber* (5), that an implied contract would be raised in equity from the conduct of the parties that Messrs. Sen & Co. should realize and pay over to Mr. Orr his costs out of the fund that might be recovered, in consideration of Mr. Orr's parting with the papers; for without such concession on Mr. Orr's part, Messrs. Sen & Co. could not have earned their costs. Express evidence would be required to show that a common law lien is absolutely, and for no consideration, abandoned without some such contract being implied. Messrs. Sen & Co., therefore, received this money as agents for the plaintiff.

[371] Mr. *Hill* (in reply).—The facts are not made out so as to support Mr. Orr's case of an implied contract. There was no implied agency to receive the money; there is at most a license.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., PRINSEP and NORRIS, JJ.) was delivered by

PETHERAM, C.J.—Upon the facts stated, our answer is that judgment was rightly given in favour of the plaintiff against Messrs. Sen & Co.

When judgment was given in favour of Thakamoney Dassee against the Secretary of State for her claim and costs, both Mr. Orr and Messrs. Sen & Co. had a lien on that judgment for the amount of their costs, which either of them might have enforced by notice to the defendant not to pay over the amount recovered to the plaintiff until the lien was satisfied, and after the judgment had been satisfied, and the amount thereof was in the hands of Messrs. Sen & Co., they had a lien upon the fund for their costs. Mr. Orr by handing his bill to Messrs. Sen & Co. for

(1) 2 E. & E. 19. (2) 4 Bing. N S. 692. (3) 6 T.R. 361.
(4) 4 M. and Cr. 354. (5) L. R. 5 Ex. D. 130.

1892
MARCH 18.
SMALL CAUSE COURT REFERENCE.
19 C. 368.

taxation, and by not giving notice to the defendant of his lien, enabled Messrs. Sen & Co. to get the whole fund into their hands; but we think they did so on behalf, not only of themselves and the plaintiff, but on behalf of Mr. Orr also, and that the fund when in their hands was subject to a lien for the whole of the costs, which had been incurred in recovering it, *i.e.*, not only for their own costs, but for those of Mr. Orr as well, and that they were bound not to part with the fund until so much of the lien as was a security for Mr. Orr's costs had been satisfied. They have parted with the fund without reference to those costs, and the plaintiff is, we think, entitled to call upon them to pay the amount.

Attorneys for the plaintiff: Messrs. *Orr & Co.*

Attorneys for the defendants: Messrs. *Sen & Co.*

A. A. C.

---

19 C. 372.

[372] SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep and Mr. Justice Norris.

DUNCAN BROTHERS & CO. (*Plaintiffs*) *v.* JECETMULL GREEDHAREE LALL (*Defendants*).* [21st May, 1892.]

Civil Procedure Code (Act XIV of 1882), *s.* 43—*Breaches of the same contract, how sued upon—Cause of action—Contract.*

Where a contract for the sale and purchase of goods is broken by the purchaser, in part by refusal to take delivery, and in part by refusal to pay for goods delivered, both breaches having occurred before any suit is brought, the vendor is debarred by s. 43 of the Code of Civil Procedure from bringing two suits against such purchaser, his claim being one arising out of one cause of action and based on one and the same contract.

The view taken by Wilson, J., in *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (1) approved.

PETHERAM, C.J.—"The whole of the claim which the plaintiff is entitled to make in respect of the cause of action" in s. 43 means, in the above case, the entire claim which the plaintiff has against the defendant at the time the action is brought, in respect of any failure or failures to accept and pay for goods purchased of him by the defendant under one contract, and the whole of such claim must be included in one action.

PRINSEP, J.—The expression 'cause of action' is to be construed with reference to the substance rather than the form of the action. The claim in both the above cases being for damages on account of breaches of the same contract, s. 43 read with the illustration debars the plaintiff from bringing two suits.

[**F.**, 4 Bur. L T. 177 = 11 Ind. Cas. 827; **R.**, 16 A. 165 = 14 A.W.N. 65; A.W.N. (1908) 199; 14 C.L.J. 589 (596) = 10 Ind. Cas. 406; 28 P.R. 1907 = 93 P.L R. 1908; **D.**, 21 B. 267 (271).]

REFERENCE to the High Court made by R. S. T. MacEwen, Esq., Second Judge of the Calcutta Court of Small Causes.

The following was the referring order:—"The defendants entered into a contract No. 1797 with the plaintiffs on the 7th January 1889 for the purchase of '50 bales grey shirtings, quality 3019, at Rs. 4-13 per piece, shipment in March or April next. Bill of lading date to be counted

---

* Small Cause Court Reference No. 3 of 1891, made by R. S. T. MacEwen, Esq., Second Judge of the Calcutta Court of Small Causes, dated the 13th April 1891.

(1) 12 C. 339.

as date of shipment under this contract. Goods to be as per sample shown buyer in seller's possession. Dimensions 37″× 38 yards. Goods to be stamped T. P.'

[373] "All the bales arrived between 25th April and 14th June 1889. The defendants took delivery of 1 bale on 1st May and paid for it; 5 bales were delivered to them on 27th July for which they refused to pay, and they refused to take delivery of, and pay for, the remaining 44 bales, which were resold by the plaintiffs after notice to the defendants.

"The plaintiffs instituted two suits on the same date—one for Rs. 1,628-8-3, being the damages arising on the resale of the 44 bales: the other for Rs. 1,229-3-6, the price of the 5 bales and interest.

"By consent both suits were heard together. In both suits the defence was taken that the plaintiffs had split their cause of action. In the suit for damages it was also pleaded that the goods were not according to sample: that the breach was on the part of the plaintiffs: that the plaintiffs had no right of resale, and that the defendants were not liable in damages.

"In the suit for the price of the 5 bales it was pleaded that there had been no acceptance of the goods, and that the suit would consequently not lie.

"The contract sued upon was admitted. I found the following facts: that 41 bales had been shipped within the contract time: that 9 had not been so shipped: that the defendants had notice of the arrival of all the bales, including the 9 late shipped: that the defendants despatched the first bale received by them to a constituent up-country without opening it or examining its contents: that in consequence of information received from this constituent they, for the first time, on the 13th June 1889, complained to the plaintiffs in a letter of that date that the bale sent up-country was found to be 'of very inferior quality,' and desired that the contract should be cancelled: that they had no personal knowledge of the fact therein stated: that in reply to this complaint the plaintiffs refused to cancel the contract, but offered to put the matter in the hands of the Chamber of Commerce for survey: that the defendants refused the offer: that thereafter, that is to say on 10th August 1889, Hazareemull, one of the defendants, proposed that the goods should be surveyed by two gentlemen—one from the firm of Messrs. Horne, Dunlop & Co., and the other from the firm of Messrs. Hoare, Miller & Co.: that the plaintiffs, waiving their right [374] under the contract to nominate a surveyor, agreed to this proposal that the decision of the surveyor should cover all the bales which had then arrived, that is to say, 44 then in the plaintiffs' godowns, and the 5 which had been previously delivered to the defendants: that the defendants had accepted the 5 bales subject to the survey agreed upon: that in pursuance of such agreement the plaintiffs on 21st August intimated to the defendants that the survey would be held in their office at 12 o'clock the next day, when they were requested to be present: that on 22nd August the survey was duly held by Mr. Dunlop, of Horne, Dunlop & Co., and Mr. Ormerod, of Hoare, Miller & Co.: that there was no difference between the sample and the goods tendered: that the goods tendered were a fair delivery, and that the defendants had no cause of complaint on the ground of inferiority, which was the only ground of complaint at that time.

"I held that the defendants having refused to take and pay for the 44 bales and to pay for the 5 bales delivered to them after the survey

1892 MAY 21. — SMALL CAUSE COURT REFERENCE. — 19 C. 372.

agreed upon, had committed a breach of the contract: that the plaintiffs were entitled to resell the 44 bales: that the damages and the price of the goods claimed had been proved, and that the plaintiffs were entitled to a decree in both suits.

"My judgment is contingent upon the opinion of the High Court on the following question submitted by the defendants' pleader:—

"'Whether or not the plaintiffs are debarred from bringing two suits against the defendants based on one and the same contract, both causes of action having accrued at the time of the institution of the suits.'

"This question was decided in the case of *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (1), but there was a difference of opinion between the learned Judges on the point. The Chief Justice, Sir Richard Garth, held that a claim for the price of goods sold was a cause of action of a different nature from a claim for damages for non-acceptance of goods, and that such claims, although arising under one and the same contract, may be sued upon separately, s. 43 of the Civil Procedure Code notwithstanding.

[375] "Mr. Justice Wilson held that where there is one contract for the purchase of goods, and the purchaser takes some of the goods, but breaks his contract in part by not paying for the goods he takes, and in part by not taking and paying for the remainder (which is precisely the present case), and both breaches occur before any suit is brought, the plaintiff's claim is one arising out of one cause of action, and the whole claim must be included in one suit.

"The whole claim in the present case exceeds the pecuniary jurisdiction of this Court. The Court has only jurisdiction if the plaintiffs are entitled to bring two suits in the way they have done: or one suit embracing both counts, but abandoning any excess over Rs. 2,000. The question in dispute between the parties at the time that the defendants agreed to a survey as a means of settlement affected all the goods, *i.e.*, the 5 bales which had been delivered to the defendants and the price of which is claimed in one suit: and the 44 bales which formed the subject of the resale, and in respect of which damages are claimed in the other suit: and the decision was to cover the whole 49 bales.

"I considered myself bound by the decision in the above-quoted case, and gave the plaintiffs a judgment in both cases. But having been asked to refer the question under s. 69 of the Act, and having regard to the fact that it is a decision of only two Judges, and that they differed in opinion, I considered I ought to comply with the application for a reference.

"The debt and costs in both suits and the costs of this reference have been deposited."

Mr. *Acworth*, appeared for the defendants.

Mr. *Henderson*, appeared for the plaintiffs.

Mr. *Acworth.*—I adopt the view of Wilson, J., in *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (1), and I submit the terms of s. 43 of the Code of Civil Procedure are in my favour. The section was enacted to prevent multiplicity of suits, and its language shows that what the Legislature intended to look to was the substance of the action, and not the technical cause of [376] action—see *Soorjomonee Dayee* v. *Suddanund*

---

(1) 12 C. 339.

Mohapatter (1). It was meant that all the claims as to one cause of action should be included in one suit. The cause of action is the breach of the contract, and all the breaches must be sued upon at one and the same time—*Grimbly* v. *Aykroyd* (2), *Mackintosh* v. *Gill* (3), *Wood* v. *Perry* (4), *Shib Kristo Dah* v. *Abdool Sobhan Chowdhry* (5), *Rangamma* v. *Vohalayya* (6), *Alagu* v. *Abdoola* (7). 1892 MAY 21.

Mr. *Henderson.*—The two claims here are of a different nature, the first being for non-payment of sums due for goods accepted, and the second being for damages for non-acceptance. 'Cause of action' means the right to come into Court to enforce a claim. I rely on the judgment of Garth, C.J., in *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (8).

SMALL CAUSE COURT REFERENCE.

19 C. 372.

Mr. *Acworth* was not heard in reply.

The following opinions were delivered by the Court (PETHERAM, C.J., PRINSEP and NORRIS, JJ.)

OPINIONS.

PETHERAM, C. J.—My answer to the question referred to us by the Judge of the Small Cause Court is, that the plaintiffs are debarred from bringing these two suits against defendants by s. 43 of the Code of Civil Procedure. I frame my answer to the question in this form, because, as was said by Mr. Justice Wilson in the case of *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (8), I prefer to guard myself against expressing any opinion wider than is necessary for the purposes of this case, and as was done by that learned Judge in that case, I found my judgment solely on the construction which I place on s. 43 of the Code. I agree with him in thinking that the words "the whole of the claim which the plaintiff is entitled to make in respect of the cause of action" in that section in such a case as the present means the entire claim which the plaintiff has against the defendant at the time the action is brought, in respect of any failure or failures to accept or pay for goods purchased of him by the [377] defendant under one contract, and that the whole of such claim must be included in one action.

I am not aware of any other decision on this section, except the one cited in the judgment, and to which I have referred, and, as I have said before, I base my judgment on the construction of that section alone.

PRINSEP, J.—This is a reference from a Judge of the Small Cause Court, Calcutta, in which the opinion of this Court is asked whether the two suits tried by that Court are or are not barred by reason of s. 43 of the Code of Civil Procedure. The objection taken is not merely technical, because, if under s. 43 the claims now made should have been made the subject of one suit, the amount involved would exceed the jurisdiction of the Small Cause Court.

The point referred to us is thus stated by the learned Judge of the Court of Small Causes:—

"Whether or not the plaintiffs are debarred from bringing two suits against the defendants based on one and the same contract, both causes of action having accrued at the time of the institution of the suits."

The case stated is admittedly on all fours with *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (8), in which the learned Judges (Garth, C.J., and Wilson, J.) differed.

(1) L.R. I.A. Sup. Vol. 212=12 B.L.R. 304. (2) 1 Exch. 479.
(3) 12 B.L.R. 37. (4) 3 Exch. 442. (5) 14 W.R. 408.
(6) 11 M. 127. (7) 8 M. 147. (8) 12 C. 339.

1892 MAY 21. — SMALL CAUSE COURT REFERENCE. — 19 C. 372.

The two suits are based on breaches of the same contract. One suit is for the price of goods delivered, the other for damages for non-acceptance of other goods. Section 43 of the Code of Civil Procedure declares that "every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action." The matter submitted to us therefore is, are these one or two causes of action arising out of this transaction; in other words, what is the proper meaning of 'cause of action' in s. 43.

Garth, C.J., in the case already mentioned, laid down that the "real principle which runs through all cases is that if the several items which make up the claim are of the *same nature* and form part of the same course of dealing, *so as to pass under the same description* and *form part of one transaction*, they must be considered **[378]** as one cause of action, and must be joined in one suit, though they may have arisen out of several contracts. But claims which are diverse in character, which do not answer the same description, and which would require a different class of evidence to support them, may be made the subject of different suits, though they may arise out of the same contract." The learned Chief Justice observed that in that case, as in the case now before us, there is "a claim for debt and a claim for damages," and he mainly relied on the fact that the evidence in each case would be different, so as to entitle the plaintiff to bring separate suits.

Wilson, J., observed that "in one sense every breach of contract is a separate cause of action." But, he added, the illustration to s. 43 "shows that the framers have not here used the expression in this sense." That illustration is: "*A* lets a house to *B* at a yearly rent of Rs. 1,200. The rent for the whole of the years 1881 and 1882 is due and unpaid. *A* sues *B* only for the rent due for 1882. *A* shall not afterwards sue *B* for the rent due for 1881."

I do not propose to consider the cases cited by the learned Judges which relate to the practice in the Courts of England, and which do not, therefore, necessarily help us in deciding the practice in the Courts of India which has been laid down by a special Code, and has been discussed in some of our reported cases. The terms of s. 7 of the Code of 1859, and of s. 43 of that of 1882, do not vary materially. The former declared that "every suit shall include the whole of the claim arising out of the cause of action;" s. 43 of the Code of 1882 provides that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." The cases, therefore, decided under the Code of 1859 are in point.

Their Lordships of the Privy Council expressed their opinion on the subject in *Moonshee Buzloor Raheem* v. *Shumsoonnisa Begum* (1) (see page 605 of the report). In that case, after previous litigation to recover various moveable properties misappropriated by the defendant, the plaintiff brought a fresh suit to recover some "Company's paper" which she might have included in the former suit as part **[379]** of her claim. Their Lordships stated that "the correct test in all cases of this kind is, whether the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit. ....But the cause of action in the former suit of the respondent seems to them to be the refusal by the husband to restore, or his misappropriation of the wife's property which he says she intrusted to him. There is

(1) 11 M.I.A. 551.

nothing to distinguish the deposit of this particular Company's paper from the deposit of those which she deposited with it, and has recovered in the former suit. It was a mere item of her demand, and is admitted on the face of the present plaint to have been omitted from it for no other reason than the very insufficient one before mentioned."

In *Thakur Shankar Baksh* v. *Dya Shankar* (1) the plaintiff sued for redemption of a mortgage of certain villages, having previously sued for redemption on a sub-proprietary or lesser title in the same village. Their Lordships held that the second suit was barred, holding that it did not make any difference as regards the cause of action, that in the former suit the plaintiff asked for the sub-proprietary right and in the latter for the superior proprietary right. "It is not," their Lordships state, "part of the cause of action. It is the manner in which the redemption of the mortgage was to be given." As their Lordships laid down in *Soorjomonee Dayee* v. *Suddanund Mohapattar* (2), "the term 'cause of action' is to be construed with reference rather to the substance than to the form of action."

To apply the test laid down by their Lordships of the Privy Council, each of the two cases before us is founded, in fact, on a cause of action distinct from that which is the foundation of the other. The two suits were brought simultaneously, and they are no doubt different in the form of action, but still the claim on both is for damages on account of breaches of the same contract. The difference in the form of action is of no consequence, for it has been laid down by their Lordships of the Privy Council that the substance rather than the form of action should be taken into consideration.

[380] In both the plaintiff seeks to recover monies due from the defendant on breach of the same contract—in the one suit as the price of goods delivered, in the other as damages in consequence of non-acceptance of other goods. In substance, however, the two suits are the same. In both the plaintiff seeks to obtain the benefit of his contract. Taking this with the illustration to s. 43 of the present Code, I think that the plaintiff was debarred from bringing two suits, and we should answer the learned Judge of the Small Cause Court accordingly.

NORRIS, J.—I concur in holding that the question upon which our opinion is asked by the learned Judge of the Small Cause Court should be answered in the affirmative.

Attorneys for the plaintiffs: Messrs. *Dignam*, *Robinson* and *Sparkes*.

Attorney for the defendant: Mr. *N. C. Bose*.

A. A.

(1) 15 I. A. 66=15 C. 422. (2) L.R. I. A. Sup. Vol., 212=12 B. L. R. 304.

1892
APRIL 20.

CRIMINAL REFERENCE.

19 C. 380.

19 C. 380.

CRIMINAL REFERENCE.

Before Mr. Justice Norris and Mr. Justice Beverley.

QUEEN-EMPRESS *v.* HARADHAN *alias* RAKHAL DASS GHOSH (*Accused*).* [20th April, 1892.]

Forgery—Cheating—Using a forged document—"Fraudulently"—"Dishonestly"—Penal Code (Act XLV of 1860), *ss.* 24, 25, 415 *and* 471—*Practice—Right to begin in reference by Presidency Magistrate on question of law—Criminal Procedure Code (Act X of* 1882), *s.* 432.

In construing ss. 24 and 25 of the Penal Code, the primary and not the more remote intention of the accused must be looked at.

Queen-Empress v. *Girdhari Lal* (1) cited.

Under the rules of the Calcutta University a private student desiring to appear at the Entrance examination is required to forward to the Registrar, with his application for permission to appear, a certificate to the effect, *inter alia*, that he is of good moral character and has submitted himself to a test examination by, and furnished exercises to, the person signing the certificate sufficient in that person's opinion to show that his **[381]** qualifications give a reasonable probability of his passing the examination. Such certificate has to be signed by one or other of the persons mentioned, in the rules, amongst them being the Head Master of a high school under public management. On such certificate being sent to the Registrar and the prescribed fee paid, that officer forwards a receipt to the candidate with his roll-number thereon, which is also an authority for him to appear at the examination and enter the examination-hall. A private student forwarded to the Registrar, with his application for permission to appear, a certificate in the prescribed form, purporting to be signed by the Head Master of a high school, such signature however being, as the applicant well knew, a forgery. The Registrar, knowing at the time that the signature of the Head Master was not genuine, sent to the applicant the receipt for his fee and the necessary authority allowing him to appear at the examination, and in due course the applicant appeared, took his seat in the hall at the desk allotted to him, and commenced the examination.

Upon charges being preferred against the applicant of using as genuine a forged document (s. 471) and attempting to cheat (ss. 415 and 511)—

Held, that his primary object or intention was, by falsely inducing the Registrar to believe that the certificate was signed by the Head Master of a Government school under public management, to be permitted to sit for the Entrance examination, and that such intention could not be held to be "fraudulent" or "dishonest" within the meaning of ss. 25 and 24 of the Penal Code.

Held, consequently, that the use of the forged document though with the knowledge or belief that it was forged, was not fraudulent or dishonest, and that as these are essential elements to offences under ss. 471 and 415 of the Penal Code, the accused had not committed either of the offences charged.

Held, further, that the accused had not committed any offence under the Penal Code.

Jan Mahomed v. *Queen-Empress* (2) cited.

In a reference by a Presidency Magistrate to the High Court, under s. 432 of the Code of Criminal Procedure, as to whether, on the facts stated, any offence has been committed by an accused person, it lies on the prosecution to make out that an offence has been committed, and under the circumstances the prosecution must begin.

---

* Criminal Reference, No. 1 of 1892, made by F. J. Marsden, Esq., Chief Presidency Magistrate, Calcutta, dated the 11th of February 1892.

(1) 8 A. 653. (2) 10 C. 584.

1892
APRIL 20.

CRIMINAL REFERENCE.

19 C. 380.

[**Overr.**, 25 C. 512=1 C.W.N. 255 (259) (F.B.)=L.B.R. (1893—1900) 437 ; **Diss.**, 15 A. 210 (217)=(1893) A.W.N. 96 ; 28 M. 90 (96, 98, 110 and 113)=1 Weir 538-A ; **F.**, Rat. Unr. Cr. Cas. 627 (629) ; **R.**, 2 P.R 1898 Cr. ; U.B.R. (1892—1896) 279 (284) Cr. ; **D.**, 22 B. 763 (769).]

THIS was a reference made by the Chief Presidency Magistrate under the provisions of s. 432 of the Code of Criminal Procedure. The accused was charged under s. 471 of the Penal Code with having in the month of December 1891 dishonestly and fraudulently used as genuine a forged document, namely, a certificate purporting to be signed by one Saranath Chatterjee, **[382]** Head Master of the Pabna Government High English School, for the purpose of getting admitted to the Entrance examination of the Calcutta University held in February 1892, and further with the offence of attempting to cheat by means of the same document.

It appeared from the evidence of Mr. Nash, the Registrar of the University, that on the 28th December he received in his office two documents, which had been sent in to him as Registrar. The first of these two documents, which was marked Exhibit A by the Magistrate, was a letter in the following terms:—

To the Registrar of the Calcutta University.

SIR,

I HAVE the honour to inform you that I am a private Entrance candidate. I send my fee, Rs. 10 (ten), for the ensuing Entrance examination, 1892, by money-order, together with my application signed by the Head Master of the Pabna Government High English School. Please accept it, and send my receipt in the following address.

I remain,
Sir,
Your most obedient pupil,
HARADHAN (*alias*) RAKHAL DASS GHOSH.

Ganargacha (Pabna),
C/o. Babu Debendra Kumar Bagchi.

The second document, which was marked Exhibit B by the Magistrate, was an application and a certificate in the form prescribed by the University, the material portion of which was as follows.—

ENTRANCE EXAMINATION, FEBRUARY 1892.

[*This application must reach the office of the Registrar on or before the 28th December.*]

APPLICATION.

TO

The Registrar of the Calcutta University.

SIR,

I REQUEST permission to present myself at the ensuing Entrance examination of the Calcutta University.

The entrance fee of Rs. 10 is forwarded herewith.

I am, &c.,
HARADHAN (*alias*) RAKHAL DASS GHOSH.

1892
APRIL 20.
CRIMINAL REFERENCE.
19 C. 380.

CERTIFICATE.

The certificate of every candidate who is not a private student must be signed by the Principal or Head Master of the high school from which he appears.

The certificate of a candidate who appears as a private student must be signed by the Principal of an affiliated college or a Government Inspector of Schools, or by the Head Master of a high school under public management.

[383] I CERTIFY that I know nothing against the moral character of the above-named candidate; that he has not already passed the Entrance examination of the Calcutta University; that judging from the exercises that he has sent up, and the test examination to which he has submitted, there is in my opinion a reasonable probability of his now passing the Entrance examination, and that he has signed the above application in my presence.

SARANATH CHATTERJEE,
Head Master, Pabna Government
High English School.

The 23rd December 1891.

The remaining portion of this document, which is immaterial for the purpose of this report, consisted of directions as to how the fee was to be paid and what constitutes a high school and a private student, and other directions of a similar nature.

Mr. Nash stated in his evidence that a candidate for the Entrance examination has to produce a certificate in the form contained in Exhibit B, such certificate being signed according to the instructions contained in the margin, according as the candidate is sent up by a high school or is a private student; that when the certificate is sent in, a receipt for the fee of Rs.10 is sent to the candidate, and his roll-number is stated on the receipt; that on the day of the examination all the candidates enter the hall and sit at the desks which correspond with their respective roll-numbers; that they are not often asked to show their receipts, but they are supposed to do so if required, and that each candidate has to sign a roll, and his signature thereon is compared with that on his application.

He further stated that on receiving Exhibits A and B he got a receipt, which he signed; that he believed the signature to the certificate on Exhibit B to be genuine till the 14th January, when he discovered it was a forgery, and that he then sent the receipt to the candidate as if it had been genuine. He also stated that on the 8th February he found the accused in the examination-hall at the examination, and showed him Exhibits A and B, and asked if they [384] were his and that the accused admitted them to be his; and he deposed that if he had not discovered the fraud, the accused, if he could have passed the examination, would have received a certificate.

No further evidence was taken at the hearing of the case, the Magistrate at that stage stopping the case for the purpose of making the present reference, but it appeared that on the application made on the 8th February to the Magistrate for a warrant, Saranath Chatterjee was called, and deposed that the signature on Exhibit B, purporting to be his, was a forgery.

The following is the material portion of the Magistrate's letter of reference:—

"The accused was a candidate for the Entrance examination at the Calcutta University, and sent in an application (Exhibit A), together with a certificate (Exhibit B, herewith sent to be returned when done with), as

1892 APRIL 20. — **CRIMINAL REFERENCE.** — **19 C. 380.**

required by the University authorities, who, in return for A and B, sent him a receipt granting him permission to present himself at the examination. The accused actually did present himself and commenced the examination, and was permitted by the Registrar to do so, although prior to the commencement of the examination and prior to sending him the receipt granting him permission to present himself for examination, the Registrar had discovered and was aware that the signature on B "Saranath Chatterjee" was not the signature of the person whose signature it purported to be. It is now sought to charge the accused with uttering a forged document or attempt at cheating.

"The question I would refer for the opinion of the High Court is—Has the accused on the above facts been guilty of uttering a forged document, or of an attempt at cheating, or any other offence under the Indian Penal Code?

"I would refer their Lordships to the case of *Empress* v. *Dwarka Parsad* (1) and *Queen-Empress* v. *Appasami* (2).

On the reference coming on for hearing—

Mr. *W. C. Bonnerjee* (instructed by Mr. *Hume*, Government Prosecutor) appeared on behalf of the prosecution.

[385] Mr. *A. Chaudhuri*, Babu *Durga Mohun Dass*, and Babu *Hara Chandra Chakerbutty*, for the accused.

Mr. *Bonnerjee.*—There is no substantial difference between this case and the case of *Queen-Empress* v. *Munsab Ali Khan* (3), which was heard and decided by your Lordships only about three months ago, and that decision is against me. I would suggest, therefore, that this case, which is one of considerable importance, should be referred to the Full Bench.

NORRIS, J.—That case was not argued at the Bar. If after argument of counsel we should think it necessary to take the opinion of a Full Bench, we shall do so.

Mr. *Chaudhuri.*— I submit, this being a private prosecution, Mr. Bonnerjee cannot claim the right to appear. It is not the practice of this Court to hear a private prosecutor on a reference. *Queen* v. *Ramjai Mazumdar* (4).

NORRIS, J.—In matters of importance we always hear counsel. The Magistrate's reference is before us, and we need not enquire whether it is a private prosecution or not. What do you say as to the right to begin?

Mr. *Chaudhuri.*—The usual rule is that the party in support of the reference begins. But here questions of law have been submitted by the Magistrate for the opinion of this Hon'ble Court, and the Court is a Court of Reference and Revision. In *Queen-Empress* v. *Appa Subhana Mendre*(5) the Chief Justice held that counsel for the prisoner should begin. There are no cases on s. 432 of the Criminal Procedure Code.

NORRIS, J.—The prosecution has to make out that there has been an offence under the law. We think counsel for the prosecution should under the circumstances begin.

Mr. *Bonnerjee.*—There is no doubt that the accused is guilty of an attempt to defraud the University.

NORRIS, J.—Of what? There must be something tangible; mere deception is not fraud.

[386] Mr. *Bonnerjee.*—If the accused satisfied the examiners, he would have got a certificate from the University. There are scholarships, and

(1) 6 A 97. (2) 12 M. 151.
(3) Criminal Reference No. 19 of 1891 (unreported). (4) 6 B.L.R. (App.) 46.
(5) 8 B. 200.

1892 APRIL 20. — CRIMINAL REFERENCE. — 19 C. 380.

the accused might have got one in fraud of the other candidates. Suppose this was a competitive examination, the accused, if successful, would have robbed others of a place. I rely upon *Queen-Empress* v. *Ganesh Khanderao* (1).

NORRIS, J.—Is Mr. Nash, the Registrar of the Calcutta University, a public servant?

Mr. *Bonnerjee.*—I cannot contend that he is. The Bombay case lays down that by "fraud" is meant "an intention to deceive."

NORRIS, J.—In that case the decision is one on s. 182 of the Penal Code,—giving false information to a public servant. The learned Judges carefully abstain from deciding the question whether cheating or any other offence was committed or not.

Mr. *Bonnerjee.*—Here a false document was made to support a claim or title, and the offence is one under s. 463,—forgery.

NORRIS, J.—What sort of claim or title do you suggest?

Mr. *Bonnerjee.*—A claim to appear at the examination, or title to admission into the examination-hall as a *bona fide* candidate, when the accused was not one.

NORRIS, J.—The words "claim or title" have reference to property. The words are used in the ordinary sense.

Mr. *Bonnerjee.*—*Queen-Empress* v. *Ganesh Khanderao* (1) is an authority in point; also *Queen-Empress* v. *Appasami* (2). As to what may amount to cheating, see *Reg.* v. *Hensler* (3).

Mr. *Chaudhuri.*—I submit no offence has been made out. The whole question depends upon the meaning of the words "fraudulently" and "dishonestly." Those words are throughout the Penal Code used with reference to property. Section 25 defines "fraudulently," but that section has to be taken together with ss. 23 and 24. The latter section deals with the manner of taking, but what is taken must be some sort of property. This becomes clear on an examination of the other **[387]** sections of the Penal Code where the words are used. Various expressions are used for various kinds of deception. In s. 362 (abduction) the expression is "*by any deceitful means*;" in ss. 196, 198, 200, "*corruptly uses*;" in s. 81 "*to cause harm*;" in s. 205, "*falsely personates*;" in ss. 482 to 486, the words "*deceive or injure,*" and "*damage or injury*" are used. In ss. 206, 207, 208, where the word "fraudulently" is introduced for the first time, the context clearly shows that it is used with reference to property. An analysis of the sections shows that my contention is correct. In this connection SIR RICHARD COUCH said "from the illustrations to s. 415, Indian Penal Code, the word *fraudulently* seems to be used in the same sense as "*dishonestly.*"—*Queen* v. *Lal Mahomed* (4).

As regards "forgery," the intention to commit a fraud must be the near intention, not a possible and remote one. Here the primary intention was to induce the Registrar to believe that the certificate was signed by the head-master of a Government school. It was no doubt a wrong thing to do, but that does not make it an offence under the Penal Code.

The prosecution has to show that there must not only be the possibility of some person being deceived, but also of his being injured by the forgery.—*Reg.* v. *Bhavanishankar* (5) and the cases there cited. There is a class of cases in which it has been repeatedly held that the alteration of a document to screen an offence does not come within the purview of the

(1) 13 B. 506. (2) 12 M. 151. (3) 11 Cox. C. C. 570.
(4) 22 W. R. Cr. 82. (5) 11 B.H.C. 3.

forgery sections. [*Queen* v. *Lal Gumul* (1), *Queen* v. *Jageshur Pershad* (2).] I strongly rely upon *Queen-Empress* v. *Girdhari Lal* (3) [see also *Empress* v. *Fateh* (4), *Empress* v. *Jiwanand* (5), *Queen-Empress* v. *Syed Husain* (6), *Empress* v. *Shankar* (7), Weir, pp. 331 and 332.] As to what "claim" or "title" means, and also bearing on the question of forgery, see *Jan Mahomed* v. *Queen-Empress* (8). *The Government of Bengal* v. *Umesh Chunder Mitter* (9), and *Queen-Empress* v. *Dhundi* (10) show what amounts to an "attempt" to **[388]** commit an offence. In *Mojey* v. *Queen-Empress*(11) the registration of a false divorce was held not to be cheating. *Queen-Empress* v. *Ganesh Khandera*(12) does not apply. The Registrar of the Calcutta University, it has been conceded, is not a public servant, and besides, the points raised here were not raised in that case.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

This was a reference by the Chief Presidency Magistrate under the provisions of s. 432 of the Code of Criminal Procedure.

The facts found by the learned Magistrate are as follows:—

The accused, a private student, was desirous of being admitted as a candidate at the Entrance examination of the University of Calcutta to be held in Calcutta in February 1892.

The regulations of the University require that every candidate for admission to the Entrance examination shall send either to the Registrar of the University, or to a local officer recognized by the Syndicate, an application with a certificate in the following form.

[The form is that given above in Exhibit B.]

On the 23rd December 1891 the accused sent by post to the Registrar a letter, of which the following is a copy. [Set out above, Exhibit A.]

Enclosed in the letter was an application and certificate in the prescribed form.

The application was signed by the accused; and the certificate purported to be signed by "Saranath Chatterjee," who was described as "Head Master, Pabna Government High English School."

At the time he sent the certificate the accused knew or had reason to believe, as the fact was, that the signature "Saranath Chatterjee" was not the signature of the person whose signature it purported to be.

On receipt of this letter and the enclosures the Registrar forwarded to the accused a receipt for the money-order for Rs. 10, **[389]** and an "authority" to present himself at the Entrance examination.

At the time he sent the receipt and authority the Registrar knew that the signature "Saranath Chatterjee" was not the signature of the person whose signature it purported to be.

The accused actually presented himself at the examination and was permitted by the Registrar "to commence the examination;" but what he actually did towards "commencing the examination" the learned Magistrate does not state.

The accused was subsequently charged before the Chief Presidency Magistrate with dishonestly using as genuine a forged document, to wit, the certificate purporting to be signed by Saranath Chatterjee, the Head

(1) 2 N.W.P. 11. (2) 6 N.W.P. 56. (3) 8 A. 653.
(4) 5 A. 217. (5) 5 A. 221. (6) 7 A. 403.
(7) 4 B. 657. (8) 10 C. 584. (9) 16 C. 310.
(10) 8 A. 304. (11) 17 C. 606. (12) 13 B. 506.

1892 APRIL 20. — CRIMINAL REFERENCE. — 19 C. 380.

Master of the Pabna Government High English School (s. 471, Indian Penal Code)and with attempting to cheat (ss. 415 and 511, Indian Penal Code).

The learned Magistrate asks for our opinion as to whether on these facts the accused is guilty on either of the above charges, or of any other offence under the Indian Penal Code.

The learned counsel for the prosecution did not suggest that any charge other than those mentioned could be sustained, and we so far agree with him. It remains, therefore, only to consider whether, upon the facts stated, the accused is guilty of either or both of those charges.

To support a charge under s. 471, Indian Penal Code, the prosecution must prove (i) that the document in respect of which the charge is made is forged; (ii) that the accused used the document; (iii) that at the time he used it he knew, or had reason to believe, that it was forged; (iv) that at the time he used it, with such knowledge or belief, he did so fraudulently or dishonestly.

"Fraudulently" is defined by s. 25, Indian Penal Code, to be "the doing of a thing with intent to defraud, but not otherwise."

"Dishonestly" is defined by s. 24, Indian Penal Code, to be "the doing of any thing with the intention of causing wrongful gain to one person or wrongful loss to another person."

"Wrongful gain" is defined by s. 23, Indian Penal Code, to be "the gain by unlawful means of property to which the person gaining is not legally entitled," and "wrongful loss" is [390] defined by the same section to be "the loss by unlawful means of property to which the person losing it is legally entitled."

In construing ss. 24 and 25, Indian Penal Code, we are of opinion that the primary, and not the more remote, intention of the accused must be looked at.—See the observations of Edge., C.J., in *Queen-Empress* v. *Girdhari Lal* (1).

Now, what was the primary intention of the accused? Clearly this. By falsely inducing the Registrar to believe that the certificate was signed by the Head Master of a Government school under public management to be permitted to sit for the Entrance examination.

Now, this primary intention of the accused was not, we think, fraudulent or dishonest within the meaning of ss. 25 and 24, Indian Penal Code.

The learned Magistrate does not state the nature of the "authority" forwarded to the accused by the Registrar, nor does he say that the accused knew that such "authority" was necessary.

But if the "authority" consisted of some printed or written paper separate and distinct from the receipt, or of a metal token, or if it was contained in some words printed or written above or below, or on the back of the receipt, the accused's primary intention was not to obtain this authority.

If he had any intention at all about it, it was an intention to use it as a means of carrying out his main and primary intention.

The point is not devoid of authority.

In *Jan Mahomed* v. *Queen-Empress* (2) the facts were these:—The appellants, in order to obtain from the Settlement Officer a recognition of their right to the title of "Loskur," filed before that officer a *sunnud* purporting to be a grant of that title to their father by the Rajah of Cachar. They were convicted under s. 471, Indian Penal Code. On appeal the

(1) 8 A. 653.

(2) 10 C. 584.

1892 APRIL 20. — CRIMINAL REFERENCE. — 19 C. 380.

convictions were quashed. In delivering the judgment of the Court, MITTER, J., said:—"Further, on accepting all the facts as correctly found by the Sessions Judge, I do not think that the appellants are guilty of any offence under the Penal Code. The facts are simply these: The appellants, in order to get a recognition from a Settlement [391] Officer that they are entitled to the title of 'Loskur,' produced a *sunnud* purporting to have been granted by the Rajah of Cachar. The document is found not to be genuine. The question is, supposing the appellants used this document, knowing it to be not genuine, with intent to obtain recognition of their alleged 'Loskur' title from the Settlement Officer, is it an offence under s. 471 of the Indian Penal Code or under any other penal law of the country? The Sessions Judge found the appellants guilty under s. 471 of the Indian Penal Code. In using this document, if they had no fraudulent or dishonest intention, they cannot be guilty under s. 471 of the Indian Penal Code.

"Section 24 of the Code defines the word, 'dishonestly.' It is to the following effect:—' Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly.'" Now the intention of the appellants was not to cause wrongful gain or wrongful loss to any person.

"The word 'fraudulently' is thus defined in s. 25 of the Code:—A person is said to do a thing 'fraudulently' if he does that thing with intent to defraud, but not otherwise."

"In this case evidently the intention of the appellants was to produce a false belief in the mind of the Settlement Officer that they are entitled to the dignity of 'Loskur,' and in order to produce this belief they produced the *sunnud* 'A,' which has been found to be not genuine. Without defining precisely what would constitute 'an intent to defraud,' we are clear that it cannot be held in this case that the appellants produced the *sunnud* to 'defraud' the Settlement Officer, and therefore it cannot be said that they used the document 'frauduently,' as defined in s. 25 of the Indian Penal Code. We are therefore unable to agree with the Sessions Judge that the appellants are guilty under s. 471 of the Indian Penal Code. Nor does the act of the appellants in our opinion amount to any other offence. We therefore set aside the conviction and aquit the appellants."

In *Queen-Empress* v. *Munsab Ali Khan* (1) a reference from the Sessions Judge of Patna under s. 307, Code of Criminal Procedure, decided by this Bench on the 22nd December last, the facts were these. The accused was desirous of entering the Temple [392] Medical School at Patna, which under the rules of the Institution he could not do unless he satisfied the Principal that he had a good knowledge of the English language. With a view of showing that he possessed such knowledge he presented to the Principal a certificate purporting to be signed (but which as a matter of fact he knew was not signed) by the Head Master of the Chapra Academy, which stated that he (the accused) had a good knowledge of the English language. We held that the accused could not be convicted under s. 471, Indian Penal Code, as there was no dishonest or fraudulent intent.

We are therefore of opinion that, upon the facts stated, the accused was not guilty of an offence under s. 471, Indian Penal Code, inasmuch as

(1) Cr. Ref. No. 19 of 1891 (unreported).

1892
APRIL 20.

CRIMINAL REFERENCE.

19 C. 380.

his use of the forged document, with the knowledge or belief that it was forged, was not fraudulent or dishonest.

The foregoing observations are equally applicable to the charge of attempting to cheat.

The essence of the offence of cheating is a fraudulent or dishonest intention; and the act done towards the commission of the offence, which is requisite to establish the attempt to cheat, must be done with a fraudulent or dishonest intent. For the reasons given above we are of opinion that the facts of the case do not disclose any such intent on the accused's part.

H. T. H.

---

19 C. 392 (F.B.).

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Wilson, Mr. Justice Pigot, Mr. Justice Macpherson and Mr. Justice Banerjee.

KALACHAND KYAL (*Defendant*), *Appellant v.* SHIB CHUNDER ROY (*Plaintiff*), *Respondent.** [23rd March, 1892.]

Interest—Bond—Failure to pay on due date—Enhanced rate of interest from date of bond till date of realization—Penalty—Contract Act (IX of 1872), s. 74.

Held by the FULL BENCH (BANERJEE, J., dissenting as to part)—

A provision in a bond to the effect that the principal should be repaid with interest on the due date, and that on failure thereof interest should [393] be paid at an increased rate from the date of the bond up to the date of realization, amounts to a provision for a penalty, and s. 74 of the Contract Act applies to the money claimed at the increased rate of interest from the date of the bond until realization. *Mackintosh* v. *Crow* (1), *Nanjappa* v. *Nanjappa* (2), and *Sajaji Panhaji* v. *Maruti* (3), approved.

Baij Nath Singh v. *Shah Ali Hosain* (4) overruled, so far as it dissents from *Mackintosh* v. *Crow* (1).

Balkishen Das v. *Run Bahadur Singh* (5) distinguished.

BANERJEE, J.—The decision in *Mackintosh* v. *Crow* (1), which regards the interest at the increased rate as a penalty, is correct as to the claim of interest up to the stipulated day of re-payment, and *Baij Nath Singh* v. *Shah Ali Hosain* (4) was wrongly decided as to this point. Section 74 of the Contract Act applies only to that part of the claim for interest which is in respect of the period from the date of the bond to the due date, and has no application to the claim for interest for the period from the due date to the date of realization. This view is in accordance with the decision in *Mackintosh* v. *Crow* (1).

[**Diss.**, 15 A. 232 (**F.B.**); **F.**, 22 C. 143 (152); 30 C. 15=7 C.W.N. 152; 8 C.P.L.R. 77 (79); 3 O. C. 168 (170); 5 O. C. 406 (407); **Rel.**, 29 C. 43 (50); **Appl.**, 20 C. 328 (348); **R.**, 22 C. 658 (667); 27 C. 421=4 C.W.N. 122; 18 M. 175 (177)=4 M.L.J. 257; 17 C.L.J. 590=20 Ind. Cas. 516; 2 C.W N. 234; 18 Ind. Cas. 417 (434)= 36 M. 229=24 M.L.J. 135 (164)=13 M. L T. 20; 99 P.R. 1894; **Cons.**, 26 C. 300 (303)=3 C.W.N. 175; **D.**, 13 Ind. Cas. 624]

---

* Appeal from Appellate Decree, No. 825 of 1890, against the decree of H. Beveridge, Esq., Officiating District Judge of the 24-Parganas, dated the 9th May 1890, affirming the decree of Baboo Radha Kishen Sen, Second Subordinate Judge of that district, dated the 23rd January 1890.

(1) 9 C. 689. (2) 12 M. 161. (3) 14 B. 274.
(4) 14 C. 248. (5) 10 C. 305.

1892 MARCH 23.

FULL BENCH.

19 C. 392 (F.B.).

THE order of the referring Judges (PIGOT and BANERJEE, JJ.) was as follows:—

"This is a suit on a money bond in which the plaintiff claims Rupees 1,344-13-5, the principal being Rs. 400 and the sum claimed for interest Rs. 944-13-5.

"The bond is dated 5th Falgun 1289. It was stipulated in it that the money should be repaid with interest at Rs. 1-8 per mensem in Bysack 1290, and that on failure thereof interest should be paid at the rate of 2 pice per rupee per mensem from the date of the bond up to date of realization.

"The only question before us in this appeal is whether the increased rate of interest is a penalty or not, and as such comes within s. 74 of the Contract Act. In *Mackintosh* v. *Crow* (1) it was held by Garth, C.J., and Wilson, J., that such a provision was a stipulation for payment of a penalty, and came within s. 74 of the Indian Contract Act.

"In the case of *Baij Nath Singh* v. *Shah Ali Hosain* (2), Mitter and Macpherson, JJ., dissented from the decision in *Mackintosh* v. *Crow* (1), and held that such a provision did not amount to a penalty.

[394] "These decisions are therefore in absolute conflict.

"The case of *Baij Nath Singh* v. *Shah Ali Hosain* (2) is founded upon a construction of the effect of the decision of the Judicial Committee in *Balkishen Das* v. *Run Bahadur Singh* (3), which, in the opinion of Mitter and Macpherson, JJ., was inconsistent with the decision of Garth, C.J., and Wilson, J., in *Mackintosh* v. *Crow* (1).

"In the cases of *Nanjappa* v. *Nanjappa* (4) and *Sajaji Panhaji* v. *Maruti* (5), the High Courts of Madras and Bombay have held that the decision of the Judicial Committee above referred to has not the effect attributed to it in the decision of Mitter and Macpherson, JJ., and that the law is still as laid down in the case before Garth, C.J., and Wilson, J.

"In this view one member of the present Bench concurs. The other dissents from it.

"The questions referred to the Full Bench are:—

"*First.*—Whether the decision in *Mackintosh* v. *Crow* (1) is still the law, or whether that in *Baij Nath Singh* v. *Shah Ali Hosain* (2), dissenting from it, was rightly decided?

"*Second.*—If the decision in *Mackintosh* v. *Crow* (1) is right, and the provision in the bond in question amounts to a provision for a penalty, then, whether s. 74 of the Contract Act applies to the money claimed at the increased rate of interest from the date of the bond until realization, or only to the amount claimed at that rate from the date of the bond until the date of default in payment, that is, until Bysack 1290."

Babu *Nilmadhub Bose* and Babu *Shib Chunder Paulit*, appeared for the appellant.

Dr. *Trailokhya Nath Mitter* and Babu *Upendra Chunder Bose* appeared for the respondent.

Babu *Nilmadhub Bose.*—The lower Courts have held upon the authority of *Baij Nath Singh* v. *Shah Ali Hosain* (2), that the stipulation to pay interest at an enhanced rate is not in the nature of a penalty. That case was decided on a misapprehension of the **[395]** Privy Council ruling

(1) 9 C. 689. (2) 14 C. 248. (3) 10 C. 305.
(4) 12 M. 161. (5) 14 B. 274.

1892 MARCH 23. — FULL BENCH. — 19 C. 392 (F.B.).

in *Balkishen Das* v. *Run Bahadur Singh* (1), which was with reference to a decree and not a contract, and which does not appear to have intended to overrule the Indian cases on the point. The cases are collected in the Bombay decision of *Sajaji Panhaji* v. *Maruti* (2), and the law must be taken to be unaltered in the absence of an express decision of the Privy Council. As to the second point referred, I contend that s. 74 of the Contract Act applies to the whole amount payable at the increased rate up to realization, the contract being incapable of being divided. [The following cases were also referred to :—*Nanjappa* v. *Nanjappa* (3), *Mussamut Sohodea Bebee* v. *Deendyal Lall* (4), *Shirekuli Timapa Hegda* v. *Mahablya* (5), *Basavayya* v. *Subbarazu* (6), *Mazhar Ali Khan* v. *Sardar Mal* (7), *Bansidhar* v. *Bu Ali Khan* (8), *Bichook Nath Panday* v. *Ram Lochun Singh* (9), *Khurram Singh* v. *Bhawani Baksh* (10), *Kharag Singh* v. *Bhola Nath* (11), *Mackintosh* v. *Wingrove* (12), *Muthura Persad Singh* v. *Luggun Kooer* (13), *Sungue Lal* v. *Baijnath Roy* (14), *Arjan Bibi* v. *Asgar Ali Chowdhuri* (15), *Rasaji* v. *Sayana* (16).]

Babu *Upendro Chunder Bose.*—The 'sum named' in s. 74, read with the illustration, means an unvarying lump sum, and not merely a sum ascertainable by calculation—*Boolakee Lall* v. *Radha Singh* (17), *Mackintosh* v. *Hunt* (18), *Banwari Das* v. *Muhammad Mashait* (19). Section 74 does not apply to the present case, but if it applies to the sum named in the contract, the higher rate ought at all events not to be allowed from after default, this amount so payable being only ascertainable by calculation, and therefore not within the section. Then as to the first question the view of the Privy Council ought to prevail. It was not an *obiter dictum*. In that case the provisions for double interest were held to be only a **[396]** reasonable substitution of a higher rate of interest for a lower under certain circumstances, which is precisely the present case. Of the same nature is *Basavayya* v. *Subbarazu* (6). The following cases are also in my favour :—*Baij Nath Singh* v. *Shah Ali Hosain* (20), *Arulu Maistry* v. *Wakutha Chinnayan* (21), *Brojo Kishore Roy* v. *Madhub Pershad Misser* (22), *Mussamut Sohodea Bibee* v. *Deendyal Lall* (4).

Babu *Nilmadhub Bose* in reply.—In the case last cited no reasons are given in the judgment. The case of *Banwari Das* v. *Muhammad Mashiat* (19) contains no reference to the earlier decisions of that Court. The simple question to be decided here is whether the Privy Council case has altered the law.

The opinions of the Full Bench (PETHERAM, C.J., WILSON, PIGOT, MACPHERSON and BANERJEE, JJ.) were as follows :—

OPINIONS.

PIGOT, J.—I am of opinion that the judgment in the case of *Mackintosh* v. *Crow* (23) was right in law, and that the case of *Baij Nath Singh* v. *Shah Ali Hosain* (20) was erroneous, so far as it dissented from that judgment.

I do not think that the case before the Privy Council of *Balkishen Das* v. *Run Bahadur Singh* (1) at all affects the decision in *Mackintosh* v.

(1) 10 C. 305. (2) 14 B. 274. (3) 12 M. 161.
(4) 11 B.L.R. 138 (note). (5) 10 B. 435. (6) 11 M. 294.
(7) 2 A. 769. (8) 3 A. 260 (F.B.). (9) 11 B.L.R. 135.
(10) 3 A. 440. (11) 4 A. 8. (12) 4 C. 137.
(13) 9 C. 615. (14) 15 C. 164. (15) 13 C. 200.
(16) 6 B H.C. (A.C.J.) 7. (17) 22 W.R. 223. (18) 2 C. 202.
(19) 9 A. 690. (20) 14 C. 248. (21) 2 M.H.C. 205.
(22) 17 W.R. 373. (23) 9 C. 689.

Crow (1). It is true that in that case enhanced interest was allowed on the first instalment from the date of the solehnama. But the parties had already, as pointed out in the judgment, voluntarily settled upon the basis of that construction of the part of the 3rd article which related to this part of the claim. As pointed out in *Nanjappa* v. *Nanjappa* (2), "it was the other stipulation, *viz.*, that for payment of enhanced interest on the whole decretal money that was impugned in the argument, and this stipulation was not open to the objection that it made the higher rate of interest payable from the date of the decree." But further, as pointed out in the decision of the Madras High Court, the case before the Judicial Committee was one in which **[397]** the execution of a subsisting decree was the subject-matter of the appeal.

1892 MARCH 23. FULL BENCH. 19 C. 382 (F.B.).

I think it is enough to express complete concurrence with the opinion expressed by the Courts of Madras and Bombay, that the case of *Balkishen Das* v. *Run Bahadur Singh* (3) did not warrant the dissent from *Mackintosh* v. *Crow* (1) expressed in *Baij Nath Singh* v. *Shah Ali Hosain* (4).

I think that the objection made in the judgment in *Baij Nath Singh* v. *Shah Ali Hosain* (4), that cases such as the present do not come within s. 74 of the Contract Act, because no sum is named, is not one to which effect ought to be given. By the fixing of a rate of interest the sum to become payable "at any rate," as the Madras High Court says, "at the time when default is made" (5) is fixed: and this is what the section contemplates.

Upon the second question, I think that when the provision in the contract in question amounts to a provision for a penalty (or, which is the same thing, stipulates for a sum in case of breach within the meaning of s. 74), that that goes to the whole sum which may accrue due under the provision, although it may be that by non-payment for an indefinite time the aggregate amount ultimately payable may greatly exceed the amount—the fixed and ascertainable amount—to be due at time of default. I think they cannot be separated, and that s. 74 applies to all, that is, that it applies to the money claimed at the increased rate of interest from the date of the bond until realization.

The result will be that the appeal will be allowed, and the case remitted to the original Court to fix a reasonable compensation (not exceeding the amount provided for by the rate of interest specified) for the breach of contract in the non-payment of the principal money due under the bond. All costs to abide the result.

WILSON, J.—I agree.

PETHERAM, C.J.—I agree.

MACPHERSON, J.—I agree. I think I was wrong in considering that the Privy Council case of *Balkishen Das* v. *Run Bahadur Singh* (3) practically overruled *Mackintosh* v. *Crow* (1).

[398] BANERJEE, J.—I regret very much that I am unable to concur fully with my learned colleagues in this case.

It was a suit on a money bond, in which it was stipulated that the money should be repaid with interest at the rate of 1 rupee 8 annas per cent. per mensem in Bysack 1290, and that on failure thereof interest should be paid at the rate of 2 pice per rupee per mensem from the date of the bond up to the date of realization.

(1) 9 C. 689. (2) 12 M. 161 (166). (3) 10 C. 305.
(4) 14 C. 248. (5) 12 M. 167.

1892 MARCH 23. — FULL BENCH. — 19 C. 392 (F.B.).

The Courts below having allowed interest at the increased rate, the defendant has preferred this appeal, and the only question raised on his behalf is whether the increased rate of interest is not a penalty, and, as such, whether it does not come within s. 74 of the Contract Act.

According to the principle laid down in *Muthura Persad Singh* v. *Luggun Kooer* (1) and in *Mackintosh* v. *Crow* (2) such increased rate of interest is a penalty and comes within s. 74 of the Contract Act. But in the case of *Baij Nath Singh* v. *Shah Ali Hosain* (3) this view has been dissented from, and the decision of the Privy Council in *Balkishen Das* v. *Run Bahadur Singh* (4) has been referred to as supporting the opposite view that such a provision is not in the nature of a penalty.

As there is thus a clear conflict of decisions in this Court, the following questions have been referred to a Full Bench :—

First.—Whether the decision in *Mackintosh* v. *Crow* (2) is still the law, or whether that in *Baij Nath Singh* v. *Shah Ali Hosain* (3) dissenting from it, was rightly decided ?

Second.—If the decision in *Mackintosh* v *Crow* (2) is right, and the provision in the bond in question amounts to a provision for a penalty, then whether s. 74 of the Contract Act applies to the money claimed at the increased rate of interest from the date of the bond until realization, or only to the amount claimed at that rate from the date of the bond until the date of default in payment, that is, until Bysack 1290 ?

Upon the first question I was at first inclined to think that the decision of the Judicial Committee in the case of *Balkishen Das* **[399]** v. *Run Bahadur Singh* (4) in effect overruled the decisions of this Court in *Muthura Persad Singh* v. *Luggun Kooer* (1) and *Mackintosh* v. *Crow* (2), that a provision like the one under consideration is a provision for payment of a penalty. On further consideration, however, I am of opinion that the decision of the Judicial Committee has not that effect. There are no doubt passages in the judgment of their Lordships which, taken by themselves, may appear to overrule the two last-mentioned cases, but then what their Lordships were dealing with was not a contract, but a decree based upon a compromise ; and, as pointed out by West, J., in the case cited in the note to *Shirekuli Timapa Hegda* v. *Mahablya* (5), "the principles which govern contracts and their modification when justice requires it, do not apply to decrees which, as they are framed, embody and express such justice as the Court is capable of conceiving and administering." It cannot, therefore, be said that the decision in *Balkishen Das* v. *Run Bahadur Singh* (4) in any way touches the present point.

But then there remains the question whether, irrespective of the decision of the Privy Council, the case of *Baij Nath Singh* v. *Shah Ali Hosain* (3), or the earlier case it dissents from, lays down the correct rule of law. Now where, as in the present case, the contract is to repay a loan with interest at a certain rate on a certain day, and there is a further stipulation that in case of default interest is to run at a higher rate from the date of the loan, the additional sum that becomes payable in case of default on account of interest for the period between the date of the loan and the stipulated date of payment, cannot ordinarily be regarded as anything but a penalty which is intended to secure the punctual repayment of the loan—see *Thompson* v. *Hudson* (6), and it comes clearly within s. 74 of the Contract Act as a sum named, being

(1) 9 C, 615. (2) 9 C. 689. (3) 14 C. 248. (4) 10 C. 305.
(5) 10 B. 435 (438). (6) L. R. 4 E. & I. Ap. 1 (15).

exactly ascertainable at the time of the contract by arithmetical calculation. It is no doubt easy to conceive cases in which a provision for an increased rate of interest would not be in the nature of a penalty. Thus when the agreement is to repay a loan with interest at a certain rate on a certain [400] date, or to repay it on a certain other and later date with interest at a higher rate from the beginning, there are really two alternative contracts, either of which may be fulfilled by the borrower at his option; and the higher rate of interest payable under the latter contract cannot be regarded as a penalty for the non-performance of the former. That, however, is not the nature of the stipulation in the present case. Here there was only one contract to repay the loan on a certain day with interest at a certain rate, and the provision for the payment of an additional sum as interest for the period between the date of the bond and the stipulated date of re-payment was in the nature of a penalty and comes within s. 74 of the Contract Act. That being so, the creditor is not entitled to recover such sum as a matter of course; and, in the absence of evidence to the contrary, it must be held that the original rate of interest was a fair rate up to the stipulated date of payment, and so the creditor cannot recover interest for that period at any higher rate merely by reason of the debtor's default in making payment.

My answer to the first question would, therefore, be this that as regards the claim of interest up to the stipulated date of repayment, the decision in *Mackintosh* v. *Crow* (1), which regards the interest at the increased rate as a penalty, is correct, and the later case of *Baij Nath Singh* v. *Shah Ali Hosain* (2) was not correctly decided.

On the second question, I am of opinion that the amount claimed as interest at the higher rate from the stipulated date of repayment to the date of realization cannot be regarded as a penalty, and does not come within s. 74 of the Contract Act. In the first place, there is no contract for the payment of any lesser sum as interest for any period after the due date, for the breach of which the higher rate of intesest can be said to be a penalty. The second rate of interest is no doubt a higher or an increased rate in respect of the time between the date of the contract and the due date, but it is the only rate agreed upon in respect of the time following the due date. Then, again, this part of the claim is wanting in another essential peculiarity of a [401] penalty, namely, that of being a definite sum which becomes due at once as soon as default is committed. The amount of this part of the claim depends upon, and gradually grows with, the time for which the borrower finds it convenient to retain the use of the principal amount after the due date. It cannot in any sense be regarded as a sum named as the amount to be paid in case of breach of contract within the meaning of s. 74 of the Contract Act.

This view is, I think, in accordance with the decision in *Mackintosh* v. *Crow* (1).

My answer to the second question, therefore, is that s. 74 of the Contract Act applies only to that part of the claim for interest which is in respect of the period from the date of the bond to the due date, and that it has no application to the claim for interest for the period from the due date to the date of realization.

A. A. C.

---

(1) 9 C. 689. (2) 14 C. 248.

1892 FEB. 19.

APPELLATE CIVIL.

19 C. 401.

19 C. 401.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

JAMUNA PARSHAD AND ANOTHER (*Defendants, 2nd party*) *v.* GANGA PERSHAD SINGH AND OTHERS (*Plaintiffs*) AND HARDHANI LAL (*Defendant, 1st party*) *v.* GANGA PERSHAD SINGH AND OTHERS (*Plaintiffs*).* [19th February, 1892.]

Hindu Law—Joint Family—Mitakshara Law—Mortgage of undivided shares in joint-family property—Consent of co-sharer.

A, *B* and C together formed a joint Mitakshara family. On the 27th June 1872, *A* and *B*, without the consent of *C*, for their own benefit and without legal necessity, executed a bond in favour of *J* and *I* (defendants, 2nd party), mortgaging to them certain joint properties. On the 14th August 1882, *J* and *I* obtained an *ex parte* decree on their bond against *A*, *B* and [402] *C*, and in execution mauzas Pipra and Bangra were put up to sale on the 16th March 1888, and purchased by *H* (defendant, 1st party). Prior to the institution by *J* and *I* of their suit, *A*, *B* and *C* on the 24th August 1881, together mortgaged mauzas Pipra and Bangra to *N*. On the 13th March 1884, *N* obtained an *ex parte* decree on his mortgage, and in execution thereof mauza Pipra was sold on the 21st November 1884. The plaintiffs purchased the property, and duly obtained possession from the Court. In a suit by the plaintiffs for a declaration that the mortgage of the 27th June 1872 was invalid, and the decree and execution sale upon the basis thereof ineffectual as against them, and for confirmation of possession, and in the alternative that if the mortgage bond was valid that the amount due thereunder and chargeable on mauza Pipra might be determined, and the plaintiffs declared entitled to redeem upon payment of such amount,—*held*, that although *A* and *B* had no authority, without the consent of their co-sharer, *C*, to mortgage their undivided shares to *J* and *I*, yet as the plaintiffs derived their title from those mortgagors, they were not entitled to recover such shares without paying to *H*, who by his auction purchase had acquired the right of the mortgagees, the money advanced on the mortgage bond of 1872 with interest, and that the same was a charge on such shares.

Mahabeer Persad v. *Ramyad Singh* (1) applied in principle. *Sadabart Prasad Sahu* v. *Foolbash Koer* (2), *Madho Parshad* v. *Mehrban Singh* (3) distinguished. *Nilakant Banerji* v. *Suresh Chandra Mullick* (4) referred to.

[F., 5 C.L.J. 61-N; 13 C.W.N. 815=1 Ind. Cas. 670; 114 P.R. 1894; R., 7 C.L J. 644 (646); 13 C.L.J. 664=15 C.W.N. 748=9 Ind. Cas. 1034; 14 C.W.N. 552=2 Ind. Cas. 986; 3 Ind. Cas. 291; 13 Ind. Cas. 466=14 O.C. 295; 1 O.C. 53 (60).]

A joint Hindu family, governed by the Mitakshara Law, consisted of two brothers, Kishandeo Narain Singh (deceased) and Barhamdeo Narain Singh, and a nephew, Baldeo Narain Singh. On the 27th June 1872, for their own benefit and without legal necessity, the two brothers Kishendeo and Barhamdeo, without the consent of their nephew Baldeo, who was a major at the time, executed a bond for Rs. 2,650 in favour of Jamuna Parshad and Ishri Parshad (defendants, 2nd party), mortgaging to them, among other joint-family properties, taluka Bishanpur, in which was situated mauza Pipra, the property in suit. On the 24th August 1881, Kishandeo, Barhamdeo and Baldeo together mortgaged their joint property in mauza Pipra and Bangra to one Narasingh Doss. On the 25th July 1882, the defendants, [403] 2nd party, instituted a suit on their mortgage

* Appeals from Original Decrees, Nos. 104 and 127 of 1891, against the decrees of F. W. Badcock, Esq., Judge of Tirhut, dated the 30th of January 1891.

(1) 12 B.L.R. 90=20 W.R. 192.
(2) 3 B.L.R. F.B. 31=12 W.R. F.B. 1.
(3) 18 C. 157=17 I.A. 194.
(4) 12 C. 414.

bond against the above mentioned three members of the joint family, and on the 14th August 1882 obtained an *ex parte* decree against them for Rs. 7,439-12. In February 1884, Narasingh Das filed a suit on his mortgage bond, which was also decreed *ex parte* against the said three members on the 13th March 1884 ; and in execution mauza Pipra was sold by public auction on the 21st November 1884. The plaintiffs purchased the mauza and duly obtained possession from the Court. On the 16th March 1888, long subsequent to the date of the plaintiffs' possession, mauzas Pipra and Bangra were put up to sale in execution of the decree of the 14th August 1882, and purchased by Hardhani Lal (defendants' 1st party). This sale was confirmed on the 4th July 1888.

In May 1889 the plaintiffs instituted the present suit against the auction purchaser Hardhani Lal, the members of the joint family (defendants 3rd party) and the mortgagees Jamuna Parshad and Ishri Parshad.

In their plaint they set out the above facts, and also alleged that the defendant Hardhani Lal was setting up his auction purchase against their title, and was otherwise interfering with their peaceful possession. They alleged that Kishandeo and Barhamdeo were not the managers of the joint family ; and submitted that the mortgage of the 27th June 1872, having been executed by them for their own benefit and without the consent of their co-sharer Baldeo, was invalid ; that the sale of the 16th March 1888 of mauza Pipra was bad for material irregularities, and on the ground that the property had been improperly sold contrary to the terms of the mortgage decree of the 14th August 1882. The plaintiffs further submitted that the right of a subsequent mortgagee to redeem a prior mortgage could not be affected or taken away by a decree in a suit to which he was not a party ; and that as Narsingh Das was not a party to the suit of the defendants, 2nd party, although the latter were fully aware of the fact that his mortgage was in existence at the date of its institution, the said mortgage decree did not bind him, or the plaintiffs who claimed through him, or destroy their lien and right to redeem. The plaintiffs lastly submitted that, under the circumstances of the case, the utmost the defendant Hardhani Lal had acquired by his auction purchase was a charge **[404]** upon mauza Pipra for the amount that might properly be found to be due under the mortgage of the 27th June 1872, and that upon its determination by the Court they were entitled to redeem upon payment of such amount. The plaintiffs prayed that the Court might declare that the mortgage of the 27th June 1872 was invalid ; that the decree of the 14th August 1882 was not binding on them ; that the sale of the 16th March 1888 might be set aside or declared ineffectual as against them, and the plaintiffs confirmed in their possession ; and in the alternative that if the Court was of opinion that the said mortgage was valid, that it might determine the amount due thereunder and chargeable upon mauza Pipra, and declare the plaintiffs entitled to redeem upon payment of such amount.

The defendant Hardhani Lal contended that Kishandeo and Barhamdeo were the managers of the joint family, and that the mortgage of the 27th June 1872 was valid, as it had been executed by them as managers on behalf of, and for the benefit of, the joint family, and Baldeo had also acquiesced in it ; that Narsingh Das was fully aware of the existence of the mortgage, and by his conduct in not having redeemed it and allowed execution proceedings under the decree of the 14th August 1882 to result in the sale to him, was bound by them, and the plaintiffs who claimed through Narsingh Das and the defendants, 3rd party, were estopped from

1892
FEB. 19.

APPELLATE CIVIL.

19 C. 401.

questioning the validity of the mortgage or the decree; that he was a *bona fide* purchaser for value without notice; and that the sale of the 16th March 1888 was a good and valid sale.

The defendants, 2nd party, further urged that the suit as one for redemption was not maintainable, as all persons interested in the mortgaged properties had not been made parties.

The defendants, 3rd party, did not appear.

The issues were as follows:—

(1) Did the bond of June 27th, 1872, create a valid mortgage; and if so, upon what property?
(2) Are the plaintiffs bound by the decree of August 14th, 1882?
(3) Are the plaintiffs estopped from contesting the view taken by the defendants of the effect of the bond and decree?
[405] (4) Is this suit a fraudulent one instituted by the plaintiffs in collusion with defendants, 3rd party?
(5) Can the plaintiff sue to set aside the sale dated 16th March 1888, on the ground of material irregularity?
(6) Was there any material irregularity in the publication or conduct of such sale?
(7) Was there any fraud in the conduct of the sale?
(8) What are the rights of the various parties?

The Judge found that Kishandeo and Barhamdeo were not the managers of the joint family, and that they had borrowed money upon the security of the mortgage of the 27th June 1872 for their own benefit and without the consent of Baldeo. He therefore held, upon the authority of the case of *Sadabart Prasad Sahu* v. *Foolbash Koer* (1), that the mortgage was invalid. He also held that the mortgage covered taluka Bishanpur, mauza Pipra and the other villages included therein. The Judge did not try the 8th issue: but decided all the other issues, with the exception of the second part of the first issue, in favour of the plaintiffs, and gave them a decree, declaring the mortgage of the 27th June 1872 and the decree and sale based upon it invalid, setting aside the sale, and confirming the plaintiffs' possession.

The defendant Hardhani Lal appealed to the High Court. The defendants, 2nd party, also filed a separate appeal from this decision. The two appeals were heard together.

Babu *Umakali Mookerjee*, Babu *Hem Chunder Banerjee*, and Babu *Rajendra Nath Bose*, for the appellants.

Mr. C. *Gregory*, Dr. *Rash Behary Ghose* and Babu *Tarapodo Chowdhry*, for the respondents.

Babu *Umakali Mookerjee* contended that the mortgage of the 27th June 1872, although executed by two of the three members of the joint family, was in reality a mortgage of joint-family property by the managers, and was therefore perfectly valid. When the suit was instituted upon that mortgage, Baldeo did not resist the claim of the mortgagees on the ground that he had not executed the deed, and a decree was passed against all three members of the family. The appellant Hardhani Lal was no party to the suit. **[406]** He was a perfect stranger, and by his auction purchase had acquired a good title to the property in dispute, which the plaintiffs were estopped from questioning. But supposing that the two brothers Kishandeo and Barhamdeo had no power to execute a valid mortgage of the entire

(1) 3 B. L. R. (F.B.) 31=12 W. R. (F.B.) 1.

joint family property, the mortgage, so far as their two-third shares were concerned, was perfectly valid. The Full Bench ruling in *Sadabart Prasad Sahu* v. *Foolbash Koer* (1) did not apply, inasmuch as in the present case the question as to the validity of the mortgage had been raised in the lifetime of the mortgagors, and before their rights had passed to Baldeo or any other person by survivorship. The case of *Mahabeer Persad* v. *Ramyad Singh* (2) was clearly applicable. That decision had been approved of by the Privy Council in *Matho Parshad* v. *Mehrban Singh* (3). The appellant's rights, therefore, amounted to this, that he had acquired a good title to the two-thirds shares of Kishandeo and Barhamdeo, subject to the plaintiff's right to redeem them, and had also acquired the right to redeem the remaining third share of Baldeo, over which there could be no doubt the plaintiffs had a mortgage lien. The plaintiff's suit for redemption was not maintainable, because he had not made all the persons interested in the mortgaged properties parties to it—*Nilakant Banerji* v. *Suresh Chandra Mullick* (4). He further contended that the plaint and evidence disclosed no cause of action.

Mr. *Gregory* submitted that the cause of action was sufficiently stated in the plaint, which contained a distinct allegation that the defendant, 1st party, was setting up his auction purchase against the plaintiff's title, and was otherwise interfering with their peaceful possession; and that as the defendants had not taken this objection in their written statements or at the trial, no evidence was offered, and they should not be allowed to take it in appeal. He relied upon the Full Bench ruling in *Sadabart Prasad Sahu* v. *Foolbash Koer* (1), and submitted that the case of *Mahabeer Persad* v. *Ramyad Singh* (2) had no application; **[407]** but he contended that if the Court was of opinion that *Mahabeer Persad's* case did apply, and that the plaintiffs had only the right to redeem, and the suit was bad for defect of parties, that the Court should take into consideration the view which the Court below took of the plaintiff's rights in consequence of which it did not try the 8th issue, and not dismiss the suit, but remand it in order that all persons interested in the mortgaged properties might be added as defendants.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

JUDGMENT.

The suit out of which these two appeals arise was brought by the plaintiffs, respondents, on the following allegations, *viz.*, that two persons, Kishandeo and Barhamdeo, who with a third Baldeo, formed a Mitakshara joint family now represented by the defendants, 3rd party, executed in favour of defendants, 2nd party, Jamuna Parshad and Ishri Parshad, on the the 27th June 1872, a bond mortgaging certain properties, not very clearly described; that defendants, 2nd party, on the 25th July 1882, brought a suit upon the bond and obtained a decree against the said Kishandeo and Barhamdeo and also against Baldeo, and in execution of that decree improperly put up to sale mauzas Pipra and Bangra, which were purchased by defendant, 1st party, Hardhani Lal, on the 16th March 1888; that before the institution of the suit by defendants, 2nd party, Kishandeo, Barhamdeo, and Baldeo in August 1881 mortgaged to one Narsingh Das the mauzas Pipra and Bangra; that Narsingh Das, having

(1) 3 B. L. R. (F. B.) 31=12 W.R. (F. B.) 1.
(2) 12 B. L. R. 90=20 W. R. 192.
(3) 18 C. 157=17 I.A. 194.
(4) 12 C. 414.

1892 FEB. 19. — APPELLATE CIVIL. — 19 C. 401.

on the 13th of March 1884, obtained a decree on his mortgage, caused the mortgaged property mauza Pipra to be sold in execution. and the plaintiffs purchased the same on the 21st of November 1884 and duly obtained possession; that the mortgage to defendants, 2nd party, was invalid and the sale at their instance was irregularly held; and that the defendant, 1st party, was setting up his auction purchase against the plaintiffs and offering opposition to their peaceful possession. And the plaintiffs prayed that the Court might declare that the mortgage bond of the 27th June 1872 was invalid, and the decree and the execution sale upon the basis thereof ineffectual as against them; and that if the Court was of opinion that the said mortgage bond was valid, it might determine the amount of the lien chargeable **[408]** upon Pipra and declare the plaintiffs' right to redeem on payment of such amount.

Defendant, 1st party, resisted the claim on various grounds, and maintained that this auction purchase was valid; and defendants, 2nd party, urged in addition that the suit as one for redemption could not proceed, as persons interested in the other properties mortgaged jointly with Pipra were not made parties to the suit. Defendants, 3rd party, did not appear.

The parties went to trial upon various issues, of which it is necessary to notice here only two, namely, the 1st and the 8th, which were as follows:—

"*1st.*—Did the bond of June 27th, 1872, create a valid mortgage; and if so, upon what property?"

"*8th.*—What are the respective rights of the various parties?"

In the view which the Court below took of the case it was not necessary to consider the 8th issue. But it decided all the other issues, except the second part of the first, in favour of the plaintiffs, and gave them a decree, declaring the mortgage of 1872 and the decree and sale based thereon invalid, and confirming the plaintiffs' possession.

Against that decree these two appeals have been preferred by the defendant, 1st party, and defendants, 2nd party. They were heard together, and the points urged were—

first, that the mortgage bond of 1872, though executed by two only of the three joint owners, was binding upon all the three;

second, that at any rate the mortgage was valid as regards the shares of the mortgagors, or that the bond created an equitable charge as regards those shares;

third, that the suit, so far as it was one for redemption could not proceed by reason of defect of parties; and

fourth, that the plaintiffs had no cause of action.

As to the *first* point, there is no sufficient evidence to show that the two executants of the bond were acting as managers for the joint family. Great stress was laid upon the fact that Baldeo, the remaining member of the joint family, allowed the decree on the bond to be passed against him; but seeing that the suit which **[409]** resulted in that decree was instituted after the mortgage to Narsingh, through whom the plaintiffs claim, neither that decree, nor the fact of Baldeo not having objected to the decree being passed against him, would be any evidence against them.

The *fourth* point also must be decided against the appellants, as no such objection was raised in the Court below, though the plaintiffs made a distinct allegation in paragraph 10 of the plaint that their peaceful

possession had been interfered with by the defendant, 1st party. If the objection had been taken in time, it might have been met by evidence. We think it too late for the defendants to raise it now.

Upon the *second* point the Court below has decided against the appellants upon the authority of *Sadabart Prasad Sahu* v. *Foolbash Koer* (1). But we do not think that case settles the present question. It is true that the mortgage here was one by two out of three undivided co-parceners in respect of joint property without the consent of the third, in order to raise money for the benefit of those two and not for that of the family, and it is true also that the Full Bench in *Sadabart's* case held that one co-sharer 'had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint-family property, in order to raise money on his own account, and not for the benefit of the family;' but the question whether the mortgaged interest could be recovered without redemption was expressly left undecided, as the facts were not sufficiently stated to enable the Court to determine that question. Moreover, the question of the validity of the mortgage in *Sadabart's* case was raised by the non-alienating co-parcener, who did not claim through the mortgagor, and to whom the interest of the latter had passed by survivorship; whereas in the present case that question is raised not by persons claiming the mortgagor's interest by survivorship, but by persons claiming the same under a subsequent alienation made by those mortgagors jointly with their co-sharer.

In the case of *Mahabeer Persad* v. *Ramyad Singh* (2), which was decided after the Full Bench case of *Sadabart Prasad Sahu* v. *Foolbash Koer* (1), a father and his elder son, without legal necessity, **[410]** and without the consent of a minor son who was their co-parcener, had mortgaged their joint property, and a suit was brought to set aside the alienation in the lifetime of the mortgagors; and a Division Bench of this Court (Phear and Ainslie, JJ.), while setting aside the alienation in the interest of the minor, directed that on recovery of the property, it should be held and enjoyed in defined shares, and that the shares of the father and his elder son should be jointly and severally subject to the lien thereon of the mortgagees for the sum advanced by them with interest until repayment, the reason for making the loan an equitable charge upon these shares being that a decree without such qualification would have the effect of restoring their property to the father and son, and leaving them at the same time in possession of the money which they had borrowed on its security—a result that would have been contrary to equity and good conscience. The last-mentioned decision was approved by the Judicial Committee in *Madho Parshad* v. *Mehrban Singh* (3).

The present case differs from the cases of *Sadabart Prasad Sahu* v. *Foolbash Koer* (1) and *Madho Prasad* v. *Mehrban Singh* (3) in this, that the mortgage is here sought to be declared invalid by persons claiming under the mortgagors, and not as in those two cases by persons to whom the interests of the mortgagors had passed by survivorship. It differs also apparently from the case of *Mahabeer Persad* v. *Ramyad Singh* (2) in this, that the persons who would benefit directly by the setting aside of the mortgage are not as in that case the mortgagors themselves, but are persons deriving title from them and their co-sharer jointly. But the persons who would ultimately benefit by the unqualified setting aside of

(1) 3 B.L.R. (F.B.) 31=12 W.R. (F.B.) 1.
(2) 12 B.L.R. 90=20 W.R. 192.
(3) 18 C. 157 17 I.A. 194.

1892 FEB. 19. — APPELLATE CIVIL. — 19 C. 401.

the mortgage would be the mortgagors, they retaining in that case the mortgage money as well as the full value of their interest in the mortgaged property—a result no less contrary to equity and good conscience than if they had retained the mortgage money and the property itself; and therefore, as far as the point under consideration is concerned, the present case does not really differ from that of *Mahabeer Persad*, **[411]** and should be governed by the principle which was held applicable to that case. We are, therefore, of opinion that though Kishandeo and Barhamdeo, the mortgagors, had no authority, without the consent of their co-sharer Baldeo, to mortgage their undivided shares to defendants, 2nd party, yet the plaintiffs, who derive title from those mortgagors, are not entitled to recover their shares without paying to the defendant, 1st party, who has by his auction purchase acquired the rights of the mortgagees, the money advanced undert he mortgage of 1872 with interest, which should be considered as an equitable charge on the said shares. In other words, the only right which the plaintiffs have got as against defendants, 1st party and 2nd party, is the right to redeem.

It was faintly contended before us that mauza Pipra was not covered by the mortgage of 1872; but, having regard to the terms of the mortgage bond, we think the Court below was quite right in holding that such a contention is wholly untenable.

It remains now to consider the *third* point raised before us. The only claim that the plaintiffs are, in our opinion, entitled to make being one for redemption, the suit cannot proceed unless all the persons interested in the properties originally mortgaged in 1872 are before the Court [see *Nilakant Banerjee* v. *Suresh Chandra Mullick* (1)]. And as those persons have not all been made defendants, we were asked to dismiss this suit for defect of parties. We do not think, however, that that would be the proper order in this case. In the view that the Court below took of the plaintiffs' rights, they were entitled to a declaration that the defendants, 1st party and 2nd party, had no claim against them, and they were entitled to the property in dispute without redeeming the same; and the Court below did not, therefore, consider itself called upon to make any persons parties to the suit who were necessary parties to it if it was a suit for redemption. As, however, that view is in our opinion incorrect, and as the 8th issue raised in the case has now to be decided, we think the proper course to take in this case will be to send the case back to the Court below to try the suit as one for redemption after making all necessary persons parties to it.

[412] The result is that the decree of the Court below will be set aside, and the case remanded to that Court for trial with reference to the directions contained in this judgment. The appellants will be entitled to the costs of these appeals, only one hearing fee being allowed. Other costs will be in the discretion of the Court below.

C. D. P. *Appeal allowed and case remanded.*

(1) 12 C. 414.

19 C. 412.

1892 MARCH 18.

APPEL-LATE CIVIL.

19 C. 412.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

MEER MAHOMED ISRAIL KHAN (*Plaintiff*) v. SASHTI CHURN GHOSE AND OTHERS (*Defendants*).* [18th March, 1892.]

Muhammadan Law—Wakf—Settlement in favour of the settlor's family with the reservation of a life interest in part or the whole of the income for the settlor—"Charitable"—"Religious."

A wakf in favour of the settlor's children and kindred in perpetuity, with a reservation of a part or the whole of the income thereof in favour of the settlor for his own use during his lifetime, is valid.

Mohamed Ahsanulla Chowdhry v. *Amarchand Kundu* (1) referred to. *Rasamaya Dhur Chowdhuri* v. *Abul Fata Mahomed Ishak* (2) dissented from.

In the construction of a deed of wakf, the words 'charitable' and 'religious' must be taken in the sense in which they are understood in Muhammadan law.

[Overr., 20 C. 116 (F.B.); 22 C. 619 (P.C.)=22 I.A. 76=6 Sar. P.C.J. 572; R., 32 A. 503=7 A.L.J. 761=6 Ind.Cas. 219; 18 M. 201; 7 A.L.J. 1095=8 Ind. Cas. 578 (583); 8 O.C. 379 (385).]

TWO sisters, Azizunnissa Khatun and Kamrunnissa Khatun, were the owners, in possession, of the property in suit, which they held as a *sikmi taluq* under the superior landlord. Azizunnissa owned a 10 annas, and Kamrunnissa the remaining 6 annas share in the property. On 17th Falgoon 1286 B. S. (28th February 1880), the two sisters by two duly registered *wakfnamas*, identical in terms, made *wakfs* of their respective shares in various properties, including the property in suit. They constituted themselves *mutwalis* of their respective shares in the *wakf* properties, and [413] provided that upon the death of either of them the survivor should be *mutwali* or manager of both shares, that is, of the entire *wakf* properties, and that upon the decease of the survivor the plaintiff should be the *mutwali*. The plaintiff was a party to these two deeds.

The material clauses of the *wakfnama* executed by Azizunnissa were as follows:—

"* * I have no children. On 21st Kartick 1281 I executed a *wakfnama* dedicating the properties held and owned by me, as stated below, as well as the profits thereof, to God, in order to secure welfare in my passage to the next world, as well as for the purpose of providing expenses for good and charitable acts, and for the salvation of my soul. But the rules dictated by me for the good management and protection of the said properties, and for the use of its profits for good purposes, were not clearly stated in the said *wakfnama*. The manner in which it had been worded has not fulfilled my intentions, for its expressions do not likely mean that the profits of my property should be expended for good objects. Further, some other directions, such as my directions about monthly allowances, were not stated as intended. Some of them are against Muhammadan law. Moreover, as Fakirunnissa Khatun, whom I appointed on the former occasion as *mutwalli*, died during my lifetime,

* Appeal from Appellate Decree, No. 776 of 1891, against the decree of H. Peterson, Esq., District Judge of Faridpur, dated the 31st March 1891, reversing the decree of Babu Trailokya Nath Mitter, Subordinate Judge of Faridpur, dated the 29th of June 1889.

(1) 17 C. 498=17 I.A. 28. (2) 18 C. 399.

1892 MARCH 18. — APPELLATE CIVIL. — 19 C. 412.

it has become necessary to confirm the *wakfnama* previously executed by me, modifying the rules laid down in it. Having, therefore, consulted my wise and great and related co-religionists, I, in the possession of sound state of my mind, voluntarily fix the amended and correct rules given below for religious purposes, and for the use of the profits of my properties in pious acts, and in acts tending to the righteous path, and to benefit the people. The 17th Falgoon 1286.

"*Paragraph* 2.—During my lifetime, or so long as I wish, I shall myself make gift to the poor and indigent, and maintain and clothe them and supply their other expenses according to the rules observed during the Ramzan, Eed, Bakri-eed, Barwafat, and other festivals, in my capacity as *mutwalli.* I shall supply my own (personal) expenses from the remaining income of the property. No one will get monthly allowance during my lifetime. **[414]** On my death, from the income of the *wakf* property, specified in the schedule below, the Government revenue, collection charges, and expenses connected with litigation, as well as a sum of Rs. 400 a year, as monthly allowance to the *mutwali* for the time being, shall be paid in the manner stated below. From what remains or shall be collected, monthly allowances in the manner stated below shall be given to my relatives and old servants managing their duties in proper and dutiful manner. Half of what remains shall be expended according to the custom for the festivals of Ramzan, Eed, and Bakri-eed, and other religious ceremonies, and in making gifts to the poor and indigent, and in maintaining travellers and persons who take shelter after sunset. The remaining half of the profits shall be kept with the *mutwalli* as a ready and separate fund for the protection of the property from danger.

"*Paragraph* 3.—After my death, from the profits of the *wakf* property collected, or from whatever collections be made, in case the profits decrease in consequence of accidents such as the washing away of any property by river, or in consequence of any property becoming a chur, or becoming unfruitful by reason of inundation and drought, the monthly allowance due to the *mutwalli* shall be paid from what remains; the *mutwalli* shall proportionally pay, as he thinks proper, all the monthly allowances and other expenses. If any one of the persons to whom monthly allowance was not allowed hereditarily, that is, allowance descending from son to grandson, should die, then the amount of such person's monthly allowance should be added to the fund reserved for the protection of the property. Should the money of the fund be not expended in consequence of unavoidable consequence, then within a time, not more than eight years, a fourth share of the money of the said fund shall be reserved in it, and the remainder used in purchasing other properties for the enlargement of the *wakf* property, and for being added to it. The *mutwalli* shall in no way be competent to appropriate the said money to his own use. Should the property be enlarged and the income of it be increased, then one-third of the said additional income shall be added to the monthly allowance of the *mutwalli*, and the remainder to the charitable fund stated above, and expended according to the rule fixed."

[415] Then followed provisions for the improvement of the *wakf* property, the payment of existing and future debts incurred by Azizunnissa, for charitable gifts, gifts to saints, the entertainment of persons on the Eed, Bakri-eed, and other festivals, and during the month of Ramzan, and of travellers, and the care of the poor and indigent of her village, and a declaration that the persons entitled to monthly allowances set out in the schedule should not have any right to claim the same in her lifetime.

1892 MARCH 18. — APPELLATE CIVIL. — 19 C. 412.

After some further provisions she proceeded. . . . . "I shall not be competent to change the *mutwalli* appointed by this *wakfnama*, or to execute any other *wakfnama* regarding the said property, or any other document, &c., containing other conditions. * *

"*Paragraph* 13.—Out of the annual profits of the *wakf* property, as specified in the schedule below, the *mutwalli* shall get an annual allowance of Rs. 400. From what remains the persons named below shall get an annual allowance of Rs. 1,860, and half of what remains after deducting the said allowances shall be expended in the performance of the Ramzan, Eed, and other ceremonies, as stated in the third paragraph, and the remaining half shall be included in the fund kept apart for the protection of the property.

SCHEDULE.

The names of the allowance-holders.

Names.	Allowance. Rs.
Kamrunnissa Khatun, sister of the executant--annual allowance during her life	480
Syedunnessa Khatun, husband's name Mir Mahomed Abdurrub—annual allowance to be held hereditarily from son to grandson and other heirs	180
Moulvie Syed Moazum Hosain Saheb, son of the sister of the mother of the executant. On his death her granddaughter, Sekendra Khatun, the eldest daughter of Mir Mahomed Abdurrub, to get the annual allowance descending from son to grandson and other heirs hereditarily ...	300
[416] Mir Mahomed Israil Saheb, Khan Bahadur, eldest son, Fakirunnessa Khatun, daughter of the executant's brother, to get a monthly allowance, descending from son to grandson and so on to successive heirs	600
Taffazul Hosain Saheb Daroga, the son of the executant's uncle, to get an annual allowance	180
On his death his widow, Azizunnissa Khatun, to get the said Rs. 180 annually during her lifetime, provided she leads a chaste life and do not marry again; and if a son be born of the said Daroga Saheb, then the allowance to descend from son to grandson and so on.	
Ramnidi Neogi and on his death, his son and grandson and so forth, to get annual allowance of	120
	1,860

Azizunnissa and Kamrunnissa acted as *mutwallis* during their lifetime. Azizunissa died first, whereupon her sister Kamrunnissa, in accordance with the terms of the *wakfnamas*, became the *mutwalli* of the entire *wakf* estate. But being a *purdanashin* lady, and therefore unable to look after the management herself, she at first appointed her husband, Abdul Karim Khan, her general *mukhtar*; and, upon certain differences arising between them, she cancelled the power she had given him, and appointed the first two defendants, Sashti Churn Ghose and Jogeshur Ghose, her general *mukhtars*, by a duly registered *am-mukhtarnama*. In the year 1291 Kamrunnissa, as *mutwalli*, granted an *ijara* of the properties in suit to the third defendant, who was a brother of the first two defendants. Default having been made in payment of the rent due to the superior

1892 March 18. — Appellate Civil. — 19 C. 412.

landlord, he brought a suit and obtained a decree against Kamrunnissa. She having died in 1886, the name of her husband was substituted in the decree in her stead, and in execution thereof the property in suit was put to sale and purchased by the first three defendants in the name of the fourth.

[417] Thereupon, the plaintiff as *mutwalli* instituted a suit for the recovery of the property from the defendants. He alleged that the first two defendants, Sashti and Jogeshur, were the servants of the *wakf* estate, and were entrusted with the entire management of the dedicated properties; that it was their duty to look after and protect the same, to realize the rents from the tenants, and to pay the amounts due to the zemindar; that the first three defendants were uterine brothers living joint in food and estate, and that the *ijara* was taken by them jointly in the name of the third defendant; that they did not pay the rent due to the zemindar nor satisfy the rent decree obtained by him against Kamrunnissa, although they had at the time in their hands sufficient funds belonging to the *wakf* estate; that they gave no notice of the execution proceedings to Kamrunnissa, or on her death to the plaintiff, and that they brought about the sale in an irregular and fraudulent manner. He charged that their conduct amounted to breach of trust, and submitted that they were not entitled to retain the property purchased by them.

The plaintiff, accordingly, prayed that the sale might be set aside and possession of the disputed property be decreed to him as *mutwalli*.

The defendants pleaded, *inter alia*, that the plaint disclosed no cause of action, and that the suit was bad for non-joinder of parties. They alleged that the plaintiff had renounced Muhammadanism, and therefore was not entitled to act as *mutwalli* of a Muhammadan *wakf*; that the *wakfnamas* set up by the plaintiff were fraudulent and fabricated documents; that the ladies had no power to make a *wakf*; that the property in suit was not *wakf*, and had never been treated as such; that they were not the *tehsildars* of the *wakf* estate; that they were not Kamrunnissa's *am-mukhtars*, but only had charge of her law-suits; and that they were innocent purchasers for value.

The Subordinate Judge found that the *wakfnamas* had been duly executed by the ladies; that they were genuine deeds, and had been acted upon and covered the property in suit; that the first and second defendants not only managed and conducted law-suits, but realized monies from the tenants, paid Government revenue as well as the zamindar's rent, and did everything in connection with the [418] *wakf* estate. He also found that it was the defendant Sashti Churn who conducted Kamrunnissa's defence in the rent-suit, and that both the first and second defendants were perfectly well acquainted with the provisions of the *wakfnamas*, and with such knowledge acted as amlas of the *wakf* estate. He also found that in consequence of their position, the defendants were bound to protect the property in suit, and that the default in payment of the rent to the zemindar was intentional so as to facilitate the sale and the purchase by them of the property; that instead of giving notice to the plaintiff of the execution proceedings or taking any other steps for its protection from sale, the defendants themselves appeared as bidders and purchased the property for an inadequately small price. He held that the three brothers were joint in food and estate, and were jointly interested in the *ijara*. He was of opinion that the *wakf* was valid, and that the plaintiff had sufficiently established fraud to entitle him to a decree.

He accordingly gave the plaintiff a decree, directing the defendants to reconvey the property to the plaintiff on his paying into Court the purchase-money with interest. 1892 MARCH 18.

On appeal the District Judge upheld the findings of the Subordinate Judge that the *wakfnamas* had been duly executed by the ladies, and that they were genuine documents and had been acted upon; but as he was of opinion that the deeds of *wakf* showed no substantial dedication for charitable or religious purposes, and that provision for the members of the family was the primary object of the grantor, and the application of the funds to purposes covered by them merely contingent, and that therefore the settlements were practically a family arrangement, he held, upon the authority of the case of *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1), that the *wakfs* were invalid. APPELLATE CIVIL. 19 C. 412.

Upon the question whether the sale was fraudulently brought about by the first three defendants, or was the result of the omission of the first and second defendants to do what they were bound to do as general agents, the Judge agreed with the Subordinate Judge in finding that the first two defendants were the agents for Kamrunnissa under a general power-of-attorney, and acted [419] for her and transacted all business connected with the property, and that the three defendants were jointly interested in the *ijara*; but differed from him in finding that the agency ceased on the death of Kamrunnissa and had not been renewed by the plaintiff, and that there was nothing to show that the first two defendants had funds in their hands and allowed the arrears to remain undischarged and so bring the property to sale. He came to the conclusion that there was "no fraud or collusion on the part of the defendants in failing to give notice of the sale to the plaintiff, or any misbehaviour and misconduct on the part of the defendants as would entitle the plaintiff to ask for a cancelment of the sale proceedings and an invalidation of the defendant's purchase."

The Judge accordingly decreed the appeal, reversing the judgment and decree of the first Court, and dismissing the plaintiff's suit. The plaintiff appealed to the High Court.

The Advocate-General (Sir *Charles Paul*), Moulvi *Mahommed Yusuf*, Moulvi *Serajul Islam*, and Moulvi *Syud Shamsul Huda*, for the appellant.

Mr. *Pugh*, Mr. *Jacob*, and Babu *Golab Chunder Sircar*, for the respondents.

The *Advocate-General*, on behalf of the appellant, contended that the first two defendants were in a fiduciary position in relation to the *wakf* estate, and therefore could not purchase the property; that being in such a position they should have paid the rent due to the superior landlord, and that there ought to have been sufficient funds in their hands for that purpose. He also contended that the *wakf* was valid, and relied upon the case of *Doe d Jaun Beebee* v. *Abdollah Barber* (2).

Mr. *Pugh*, on behalf of the respondents, argued that the first two defendants were not in a fiduciary position after the death of Kamrunnissa, as her death had put an end to the agency; that there was no obligation on them to pay the rent to the superior landlord, nor had they at the time any money in their hands to pay it; that the *ijaradar* was in no way responsible for the rent previous to his *ijara*; that the plaintiff knew of the sale, and under the circumstances the purchase by the defendants, even if it be [420] held that they were agents, was valid, as there was no fraud or

(1) 17 C. 498=17 I. A. 28. (2) Fulton, 345.

1892 MARCH 18. — APPELLATE CIVIL. — 19 C. 412.

collusion. As regarded the validity of the *wakf*, he submitted that the Judge had found that the *wakf* was invalid, and that the intention was to create a family settlement, and that these conclusions being findings of fact could not be impugned in special appeal; that the object of the *wakf* was to settle the property in perpetuity on the family of the settlor and not for really charitable purposes; that the ladies had not divested themselves of the property from the moment of the execution of the *wakf*, but from the date of their death; and that therefore it could not be valid as *wakf*. He relied upon the following authorities:—*Mahomed Hamidulla Khan* v. *Lotful Huq* (1), *Fatima Bibee* v. *Arif Ismailjee Bham* (2), *Abdul Ganne Kasam* v. *Hussen Miya Rahimtula* (3), *Nizamudin Gulam* v. *Abdul Gafur* (4), *Pathukutti* v. *Avathalakutti* (5), *Mahomed Ashamulla Chowdhuri v. Amarchand Kundu* (6), and *Rassamaya Dhur Chowdhuri* v. *Abdul Fata Mahomed Ishak* (7).

The Court (O'KINEALY and AMEER ALI, JJ.) delivered the following judgments:—

JUDGMENTS.

AMEER ALI, J.—This appeal arises out of a suit brought by the plaintiff under the following circumstances:—Two Muhammadan ladies of the name of Azizunnissa and Kamrunnissa, respectively, were the owners, in possession, of the property in suit held as a *shikmi taluq* under the superior landlord. In the year 1286 they purported to make a *wakf* of their shares in various properties, including the one in suit. The *wakfnama* of Azizunnissa alone has been translated and printed in the paper-book; but the terms of both are said to be identical. Both the ladies by their respective deeds constituted themselves *mutwallis* in respect of the shares dedicated by themselves. And they provided that upon the death of either, the survivor should be the *mutwalli* or manager in respect of both shares, in other words of the entire dedicated property, and that upon her decease the plaintiff should be the *mutwalli*. The plaintiff was a party to these deeds of *wakf*, which were duly registered in accordance with the provisions of the law [421] in force at the time. Azizunnissa appears to have died first, whereupon Kamrunnissa became, under the *wakfnama*, the *mutwalli* of the entire *wakf* estate. From her position as a *purdanashin* lady she was naturally unable to carry on personally the work of management, which was entrusted at first to her husband, and after his dismissal to the first two defendants, who are brothers, by a registered *am-mukhtarnama*. In 1291 Kamrunnissa leased out the properties in suit to the third defendant, a brother of the first two. A default having been committed in the payment of the rent due to the superior landlord, he brought a suit and obtained a decree against Kamrunnissa. She died in 1886, and the decree was executed by the substitution of the name of Kamrunnissa's husband in her stead, and the property in suit was put up to sale and purchased by the first three defendants in the name of the fourth.

The plaintiff brings this suit to recover this property from the defendants. He alleges, in substance, that the first two defendants, Sashti and Jogeshur, were the trusted servants of the *wakf* estate, and had the entire charge of the properties; that their duty was to look after and protect the same, to realize the rents from the tenants, and to pay the amount

(1) 6 C. 744. (2) 9 C.L.R. 66. (3) 10 B.H.C. 7. (4) 13 B. 264.
(5) 3 M. 66. (6) 17 C. 498 = 17 I.A. 28. (7) 18 C. 399.

payable to the zemindar; that the *ijara* was taken by the three brothers jointly; that they did not pay the zemindar's rent, though they had in their hands money belonging to the *wakf* estate; that they gave no notice of the execution proceedings to the plaintiff, and that they brought about the sale in an irregular and fraudulent manner. He charges that their conduct was in breach of their fiduciary obligations, and he alleges that they are not entitled to retain the property purchased by them. He accordingly claims the recovery of the same.

The defendants raised various defences. They pleaded, *inter alia*, want of a cause of action on the part of the plaintiff and non-joinder; they alleged that the plaintiff was not a Mussulman; that the *wakfnama* put forward by the plaintiff was a fabricated document; that the ladies had no power to make a *wakf*; that the property was never called *wakf*; that they were never the *tehsildars* of the estate; that they were only charged with the conduct of Kamrunnissa's law-suits, and that they were innocent purchasers.

[422] The Subordinate Judge framed several issues in the case, but it is unnecessary to set them out in detail. Shortly speaking, he found that the deeds of *wakf* were genuine; that the defendants Nos. 1 and 2 not only managed the law-suits, but realized monies from the tenants, and paid Government revenue as well as zemindar's rent; that they were in fact "all in all" and did everything in connection with the *wakf* estate. He found further that it was Sashti who conducted Kamrunnissa's defence in the rent-suit, and that both the defendants Nos. 1 and 2 were aware of the terms of the *wakfnamas*. In other words, he found as a fact that the defendants, with a full knowledge of the provisions contained in the *wakfnamas*, acted as *amlas* of the *wakf* estate. He found also that, though from their position they were bound to protect the property, they took no steps for its protection from sale. He stated "that the price was not fair is not denied." He held further that all the three brothers, who were joint in food and estate, were interested in the *ijara*. And he was of opinion that the *wakf* was valid, and that fraud was sufficiently established. He accordingly made a decree directing the defendants to reconvey the property on the plaintiff paying into Court the purchase-money with interest.

On appeal, the District Judge agreed with the first Court in holding that the deeds of *wakf* were genuine and were duly executed by the ladies and acted upon; that the defendants Sasthi and Jogeshur transacted all business connected with the dedicated property under a general power-of-attorney, and that the interests of the three brothers were identical. But he held that there was "no fraud or collusion on the part of the defendants in failing to give notice of the sale to the plaintiff, or any misbehaviour and misconduct on the part of the defendants as would entitle the plaintiff to ask for a cancelment of the sale proceedings, and an invalidation of the defendants' purchase."

He also held that in his opinion the *wakf* was invalid. This latter position I shall examine later. The Judge does not upset the finding of the first Court that the defendants were aware of the terms of the *wakfnamas* in question, and acted as sub-managers to the *mutwalli* with a full knowledge of their position as such, nor does he hold that the defendant Sashti had not the [423] conduct of Kamrunnissa's defence in the rent-suit. He seems to think that the death of Kamrunnissa absolved the defendants from all fiduciary obligation towards the estate. In this view I cannot concur. The liabilities which spring from fiduciary

1892 MARCH 18. — APPELLATE CIVIL. — 19 C. 412.

relations are too clear to require discussion. It is conceded that, had Kamrunnissa been alive, she could have claimed a reconveyance of the property from the defendants, independently of any question of fraud. But it is said, as the District Judge has said, that the plaintiff has no right to maintain such a suit.

The position which the first two defendants held in connection with the estate is abundantly established, and both the lower Courts are agreed on that point. Though the defendants denied having anything to do with the estate of Kamrunnissa beyond looking after her law-suits, though they denied all knowledge of the *wakf*, going so far as to charge that the documents propounded were forgeries, it has been found that they were in fact entrusted with the entire charge of the dedicated property; that they transacted all business connected therewith; that they realized the rents, paid the *sudder jama*, and were in fact "all in all." It has been found also that they were aware of the terms of the *wakf*, which showed that the plaintiff was the manager in succession to Kamrunnissa. Assuming for a moment that the *wakf* purported to be created by the ladies did not amount to a valid dedication, the utmost that can be said is that the estate does not possess all the characteristics of a valid *wakf* under the Muhammadan law. But how does that affect the position of the defendants? Assuming that it was not an absolute *wakf*, there can be no doubt that the deeds represented an arrangement by which certain people took an interest in the properties which formed the subject-matter of that arrangement. Kamrunnissa had succeeded to the management under the *wakfnamas* in question, and was in possession of the entire estate as *mutwalli*. She was in fact, and could only be, in possession of her sister's share as a manager under that arrangement. Since her death the plaintiff occupies that position. As manager, and therefore acting on behalf of the endowment, she appointed the two defendants sub-managers, for that, it has been found, was their real position. Ordinarily, no doubt, the death of the principal would determine [424] the agency. In the present case the defendants have not produced their *am-mukhtarnama*, though called upon to do so. It is, however, abundantly clear from the findings of the first Court, which have not been reversed by the Judge, that the lady was neither the owner, nor dealt with the estate as her own, and that they were not merely the *amlas* of the lady, as owner, but of the endowment, and that they acted in that capacity with a full knowledge of the circumstances and the position of the parties. Besides, they were Court *mukhtars*, and had charge of all Court works connected with the estate. In my opinion, it does not lie in their mouths to say that their fiduciary relationship was one of a personal character which ceased with the death of Kamrunnissa. The Judge does not find that the defendants had been dismissed as soon as Kamrunnissa died. Any other conclusion, to my mind, would have a most mischievous tendency. Suppose, for example, the managing member of a joint Hindu family appointed a manager or attorney to transact the joint family business, can it be contended that the death of the managing member would put an end to the fiduciary relationship of the agent, and the succeeding managing member could not sue him upon the basis of such relationship?

As regards that portion of the property which belonged to Azizunnissa, the position of the defendants is nowise different from that of Kamrunnissa herself in relation to the *wakf* created by her sister and the persons interested therein. Had Kamrunnissa purchased the property,

the plaintiff, as representing the endowment, could have claimed a reconveyance from her.

The District Judge has wholly overlooked these considerations. He seems to think the fiduciary relationship was purely personal towards Kamrunnissa, and that as the plaintiff has failed to establish actual fraud, he is not entitled to any relief. I think this conclusion to be erroneous. To my mind the fiduciary position occupied by the defendants had relation to the endowment. This agency was, no doubt, created by Kamrunnissa, but it is clear that they were the servants and agents not of Kamrunnissa as owner, but of Kamrunnissa as manager; and the agency, therefore, could not and did not end with her death; and that, therefore, whether there was actual fraud on their part or not, the plaintiff, as **[425]** representing the endowment, is entitled to demand a reconveyance just in the same way as Kamrunnissa could if she had been alive.

I have proceeded so far upon the assumption that the *wakf* did not amount to a valid dedication. I now proceed to consider whether the view taken by the Judge as to the character of the *wakf* is correct or not. The Judge on this point says as follows:—

"The Subordinate Judge, on the nature of the deed, concludes that there is nothing in the law or the quoted authorities to prevent bequests in favour of relatives and their descendants in perpetuity being inserted in a *wakfnama*, and that a deed with such recitals is a valid *wakf*. So far as I understand the law, this argument is sound; that there is no prohibition against inserting such provisions in a *wakfnama* in favour of relatives, whether the latter are indigent or not, even if the grants are unlimited. The question in the present case is, was the charitable or religious dedication the primary object of the lady, or did the deed merely incorporate family settlements with the reservation, nominal as it is contended, for such objects as to constitute a valid *wakf*? It must be admitted that the deeds show no substantial dedication for charitable or religious purposes. The annuities and allowances are determinate, the charges to be incurred for performance of festivals are left undefined, and would necessarily have to be met from the residue of the annual income of the property, after satisfaction of the fixed demands, if any such surplus were available. Under these circumstances, whatever may be the income of the property devoted, it is evident that provision for the members of the family was the primary intention of the grantor, and the application of the funds to purposes covered by *wakfnamas* merely contingent. The lower Court, of course, had not the ruling of the Privy Council in *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1) before it, as an authority in connection with an enquiry as to the essential conditions necessary to constitute a valid *wakf*. The facts of the present case are not so pronounced as the one the Privy Council dealt with, so far as the immediate motive was the aggrandisement of the family. This was practically a family settlement with recitals in the deeds to represent them as *wakfnamas*, in order to obtain advantages accruing to documents of that character.

[426] In the case of *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1) referred to by the Judge, their Lordships of the Privy Council expressly abstained from laying down any general definition. The words used by them in this respect are too important to be ignored. They said —" Their Lordships do not attempt in this case to lay down any precise

(1) 17 C. 498=17 I. A. 28.

1892 MARCH 18. — APPELLATE CIVIL. — 19 C. 412.

definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses, which is only to take effect after the failure of all the grantor's descendants, is an illusory gift, a point on which there have been conflicting decisions in India." Nor do the facts of that case or the case of *Rasamaya Dhur Chowdhuri* v. *Abul Fata Mahomed Ishak* (1) cited at the Bar by respondent's Counsel bear the least analogy to the present case. It must not be understood, however, that I assent to the principles laid down in the latter case.

It was contended that the Judge has found that the *wakf* was not valid, and that the intention was to create a family settlement, and that these conclusions, being findings of fact, cannot be impugned in special appeal. I do not think this contention could have been advanced seriously. Analysed properly, the Judge's conclusion amounts to this. A *wakf* (he seems to think), in order to be valid, must be a substantial dedication for charitable or pious purposes in the English sense of the terms; here it is not so, *ergo* it is not a valid *wakf*. This is as pure a question of law as can be imagined. The two points which the Judge had to consider were, in my opinion, the following :—(i) What is necessary to constitute a lawful *wakf* under the Mussulman law; and (ii) does the *wakfnama* in question comply with the requirements of a lawful *wakf*. Both these points involve questions of law.

In dealing with the first question, *viz*., what is necessary to constitute a lawful *wakf* under the Mussulman law, it is necessary to make one observation. In the Mussulman system law and religion are almost synonymous expressions, and are so intermixed **[427]** with each other that it is wholly impossible to dissociate the one from the other; in other words, what is *religious* is lawful; what is *lawful* is religious. The notions derived from other systems of law or religion form no index to the understanding or administration of the Mussulman Law. The words "piety" and "charity" have a much wider signification in Mussulman Law and religion than perhaps in any other. Every "good purpose," *wujuh-ul-khair* (to use the language of the *Kifaya*), which God approves, or by which approach (*kurbat*) is attained to the Deity, is a fitting purpose for a valid and lawful *wakf*. A provision for one's children, for one's relations, and under the Hanafi Sunni Law for one's self, is as good and pious an act as a dedication for the support of the general body of the poor. The principle is founded on the religion of *Islam*, and derived from the teachings of the Prophet.

I will give here a few passages from some of the best known authorities to show how utterly opposed the view taken in this case is to the Mohammadan Law. The *Fath-ul-kadir* (2) says—"Literally, it (the word *wakf*) signifies detention, ... in law ...... according to the Disciples, the tying up of property in such a manner that the substance (*asl*=*corpus*) does not belong to anybody else excepting God, whilst the produce is devoted to human beings, or is spent on whomsoever he [the *wākif*] likes; and the reason of it is that, though a desire to approach the Deity (*kurbat*) should form the ultimate motive of all

(1) 18 C. 399.

(2) A commentary on the Hedaya frequently quoted in the *Fatawa Alamgiri*, cited also in *Doed, Jaun Beebee* v. *Abdollah Barber* (Fulton, 345); see Morley's Digest, Vol. I, Introd., p. cclxix.

wakfs, yet if, without such an (immediate) desire, a person were to dedicate a property in favour of the affluent (*aghnia* اغنيا), the *wakf* would be valid in the same way as a *wakf* in favour of the indigent or for the purposes of a mosque; for, in giving to the affluent there is as much *kurbat* as in giving to the poor or to a mosque, and though the profit may not have been given to the poor on the extinction of the affluent [still] it is *wakf* and will be treated as *wakf* even before their extinction. This principle is founded on the reason that the motive in all *wakfs* is to make one's self beloved by doing good to the living in this world and to approach the Almighty in the next. . . . . .

[428] "In *wakf Islam* is not a condition; consequently if a *Zimmi* makes a *wakf* on his children and his posterity *and* gives it at the end to the indigent, it is lawful [equally with that made by a Moslem]. And it is lawful in such a case to give the usufruct conditioned for the indigent to the poor of both Moselms and *Zimmis*. The *wakif* may lawfully condition to give the usufruct solely to the poor of the *Zimmis*, and in that will be included Jews and Christians and Magians; or he may condition that a special body of them may get the produce (1) . . . whatever condition the *wakif* makes if it is not contrary to the *Sharaa*, will be lawful. And so long as the object is not sinful, the *wakif* may give to whomsoever he likes. . . According to Abu Yusuf the mention of perpetuity [or dedication to an object of a permanent nature] is not necessary to constitute a valid *wakf*, for the words *wakf* and *sadakah* conjunctively or separately imply perpetuity. . . In the *Baramika* it is stated that, according to Abu Yusuf, when a *wakf* is made in favour of specific individuals, on their extinction the profits of the *wakf* will be applied to the poor (2). . . . Among the *wakfs* created by the *Sahaba* [Companions of the Prophet], . . the first is the *wakf* of Omar (may God be pleased with him)

---

(1) اما تفسيره لغةً فالحبس... وشرعاً... فعندهما حبسها لا على ملك احد غيرالله تعالى الى اخره ... والتصدق بمنفعتها اوصرف منفعتها الى من احبّ ... وانما قلنا اوصرف منفعتها لان الوقف يصح لمن يحب من الاغنياء بلاقصد القربة وهو و ان كان لابد في اخره من القربة بشرط التابيد و هو بذلك كالفقراء و مصالح المسجد لكنه يكون وقفا قبل تقرض الاغنياء بلاتصدق و سببه ارادة محبوب النفس في الدنيا ببرّالاحياء و في الاخرة بالتقرب الى ربّ الارباب جَلّ و عزّ ... و اما الاسلام فليس بشرط فلو وقف الذمّي علي ولده و نسله وجعل آخره المساكين جاز و يجوزان يعطي لمساكين المسلمين و اهل الذمة و ان خصّ في وقفه مساكين اهل الذمة جاز و يفرق على اليهود والنصارى والمجوس منهم الاّ ان خصّ صنفاً منهم '

(2) و منها ما ذكر في البرامكة قال ابو يوسف اذا انقرض الموقوف عليهم يصرف الوقف الى الفقراء '

1892 MARCH 18. — APPELLATE CIVIL. — 19 C. 412.

of his land called *Samagh* [at Khaibar . . that created by Zobair bin [429] Awwam of his house for the support of his daughter who had been divorced (by her husband); . . that of Arkam Mukhzumi, on his children of his house called *Dar-ul-Islam* at Safa (near Mecca), where the Prophet used to preach Islam, and where many of the disciples, among them Omar, accepted the Faith . . . Baihaki in his *Khillafiat* has stated upon the authority of Abu Bakr Obaidulla bin Zubir that [the Caliph] Abu Bakr (may God be pleased with him) had a house in Mecca which he bestowed in charity upon his children, and that it is still in existence . . . And Saad ibn Abi Wakkas bestowed in charity his houses in Medina and Egypt upon his children, and that *wakf* is still in existence, and [the Caliph] Osman (may God be pleased with him) made a *wakf* of *Ruma*, which exists until to-day, and Amr ibn al-Aas [the Amru of European history], of his lands called *Wahat* in Tayef, and of his houses in Mecca and Medina upon his children, and that [*wakf*] also is still continuing (1) . . According to Abu Yusuf the *wakf* may lawfully retain the governance of the trust, or reserve the profits for himself during his lifetime. This has been fully dealt with by Kuduri in two parts . . The jurists, Ahmed ibn-i-Abi Laila, Ibn Shabarma, Zahri, and others, [430] agree with Abu Yusuf. Mohammed alone holds a contrary opinion. . . Abu Yusuf bases his rule upon the practice and sayings of the Prophet himself who used to eat out of the produce of the lands dedicated by him....Another proof in support of Abu Yusuf's rule is that the meaning of *wakf* is to extinguish the right of property in one's self and consign it to the custody of God. Therefore, when a person reserves the whole or a portion of the profits for himself, it does not interfere with the dedication, for that also implies the approval of the Almighty and is lawful.... For example, if a man were to dedicate a caravanserai and make a condition that he may rest in it, or a cistern and condition that he should take water from it, or a cemetery, and say that he may be buried there, all

---

(1) قال المصنف لان جماعةً من الصحابة و قفوه ... و اسانيدها مذكورة في وقف الخصّاف و منها ما تقدم في وقف عمر رضي الله عنه ارضه ثمغ ... و ان الزبير بن العوّام رضي الله عنه وقف داراله على المردودة من بناته ... و عن عثمان بن الارقم المخزومي انه كان يقول انا ابن سبع الاسلام اسلم ابي سابع سبعةٍ وكانت داره على الصفا و هي التي كان النبيّ صلى الله عليه وسلم يكون فيها في الاسلام و فيها دعا الناس الى الاسلام و اسلم فيها خلق كثير منهم عمر بن الخطاب رضي الله عنه فسميت دار الاسلام و تصدق بها الارقم على ولده ... وفى الخلافيات البيهقي قال ابوبكر بن عبدالله بن الزبير الحميدي تصدق ابوبكر رض بداره بمكة على ولده فهي الى اليوم و تصدق عمر رض بربعه و تصدق سعد رض بن وقاص بداره بالمدينة و بداره بمصر على ولده فذلك الي اليوم و عثمان رض برومة فهي الى اليوم وعمرو بن العاص بوهط من الطائف وداره بمكة والمدينة على ولده فذلك الى اليوم ،

1892
MARCH 18.
APPELLATE CIVIL.
19 C. 412.

this would be lawful. [Further] our Prophet (may the blessings of God be with him) has declared that a man's providing for his subsistence is a *sadakah* [an act of piety or charity]. This *Hadis* has been substantially handed down by a large number [of people] and is authentic, and Ibn Maja states from Mikdam bin Maadi Karib that the Prophet declared that no gain of a man is so meritorious as that which he earns by the labour of his hands ; and that which he provides for the maintenance and support of himself, the people of his household, his children, and his servants, is a *Sadakah.* And Imam Nisai from Bakia and he from Bubair has given the same tradition in these words :—'Whatever thou providest for thyself is a *Sadakah.*' Ibn Haban in his *Sahih* states that Abu Said reports from the Prophet that any one who acquires property in a lawful manner, and provides therewith for his maintenance and for that of the other creatures of God, gives alms in the way of the Lord. . . . And Dar Kutni reports from Jabir that the Prophet (may God's blessing be with him) . . . declared that all good acts are *Sadakah* and that a man providing subsistence for himself and his children and his belongings, and for the maintenance of his position, is giving charity in the way of God. . Tibrani has reported from Abi Imama that the Prophet of God declared that a man making a provision for his own maintenance, or of his wife, or of his kindred, or of his children, is giving *Sadakah.* And in the *Sahih* of Muslim it is stated from Jabir that the Prophet told a man to make a beginning with himself and give the remainder to his **[431]** kinsfolk. *All these traditions support Abu Yusuf's rule and Sadr-ush-Shahid has laid down that decisions are passed according to Abu Yusuf's opinion and we decide according to it.*"(1)

---

(1) ولابي يوسف ماروي ان النبي صلعم كان ياكل من صدقته ...
و لان الوقف ازالة الملك الى الله تعالى فاذا شرط البعض او الكل لنفسه
فقد جعل ماصار مملوكاً لله لنفسه لا انه جعل ملك نفسه لنفسه الملك...
الكائن بالعين و اسقاطه لاالى الي مالک ابتغاء مرضات الله تعالى على
وجهٍ يعتبر فيه شرطه الغير المنافي القربة و الشرع و شرط النفقة على
نفسه منه لاينافي ذلك كما اذا بني خاناً و شرط ان ينزل فيه اوسقاية و شرط
ان يشرب منها او مقبرة و شرط ان يدفن فيها قال صلعم نفقة الرجل على
نفسه صدقة روي معني هذا الحديث من طُرقٍ كثيرةٍ يبلغ بها الشهرة فروي
ابن ماجة من حديث المقدام بن معدي كرب عنه صلعم قال ما من كسب
الرجل اطيب من عمل يده وما انفق الرجل على نفسه و اهله و ولده و
خادمه فهوله صدقة و اخرجه النسائي عن بقية عن بحير بلفظ ما اطعمت
نفسك فهولك صدقة الحديث و اخرج بن حبان في صحيحه عن ابي سعيد
عن النبي صلعم قال ايما رجل كسب مالاً حلالاً فاطعمه نفسه او كساها
فمن دونه من خلق الله تعالى فان له به زكوة و رواه الحاكم الا انه قال

1892
MARCH 18.
—
APPELLATE
CIVIL.
—
19 C. 412.

[432] I have quoted this passage at length in order to show what the Mussulman law really is. That decisions are passed according to Abu Yusuf is also laid down in the *Fatawa-Alamgiri* (1).

As a matter of fact, there is absolutely no difference among Mussulman lawyers of any school or sect regarding the lawfulness of a *wakf* in favour of one's children and descendants. The authors of the *Radd-ul-Muhtar* (quoted in this country as the *Shami*) and of the *Majmaa-ul-Anhar* lay that down in distinct terms. The latter is most explicit :—"There is no difference if a person conditions the profits of a *wakf* for his children, and accordingly in such a *wakf* male and female [children] will take together, unless he conditions for the males alone." (2).

With regard to the reserve of a part or the whole of the income by the *wakf* for his own use during his lifetime, there is a divergence between Abu Yusuf and Mahommed. The former holds it to be lawful, and the rule laid down by him is recognized as law in almost every Hanafi country, with the exception, perhaps, of Bokhara. It is the law in India, in Turkey, in Irak, Afghanistan and Transoxiana. In the *Fatawa-Alamgiri* it is stated that the *Fatwa* is with Abu Yusuf; in other words, decrees are passed according to his rule. In the *Asaaf*, the *Kazi Khan*, the *Raddul-Muhtar*, the *Majamma-ul-Anhar*, the *Ghait-ul-Bayan*,—in fact in every law work, it is laid down that the rule of Abu Yusuf is the recognized and accepted law, and it was so distinctly enunciated in *Doe d. Jaun Beebee* v. *Abdollah Barber* (3).

In the *Hawi* (written in the 6th century of the Hegira and frequently quoted in the *Alamgiri*) the rule is thus stated :—"If a man make a *wakf* with this condition that so long as he lives he shall eat out of it and feed others, and on his death his children will have the same right in it, and

---

فان له زكوة وقال صحيح الاسناد ولم يخرجاه و اخرجه الحاكم ايضا
والدار قطني عن جابر قال قال رسول الله صلعم كل معروف
صدقة وما انفق الرجل على نفسه و اهله فهو له صدقة وما وقي به
عرضه فهو صدقة الحديث وفيه فقلت لمحمد بن المنكدر ما معني
وقي به عرضه قال ان يعطي الشاعر وذا اللسان المتقي و قال صحيح الاسناد
و اخرج الطبراني عن امامة عنه عليه الصلوة والسلام قال من انفق على
نفسه نفقة فهي له صدقة و من انفق على امرأته و اهله و ولده فهو له صدقة
وفي صحيح مسلم عن جابر انه عليه الصلوة والسلام قال لرجل ابدأ بنفسك
فتصدق عليها فان فضل شي فلاهلك الحديث فقد ترجح قول ابي
يوسف قال الصدر الشهيد والفتوى على قول ابي يوسف ونحن ايضاً
نفتى به —

(1) Baillie's Dig. (2nd ed.), p. 567 ; Alamgir, vol. II, p. 460.

(2) ولا خلاف في اشتراط الغلة لولده فاذا وقف على ولده
شمل الذكر والانثى الا ان يقيد بالذكور ،

(3) Fulton, 345.

similarly his children's children in perpetuity so long as his posterity lasts, that they should eat out of it and feed others too; this *wakf* is valid on this condition. **[433]** This is according to Abu Yusuf and it is accepted as authority for the *Fatwa*" (1).

1892 MARCH 18. — APPELLATE CIVIL. — 19 C. 412.

There are two other matters on which Abu Yusuf and Mohammed are at variance. According to Mohammed, a *wakf* is not operative until it has been consigned to a *mutwalli*, nor unless the ultimate application be destined for an unfailing object. According to Abu Yusuf, on the contrary, it is operative and obligatory the moment the *wakif* declares he constitutes a particular property as *wakf*. Nor is it necessary, according to him, to specify the ultimate application of the *wakf*. It is enough if the word *wakf* is used, for that implies perpetuity, and if the reversion is not expressly given to an unfailing object, the law will supply the deficiency. My meaning will be clear from the following passages. The *Radd-ul-Muhtar* lays down :—" Abu Yusuf holds the declaration of *wakf* to be like a declaration respecting the emancipation of a slave. Accordingly he does not consider a transfer necessary. According to him the *wakf* becomes binding and operative on mere declaration like the declaration for emancipation...and it extinguishes the right of property, and this is stated in the *Durrar* [*al-Ahkam*] and *it is correct*."..." Perpetuity is a condition by consensus, but according to Abu Yusuf its *mention* is not necessary...... and if a man says 'I make this dedication on my children' and add nothing further, it is valid according to him......According to Abu Yusuf the mention of the word *wakf* or *sadakah* implies perpetuity, and consequently it is stated in the 'Book' [*Muktasur-al-Kuduri*] that such a *wakf* is valid, and after the failure of the children it will be for the poor, though they are not named, and *this is correct*."

The *Ramz-ul-Hakaik*, after stating the origin of *wakfs*, adds " besides the incidents of a *wakf* are that it cannot be sold, nor can it be given by gift, nor can it be inherited, and its produce may be spent on the poor and relatives and travellers, and the *wakif* may eat thereof...And according to Abu Yusuf mere saying that, 'I have made this property *wakf*,' is sufficient to extinguish the proprietary right of the *wakif*, for by that the property is **[434]** assigned over to God, *like the emancipation of a slave*, and in this view the other three Imams agree, *viz*., Shafei, Malik, and Hanbal...and says Abu Yusuf that even if an object is mentioned that is likely to fail, still the *wakf* will be valid, and after the extinction of the object named, the produce will be given to the poor, even if the poor are not mentioned."

According to Abu Yusuf, whose opinion, it will be seen, is the recognized law, a declaration of *wakf* is like a declaration of emancipation. The meaning of this passage has not, I am afraid, been fully apprehended or appreciated by our Courts of Justice. When a man declares that he has emancipated his slave, or that he emancipates him, the master's right of property in the person of the slave, under the Mussulman law, becomes extinguished immediately. There can be no reserve or condition in such an act. Neither the emancipator nor his heir, nor any person deriving title from him, can say that in making that declaration he had no intention of making a *bona fide* emancipation or of setting free the slave absolutely. Abu Yusuf puts a declaration of *wakf* on the same footing as a

---

(1) وكذالولد ولده ابداً ما يتناسلون يأكلون و يطعمون جاز الوقف
على هذا الشرط و هذا كله قول ابي يوسف والمختار للفتوى ،

1892 MARCH 18. — APPELLATE CIVIL. — 19 C. 412.

declaration of emancipation. A *wakif's* right becomes extinguished immediately with his declaration, and neither he nor anybody else can say that when he made the declaration he had no intention to create a valid dedication.

The Courts of Justice have repeatedly laid down that it is in accordance with "justice, equity and good conscience" that the Mussulman law should be administered to Mussulmans on all these questions. To hold that a *wakf* in favour of one's descendants and kindred is not valid would be, in effect, to abrogate an important branch of the Mussulman law. It is difficult to understand what the Judge means when he says that this is not a *wakf* "substantially for charitable or religious uses." The words "charitable" and "religious" must be understood from a Mussulman and not from an English point of view. If the Judge means to say that a provision for one's children and kindred is not a charitable and religious act, according to the Mussulman law, he is clearly wrong.

In this particular case the *wakf* is in favour of some of the *wakif's* kindred. The executant of the deed, which is to be found in the paper-book, begins with the statement that in 1881 she had [435] executed a *wakfnama* dedicating her properties to God "in order to secure *welfare* in her passage to the next world, as well for the purpose of providing expenses for good and charitable acts and the salvation of her soul." She then goes on to say that the rules laid down by her for the management of the property and the application of the income were not clearly stated. She now fixes amended and correct rules for religious purposes, and for the use of the profits of her properties in pious acts and in acts tending to the righteous path and to benefit the people. In effect, the new deed was confirmatory of the first, and emphasized the absolute divestment of all proprietary interest in the properties and their complete dedication to pious or religious purposes. She then provides for the governance of the trust; she constitutes herself the first *mutwalli*; she declares that after her death her sister, if surviving, will take her place, and upon her death the plaintiff would succeed.

In para. 2 she provides that during her lifetime, or so long as she would like to act as a *mutwalli*, she would make gift to the poor and indigent, and maintain and clothe them and supply their other expenses, according to the rules observed during the *Ramzan*, *Eed*, *Bakri-Eed*, *Barwafat* and other festivals; and that from "the remaining income" of the property she would supply her own personal expenses. She then proceeds to lay down the rule for the application of the income after her death:

"On my death from the income of the *wakf* property specified in the schedule below, the Government revenue, the collection charges and expenses connected with litigation, as well as a sum of Rs. 400, as annual allowance to the *mutwalli* for the time being, shall be paid in the manner stated below; from what remains or shall be collected, monthly allowances shall be given to my relatives and old servants managing their duties in proper and dutiful manner. Half of what remains shall be expended according to the custom for the festivals of *Ramzan*, *Eed*, *Bakri-Eed*, and other religious ceremonies, and in making gifts to the poor and indigent, and in maintaining travellers and persons who take shelter after sunset. The remaining of the profits shall be kept with the *mutwalli* as a ready and separate fund for the protection of the property from danger."

1892 MARCH 18. APPELLATE CIVIL. 19 C. 412.

[436] In other words, during the *wakif's* lifetime the income is to be applied partly in giving relief to the needy and partly in defraying the expenses of certain religious festivals and those connected with her own self. After her death, the income is to be divided into three parts, one portion is to be given to a specified body of individuals, some of whom are relations, and others, servants, and on their decease to their descendants in perpetuity; the second, to *strictly* religious and charitable purposes; and the third to be kept for the protection of the estate. Each and every provision is perfectly lawful under the Mussulman law.

Even, had she primarily reserved to herself an interest in the income for her life, and the right of giving allowances to the persons named and disbursing the religious expenses according to her discretion, there would have been nothing illegal or contrary to the provisions of the Muhammadan law in such a condition. In the *wakfnama*, which formed the subject of discussion in *Doe d. Jaun Beebee* v. *Abdollah Barber* (1), there was a condition to that effect, and it was held to be valid. The provision that in case the *mutwalli* refuses to pay the allowances, the annuitants would be entitled to recover the same by suit does not effect the *wakf*. Under the Mussulman law, they would have been entitled, even without such provision, to have recourse to the *kazi*. These allowances, it is admitted, cover about half the income. A portion of the balance is to be devoted for the maintenance of the property, which is absolutely valid under the Mussulman law. From the remainder certain *strictly* religious and charitable expenses are to be defrayed. In case of failure of the issue of the annuitants, the lapsed annuities are to be applied to the same purposes. So that in the end the entire income will become applicable to strictly religious purposes—see *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (2).

The Judge says there is no sum specified for what he calls the substantial religious and charitable expenses. He considers this a circumstance which militates with the idea of its being a valid *wakf*. This notion is clearly founded on a misconception. In Muhammadan *wakfs*, the amount disbursable in charity to the poor, when such charity begins simultaneously with a provision **[437]** for the members of the *wakif's* family, is often left unspecified, or only partially specified, not with the object that the *wakif's* children may get more, but that the right of the poor to get relief may not be restricted.

For all these reasons, I am of opinion that the judgment and decree of the appellate Court must be set aside, and the decree of the first Court restored.

O'KINEALY, J.—I concur in the judgment which has just been delivered by Mr. Justice Ameer Ali, and on both the points.

It seems to me clear that the purchasers were the servants of the endowment, whose duty it was to protect the dedication and to get the best price for the property which was sold. They put themselves in the position in which their duty and interest conflicted; they bought the property; and according to the code of morality administered both here and in England, it is quite clear to my mind that the purchaser can be called upon to transfer the property to the endowment. If servants employed in the management of property, whether temporal or religious, who are in a position to find out flaws in the title under which the property is held, are allowed to buy the property for themselves, and retain it, many

(1) Fulton 345.

(2) 13 W.R. 235.

1892 MARCH 18. — APPELLATE CIVIL. — 19 C. 412.

estates will be ruined in this country. I, therefore, agree with what has been said by my learned colleague, and hold that the death of the lady did not destroy the duty of the purchasers of returning the purchased property when called on to the endowment under which they served so long.

Nor, to my mind, is the rule by which we should be guided in deciding what constitutes *wakf* less clear. We know it must be an endowment for religious or charitable purposes; and if we want to interpret a document of that kind, what we must naturally look to is what is really meant by the words "religious" or "charitable" among Muhammadans. As an example, we know the words "charitable purpose" in Scotland have quite a different meaning from that in which they are used in England. And so in India, in judging of what is really meant by the words "religious" and "charitable" by a Muhammadan, we must take the view which their law takes, and not what is to be found in the English Dictionary.

[438] I, therefore, agree, with my learned colleague in thinking that the findings of the Judge do not cover the case. He has not found that according to the Muhammadan law the object of the *wakf* was not religious or charitable; what he has found is that the objects are not charitable and religious, according to the ordinary use of the words. This, I think, is not sufficient.

I, therefore, hold that the decree of the lower appellate Court should be set aside, and that of the Court of first instance restored with costs.

C. D. P. *Appeal allowed.*

---

19 C. 438 (P.C.) = 19 I.A. 79 = 6 Sar. P.C.J. 177.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, Morris and Hannen and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

HARRIPRIA DEBI (*Defendant*) *v.* RUKMINI DEBI (*Plaintiff*).
[5th February and 5th March, 1892.]

Secondary evidence of the contents of a document—Evidence Act (I of 1872), s. 65—*Necessity of accounting for non-production of original document.*

Whether or not sufficient proof of search for or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance, and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a clear case of miscarriage.

In a suit alleging want of authority to adopt the defence rested on the case that an anumati patro had been given by the defendant's deceased husband, but failed to show that there had been a sufficient search for, and to establish the loss of, the original document, so as to render secondary evidence of its contents admissible.

[F., 15 Ind. Cas. 625 (633); R., U.B.R. (1897—1901), Vol. II, p. 382.]

APPEAL from a decree (21st February 1889) of the High Court, affirming a decree (29th March 1888) of the Subordinate Judge of Midnapore.

This suit was brought by the respondent for a declaration that an adoption, by the first defendant, Harripria, of the second defendant, Jogeshnarain Patti, an infant, whom she represented, **[439]** was invalid. Haripria was the widow of Rajah Koer Narain Roy, who died on the 5th

1892 MARCH 5. — PRIVY COUNCIL. — 19 C. 438 (P.C.) = 19 I.A. 79 = 6 Sar. P.C.J. 177.

of January 1871 (12th Pous 1278); and the adoption, which purported to be made on the 23rd April 1882, was alleged by the plaintiff, the late Raja's daughter, to have been unauthorised. Harripria's case, however, was that the Rajah had on the day before his death executed an anumati patro. In her written statement she said :—"Although the defendant is not able now to get the said anumati patro, it will be very well proved by the copy book which was at the time kept in the sherista and by many other proofs."

The defendant filed a copy of a list of documents presented to a Court "on behalf of Srimati Rani Harripria Debi, intervenor." The list was dated the 20th February 1871, and one of the items was, "Anumati patro, deed of permission executed by Rajah Koer Narain Roy in favour of Rani Harripria, dated the 27th Pous 1278." Against this entry was written, "I take back this document, Biswa Nath, 5th May." Biswa Nath died in 1883.

The Subordinate Judge having declined to admit what purported to be a copy of the anumati patro, on the ground that proper search for, and loss of, the original had not been proved, a Divisional Bench of the High Court (PIGOT and BEVERLEY, JJ.) dismissing an appeal said :—"Now, the circumstances of the case are, that the Raja having died in 1871, and it having been alleged, soon after his death, that an authority to adopt had been given by him to his wife by an attested instrument, and the allegation of the existence of such an authority having been made a foundation for her application for a certificate in respect of his estate, and used both in the Court below and in this Court as a ground justifying the granting to her of that certificate, we find that, for eleven years afterwards, that authority to adopt is not acted upon; and we find that that document is not produced in Court at the hearing of this case, and that no satisfactory evidence of the execution of it or of the contents of it, is produced. Assuming, for a moment, that the absence of the document itself was so accounted for as to justify the admission of secondary evidence,—that is to say, passing over and treating as a technicality the sound rule of law which excludes evidence of the contents of a document not itself brought forward or accounted **[440]** for,—the secondary evidence which is on the record as to the contents of the document, is such as to be wholly unworthy of serious attention. It is stated to have been an authority to adopt, and practically that is all the evidence upon the subject. None of the witnesses to the document, nor the person who engrossed it, Soonder Narain, nor any person who heard it read, nor any person who read it, gives evidence on the subject. So that quite apart from the fact that there is no evidence to account satisfactorily for the absence of the document itself, there is no proof, in the case before us, of the contents of it, or that the document said to have been signed by the Raja was really such as it is represented to have been.

"Then, upon the evidence we should have some hesitation in holding that the Raja was in such a state of health as to make it probable that he did execute such a document on the day on which he is said to have executed it.

"We, therefore, quite agree with the Subordinate Judge in holding that there is no reason whatever, in the case before us, to believe that the Raja ever did authorize in the manner set up by the defendant the adoption by her of a son to him.

"It is said that the plaintiff, in bringing forward her case, ought to have proved that the Raja had died without having given authority to

1892 MARCH 5. — PRIVY COUNCIL. — 19 C. 438 (P.C.) = 19 I.A. 79 = 6 Sar. P.C.J. 177.

adopt. We have not to consider, however, what the condition of the case might have been had the plaintiff simply tendered evidence such as she gave, and the defendant simply submitted that that was insufficient to justify a decree in favour of the plaintiff. That is not the case before us. The case before us is, that the defendant goes into evidence and seeks to establish a particular authority to adopt, and we think we are bound to come to a conclusion in this appeal upon the evidence tendered by the parties. Upon that evidence we think that the decree of the Court below was right upon the facts."

Mr. *R. V. Doyne* and Mr. *W. A. Hunter*, for the appellant, argued that sufficient proof of search for the missing power was given to lay the grounds for the admission of secondary evidence of its contents. The evidence offered would have established that the late Raja did give authority to the appellant to adopt a son **[441]** to him. It was enough for the defendant to show that a real and *bona fide* search had taken place.

Mr. *J. D. Mayne* and Mr. *J. H. A. Branson*, for the respondent, argued that no such ground had been laid, and that the document tendered had not been proved to be a copy of the original.

Mr. *R. V. Doyne* replied.

Reference was made to Act I of 1872, s. 65.

Afterwards on 5th March, their Lordships' judgment was delivered by—

JUDGMENT.

LORD HOBHOUSE.—On the 5th January 1871 Raja Koer Narain Roy died without male issue, leaving a widow, the appellant Harripria, who is defendant in this suit, and two daughters, one of whom is Rukmini, the respondent and plaintiff in the suit. Harripria therefore is his heir, and the two daughters are the reversionary heirs-apparent.

On the 23rd April 1882 the defendant adopted a son to her husband, alleging that she had authority to do so by virtue of an anumati patro, or power, executed by the Raja on the 4th January 1871.

In March 1887 the plaintiff brought this suit, alleging that the defendant had no authority to adopt, and praying for a declaration that the adoption made by her is contrary to law and invalid. Setting aside an objection for want of parties which was rightly decided in the plaintiff's favour, the defence rested on the ground that the Raja gave a lawful authority to make the adoption which was made. That has been decided against the defendant, on the ground that her proof is defective.

The original document said to have been executed by the Raja is not forthcoming. The defendant sought to prove that it had been lost, and tendered what she alleged to be a copy. The Subordinate Judge considered that there had not been any such amount of search for the original as would justify the Court in admitting a copy, and therefore, there being no evidence of the power, he gave the plaintiff a decree.

[442] The defendant appealed. The rejected document was added to the record, where it stands as Exhibit 9. The High Court held that the evidence did not show that it was a copy of any document to which the witnesses deposed as having been executed by the Raja: and on that ground, and also because they agreed with the Subordinate Judge that there had been no sufficient proof of search for or loss of the original, they dismissed the appeal. The present appeal is from that decree.

There is some evidence that the day before his death the Raja signed and gave to Harripria an anumati patro to take a son in adoption. After his death a cousin named Gojendra applied to the Civil Court for an

administration certificate, and the defendant resisted that application. In that proceeding a document, of which Exhibit 9 is alleged to be a copy, was filed by Biswa Nath, the defendant's general mokhtar, on the 20th February 1871, and was taken back again by him on the 5th May 1871. It is stated that he promised to return it to the defendant's office, but never did so. He died in March 1883. After that the search was made, the sufficiency of which is in dispute.

1892 MARCH 5. — PRIVY COUNCIL. — 19 C. 433 (P.C.) = 19 I.A. 79 = 6 Sar. P.C.J. 177.

The evidence to prove a sufficient search has been subjected to a very careful and minute criticism at the Bar. Their Lordships will make only one remark on it. The point is one which is proper to be decided by the Judge of first instance, and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a very clear case of miscarriage. But the evidence here is very far indeed from raising a case for overruling the Subordinate Judge, even if his judgment had not been supported as it has been by the Appellate Court.

That would be sufficient to dispose of the appeal on the first point, but the evidence on the second point is such as to lead their Lordships to express a clear opinion that the High Court have decided it rightly. The original document in question was not registered, and, though filed in the certificate case, it was not proved. Exhibit 9 purports to be the copy of a document filed on the 23rd January 1871, and to be issued on the 24th February 1871, with the signatures of Khetter Mohun Jana, and of Mohendra Nath Ghose, the Sheristadar of the Midnapore Court, and it bears the seal of that Court. This is the whole evidence to [443] prove it, and in effect the defendant claims that the document shall furnish its own proof. No evidence is produced to show how, by whom, or at whose instance, the copy was made, or how it came to be in the defendant's hands; and what is more important, no evidence to show that any one compared it with the original. The only witness who speaks to the execution of the power is Dhurjati, who was the Raja's record-keeper in 1871. He says that Madhub, the Raja's dewan, had prepared a draft; that, at the request of the Raja, he read it out in the presence of many witnesses; that it was then copied fair by Soonder Narain, the Raja's seha-nuvis, writing from Madhub's dictation, was witnessed, and kept by the Raja. Of the contents he only tells us that it was a power for the Rani to adopt a son, and that his daughters were to receive Rs. 2 per day for maintenance, a provision which does appear in Exhibit 9. He mentions eight attesting witnesses. Of these witnesses three are dead, but the other five would appear to have been living when the evidence was taken. One of them is Soonder Narain, the scribe who wrote the fair copy, another is Raghabanund, the father of the defendant, another is a brother of the defendant's co-wife, by name Trilochun, in whose presence she states that the Raja gave the power into her hands. Not one of the attesting witnesses is called. So that there is not an attempt to identify Exhibit 9 as being a copy of that document which Dhurjati tells us the Raja executed formally; and there is therefore no evidence at all beyond his vague statement, from which a Court of Justice can gather its contents.

The suit wholly fails, and the appeal must be dismissed with costs. Their Lordships will humbly advise Her Majesty accordingly.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Neish* and *Howell*.
Solicitors for the respondent: Messrs. *Barrow* and *Rogers*.

C. B.

1892
MARCH 5.

PRIVY COUNCIL.

19 C. 444 (P.C.)= 19 I.A. 83= 6 Sar. P.C.J. 180= Rafique & Jackson's P.C. No. 126

19 C. 444 (P.C.) = 19 I.A. 83 = 6 Sar. P.C.J. 180 = Rafique & Jackson's P.C. No. 126.

[444] PRIVY COUNCIL.

PRESENT:

Lords Macnaghten, Morris and Hannen and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

SAHIB MIRZA AND OTHERS (*Defendants*) *v.* UMDA KHANAM (*Plaintiff*), AND

SAHIB MIRZA AND OTHERS (*Defendants*) *v.* GUNVA KHANAM (*Plaintiff*). [9th February and 5th March, 1892.]

Will, revocation of—Evidence as to revocation of a Will—Onus of proof of revocation of Will—Will, Construction of, as to whether payment of a legacy was to be out of a particular fund, or out of general assests—Demonstrative legacy.

A will, duly executed, is not to be treated as revoked, either wholly or in part, by a will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the will contained either words of revocation or dispositions so inconsistent with those of the earlier will that the two cannot stand together. It is not enough to show that the will, which is not forthcoming, differed from the earlier one, if it cannot be shown in what the difference consisted. It is also settled that the burden of proof lies upon him who challenges the existing will. These propositions are of general application.

Payment of legacies, or gifts or stipends, having been refused by the representatives of the testatrix, on the ground that she had no power to dispose of the fund out of which the will must be construed to direct their payment; *held*, on a consideration of the whole will, that the words of the gifts were wide enough to charge them upon the whole of her moveable estate: also, that if the words of the will were to be taken in a more restricted sense, the gift of the stipends must be regarded as a demonstrative legacy, and in that view they would be payable out of the general estate, on failure of the particular fund pointed out.

CONSOLIDATED appeal from a decree (9th February 1888) reversing a decree (28th March 1887) of the District Judge of Lucknow, and restoring a decree (1st November 1886) of the Subordinate Judge of Lucknow.

The question was as to the rights of the plaintiffs in the suits in which these appeals were preferred to obtain decrees for their respective annuities or stipends with arrears, under the will, dated 19th March 1861, of the late Nawab Mulka Jehan. The testatrix, who died on the 9th July 1881, was the widow of Mahomed Ali [445] Shah, formerly King of Oudh. The plaintiffs were her servants, as also was Maiku Lal who brought a similar suit, and for them the will provided by giving them small annuities. The defendants who now appealed were her grandson and two granddaughters, heirs and residuary legatees.

Umda Khanam claimed Rs. 204 as arrears, admitting a payment of Rs. 20, and Rs. 4 a month for the future. Gunna Khanam made an exactly similar claim.

The defence was that the Nawab Mulka's will had been revoked, and also that the fund out of which she had temporarily directed payment was one that terminated with her life.

By consent the three suits were disposed of by the judgment in this one, given by the Subordinate Judge. His decision was that no revocation of the will of 19th March 1861 had been proved, and that the plaintiff was entitled to payment of the legacy by the defendants out of any of the moveable property of the testatrix.

1892 MARCH 5. — PRIVY COUNCIL. — 19 C. 444 (P.C.)= 19 I.A. 83= 6 Sar. P.C.J. 180= Rafique & Jackson's P.C. No. 126.

The District Judge, however, was of the contrary opinion as to the question of the revocation of the will. In his view of the matter the preparation of a new will by the Nawab Mulka, her sending to the officials a letter setting forth its terms, the disbursement of money to some of her servants after her return, they also having been legatees in the will of 1861, sufficed, with other evidence, to give rise to an inference of an intention to revoke it; and he held this will to have been revoked. There was an appeal to the Judicial Commissioner; objections being also filed by the present appellants under s. 561 of the Code of Civil Procedure. On this second appeal the judgment of the District Judge was reversed, and that of the first Court restored. As to the principal points raised the reasons were the following:—" It was further contested that the will itself specifies a particular fund out of which the legacy in question was to be paid, and that that fund failed; and that the legacies could not be paid out of the general assets. This contention, however, is refuted by the words of the will itself, which declared that the legacy was to be paid from the testatrix's 'Moshahra *Wasika, Lotewagaira*,' *i.e.*, 'from my monthly pension, notes, &c., &c.' These words are, I consider, quite wide enough to include the rest of the testatrix's moveable property. It was **[446]** further urged that the legacies had been adeemed; of this, however, there is no proof whatever as far as plaintiff is concerned. No doubt Nawab Mulka Jehan made large gifts on her safe return from Karbala in 1886. But there is nothing on the record to show that she ever intended that any gift of hers to the plaintiff should be in lieu of the legacies. In former similar cases the lower appellate Court has on such considerations as these held similar legacies by Nawab Mulka Jehan to be valid. It has come to a different conclusion in the present instance, mainly in consequence of certain facts which have come to the Court's notice subsequent to the decision of the former cases. Certain correspondence between the Queen and the Chief Commissioner of Oudh has been produced on behalf of the defendants-respondents, which was not before the lower appellate Court on the previous occasions. The will of 1860 was executed just before the lady's departure to the holy place at Karbala (Baghdad). The lady returned in 1886, and her letter to the Commissioner, Lucknow, which has now been produced in this case, is dated 6th December 1876. This letter purports to pray the Commissioner to peruse a document, which she apparently enclosed with her letter, and states that that document was a will appointing her second grandson, Nawab Sahib Mirza, executor thereof. She prayed the Government to approve of it, and said that on receipt of Government sanction she would complete and perfect it, and would do all that was necessary to make it legally valid. She also prayed that certain Government promissory notes might be received in trust for her and lodged in the Government Treasury. Her requests were refused by the Chief Commissioner, who, for some reason not clearly apparent, considered that this lady was not entitled to any special indulgence. He recommended her to have the will sent to the Registrar under s. 42, Act VIII, 1871. This course the lady never adopted. What she did with this draft will (for such I presume it was) cannot now be known. Neither it nor any copy thereof, executed or non-executed, has been filed.

" On these facts it has been contended for the respondents that the will of 1860 was merely a conditional or temporary will, such as is known to Muhammadan law, and that it was designed merely to operate in the event of Nawab Mulka Jehan's not **[447]** returning to India from

1892
MARCH 5.
——
PRIVY
COUNCIL.
——
19 C. 444
(P.C.)=
19 I.A. 83=
6 Sar. P.C.J.
180=
Rafique &
Jackson's
P.C. No. 126.

her pilgrimage to Karbala, and that as she in fact safely returned from Karbala, the will became inoperative after her said return; and, 2ndly, it is contended that if it did not become inoperative by the mere fact of the lady's return from Karbala, yet it was rendered void by a subsequent revocation thereof by Nawab Mulka Jehan herself, as witnessed by the documents above referred to. These arguments have induced the District Judge to reverse the judgment of the Court of first instance, though he owns that he does so with much hesitation. In my opinion there was no complete revocation of the will of 1860.

"No doubt the correspondence now brought on the file shows that the Queen in 1876 clearly had the *animus revocandi*, but in my opinion it goes no further than this. On the contrary, the correspondence shows that the document therein referred to, namely, the new draft will, was then not finally completed, for the lady says she will do what is necessary to make it legally complete when the Government shall have approved of it and of her proposals in connection with it. But the Government never gave that sanction. On the contrary, it declined to assist the Queen at all in the matter. There is absolutely nothing on the record to show that she did ever complete and make legally perfect the said proposed second will. She never registered it, though she was expressly recommended by the Government to do so, and the natural inference is that she laid aside her intention when she found that the Government would not assist her. This conclusion is strengthened by the fact that she never withdrew her old will of 1860 from the Wasika Office, wherein it had been deposited."

On this appeal—

Mr. *J. Rigby*, Q.C., and Mr. *C. W. Arathoon*, for the appellant, argued that the decree of the District Judge was correct, and should be restored. From the Nawab Mulka's letter written in 1876, and from her acts and omissions, it was a reasonable inference that she considered that the will of 1860 was revoked by another will, although the latter was not forthcoming, made in 1876. It might be doubted whether the revoked will of 1860 was ever intended by her to do more than operate in the event of **[448]** her death while absent on her pilgrimage. If the will of 1860 was not revoked, then arose a question of the construction of the 5th clause of it. The contention was that the intention of the testatrix was shown to be that the source, from which the legacies now sued for should be taken, was her pension. While that lasted, the legacies might have lasted; when it came to an end, they failed. In the course of the argument *Suleman Kadr* v. *Dorab Ali Khan* (1) was referred to, and Act XXIII of 1871, the Pensions Act.

There was no appearance for the respondents.

Afterwards, on the 5th March, their Lordships' judgment was delivered by—

JUDGMENT.

LORD MACNAGHTEN.—The respondents in these consolidated appeals, who were plaintiffs in the Court of the Sub-Judge of Lucknow, are two servants of the late Nawab Mulka Jehan, widow of Mahomed Ali Shah, King of Oudh.

Nawab Mulka Jehan died in the year 1881. Each of the respondents claimed to be entitled to an annuity or stipend under her will. The

(1) 8 C. 1=8 I.A. 117.

1892 MARCH 5.

PRIVY COUNCIL.

19 C. 444 (P.C.) = 19 I.A. 83 = 6 Sar. P.C.J. 180 = Rafique & Jackson's P.C. No. 126.

annuities are very small in amount, but it is said that there are many other claimants in a similar position, and that the total amount involved in the decision of these appeals is considerable.

The will on which the respondents founded their claims is dated the 19th of March 1860. The appellants, who are heirs of Nawab Mulka Jehan, as well as residuary legatees under her will, rested their defence on two grounds, both of which were urged at the Bar. In the first place, it was said that the will of 1860 was revoked by a will made in 1876. In the next place, assuming the will of 1860 to have become operative, it was contended that, upon the true construction of that will, the annuities were directed to be paid solely and exclusively out of certain funds over which the testatrix had, at the time of her death, no power of disposition.

The Sub-Judge and the Judicial Commissioner were in favour of the respondents on both points. The District Judge held that the will of 1860 was revoked.

[449] The alleged will of 1876 is not forthcoming. All that is known about it is to be found in a letter addressed by Nawab Mulka Jehan to the Commissioner of Lucknow, and dated the 6th of December 1876. In that letter Nawab Mulka Jehan expressed herself as follows : "I heartily desire that, with your permission and consent, a will in which I have appointed my grandson Sahib Mirza Bahadur my executor be formally and with certain conditions executed and ratified, so that in accordance therewith my estate may be managed after my death, in future, with the exception of the arrangement connected with the distribution (of stipends) among my dependents and the establishment of a charitable institution for the benefit of the public in general, the management and administration of which are not possible without the aid of Government." A little further on she says, "a copy of the will is also forwarded for your inspection." And the letter concludes with this sentence ; "In short, this last will and testament of mine, being completed and properly executed, shall, after the Government shall have accorded its sanction thereto, be deposited with the Government." No other passage in the letter throws any light upon the subject. No copy or draft of the will referred to in the letter has been produced. Some oral evidence was offered as to its contents, but this evidence was held to be worthless.

The Government, it seems, declined to have anything to do with the matter. Nawab Mulka Jehan was recommended to deposit her will with the Registrar under the Registration Act. This advice, however, was not followed.

Considering the terms of the letter of the 6th of December 1876, it is by no means clear that the will referred to in it was ever executed. The expressions in the letter are no doubt consistent with the view of the District Judge that the will was executed before application was made to the Commissioner, but they are not inconsistent with the view of the Sub-Judge and the Judicial Commissioner that the will was not executed at the date of the letter, and that it was not intended to be executed until after the Commissioner's consent had been obtained. There is nothing to show in what respects the alleged will of 1876 differed from the will of 1860, except that it appears that Sahib Mirza **[450]** Bahadur was named as executor in the later instrument. Nor indeed is it possible to determine whether the reference to "the arrangement connected with the distribution of stipends" and "the establishment of a charitable institution" points to dispositions which are found in the will of 1860 and with which

1892 MARCH 5 — PRIVY COUNCIL. — 19 C. 444 (P.C.) = 19 I.A. 83 = 6 Sar. P.C.J. 180 = Rafique & Jackson's P.C. No. 126.

the testatrix did not propose to interfere, or to new and perhaps different dispositions contained in the alleged will of 1876.

In these circumstances, and upon these materials, which are the only materials relevant to the question under consideration, their Lordships are of opinion that the proper and necessary conclusion of law is that the will of 1860 was not revoked.

It is well settled that a will duly executed is not to be treated as revoked, either wholly or partially, by a will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the later will contained either words of revocation, or dispositions so inconsistent with the dispositions of the earlier will that the two cannot stand together. It is not enough to show that the will which is not forthcoming differed from the earlier will, if it cannot be shown in what the difference consisted. It is also settled that the burden of proof lies upon the person who challenges the will that is in existence. These propositions have been established in this country, both in this Tribunal and in the House of Lords [*Cutto* v. *Gilbert* (1), *Hitchins* v. *Basset* (2), *Goodright* v. *Harwood* (3)], and as they are founded on reason and good sense they must be regarded as of general application.

The only remaining question is as to the true construction of the will of 1860.

That will was made when the testatrix was about to proceed on a pilgrimage to "Holy Karbala." Nawab Mulka Jehan it seems was a lady of great wealth. Besides her landed property, she was in the enjoyment of wasika allowance of Rs. 405 a month, in regard to which no claim is made by the respondents, a pension of Rs. 4,500 a month which was stopped in 1873, and the income of 12 lakhs of rupees which were settled by treaty, and in which apparently she had only a life-interest. It is, moreover, admitted that at the time of her death her moveable **[451]** property was worth about Rs. 9,11,166, including Government notes worth about Rs. 6,96,000. The will provides for the management of her affairs during her pilgrimage, as well as for the distribution of her estate after her death. It is addressed to the Chief Commissioner, and invokes the assistance and protection of the Government under whose supervision the testatrix places her property.

The instrument begins with some general reflections on the duty of a pious Muhammadan to make a will, in order to prevent disorder in his affairs after his death, which seem to show an intention on the part of the testatrix to dispose of the whole of the property over which she had disposing power.

Clause 3 deals with the application of the income of the testatrix's landed property during her pilgrimage. If there should not be enough in hand from that source to answer the purposes of the will, her agent was to make up the deficiency from "the pensionary allowance and interest on notes, &c., paid from the treasury," and remit the balance to the testatrix. Pausing there, one can hardly doubt that the testatrix must have intended her agent to remit to her the whole balance of the income of her immoveable estate, and not merely the balance of her wasika allowance and pension, and the income of the 12 lakhs. But the only words to carry the income of the words "pensionary allowance and interest on notes, &c.,

(1) 9 Moo. P.C. 131. (2) 3 Mod. 203 = Show. Par. Cas. 146.
(3) 2 W. Black 937.

1892 March 5. — Privy Council. — 19 C. 444 (P.C.) = 19 I.A. 83 = 6 Sar. P.C.J. 180 = Rafique & Jackson's P.C. No. 126.

paid from the treasury." Then the will goes on to provide for the remittance to the testatrix of the income of her landed property when collected.

Clause 5 contains the gift on which the present question turns. In it Nawab Mulka Jehan, in the event of her death, declares her will as follows:—

"Rupees 981 of the Queen's coin, out of my allowance from wasika and notes, &c., shall be paid monthly from the Government treasury to my relations, dependents, and servants as detailed below . . . . and the remainder of my allowance from wasika and notes, &c., and the whole of my landed property, *i. e.*, houses and groves, &c., and jagir villages, shall be divided among my grandsons and grand-daughters according to their lawful shares, and be paid to the agent of each of them." There again, in the ultimate disposition, it would appear that the testatrix must [452] have intended to deal with all her moveable property over which she had disposing power.

On consideration of the whole will their Lordships are of opinion that the Sub-Judge and the Judicial Commissioner were right in holding that the annuities or stipends given to the respondents were payable out of the testatrix's moveable property, which she had power to dispose of by will. Probably the testatrix was under the erroneous impression that she could deal with the wasika allowance, and her pension from Government, and the income of the fund settled by treaty. But their Lordships are of opinion that the words of the gift are large enough to charge the annuities or stipends in question upon the Government notes held by the testatrix, and also upon the rest of her moveable property. They may add that if the words of the will are to be taken in a more restricted sense, it appears to them that the gift of these annuities or stipends must be regarded as a demonstrative legacy, and in that view they would be payable out of the testatrix's general estate, in the event of the failure of the particular fund pointed out for their payment.

In the result, therefore, their Lordships are of opinion that the appeals ought to be dismissed, and they will humbly advise Her Majesty accordingly.

Appeals dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

1892 MARCH 5.

PRIVY COUNCIL.

19 C. 452 (P.C.) = 19 I.A. 101 = 6 Sar. P.C.J. 171.

19 C. 452 (P.C.) = 19 I.A. 101 = 6 Sar. P.C.J. 171.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, Morris and Hannen, and Sir R. Couch.

[On appeal from the High Court at Calcutta.]

BIRESWAR MUKERJI AND OTHERS (*Defendants*) v. ARDHA CHANDER ROY AND OTHERS (*Plaintiffs*) AND SHIB CHANDER ROY (*Defendant*) v. GOBIND MOHINI AND OTHERS (*Plaintiffs*).
[3rd February and 5th March, 1892.]

Hindu law, Adoption—Adoption, necessity of there being gift and acceptance of the adopted child—Construction of Will as to there being a designation, as legatee, of a child whose adoption failed.

The Court of first instance and the appellate Court, after observing fully upon the evidence, found that, although a ceremony of adoption had taken place, there had not, in fact, been a giving and taking of the child.

[453] There being no reason for departing from the ordinary course, where two Courts have concurred, the above finding was accepted; and it was, thereupon, *held*, that there had been no adoption.

Where, in a will, there was a clear indication of the testator's intention before making an adoption to give the greater part of his property to the boy whom he was about to adopt, and the bequest was by name to the latter, who was not selected as being the adopted son, but for reasons, which, though likely to lead to the adoption, were independent of it,—*held* that the bequest was effectual, notwithstanding that there had been no adoption.

[**R.**, 26 M. 291 (318); 4 C.L.J. 537 = 11 C.W.N. 147; **D.**, 28 A. 488 = 3 A.L.J. 415 = 8 Bom.L.R. 402 = 3 C.L.J. 594 = 10 C.W.N. 730 = 1 M.L.T. 171 = 33 I.A. 97 (**P.C.**); 20 B. 718; 9 C.W.N. 309 (317); 4 O.C. 6 (12).]

TWO appeals from a decree (21st May 1886) substantially affirming, with a modification, a decree (9th January 1884) of the District Judge of the 24-Parganas.

The two suits out of which these appeals arose were brought, in effect, for a partition of joint-family estate, with a declaration of the rights of the parties, and consequential relief.

The joint estate belonged to the Roy Chaudhri family of Panihati, in the district of the 24-Parganas, descended from Gauri Charan Roy Chaudhri who died in 1801. He adopted, and by his will put in his place, Joygopal, who died in 1826, leaving seven sons, of whom only four left either issue or widows. The family estate had vested in their representatives at the time when these suits were brought, in 1880 and 1881.

The principal questions raised in these two appeals, which were preferred from one decree made in the High Court on three appeals filed in the two suits, were—*first*, as to the right of those representatives in reference to an adoption in which the ceremonies, but not the actual giving and taking of the child, had been carried out; *secondly*, as to whether the latter could take as a designated person under the will of the testator, who had intended to adopt him, but had not effectively done so.

Of Joygopal's seven sons three died without issue.

Pran Krishna, the third son, who died in 1863, left a son, Jagat Chander, who died in 1879, having made the will, as to the construction of which the second of the above questions was raised. The words of that will, material to this report, are set forth in their Lordships' judgment. Jagat Chander left no son, but left a widow, Kadambini, who was a party to

these proceedings, and **[454]** he left two daughters—Hemangini, mother of the present appellants, Bireswar and Sureswar Mukerji, and Ushamoyi, mother of Shib Pershad Banerji, another of the appellants. 1892 MARCH 5.

PRIVY COUNCIL.

19 C. 452 (P.C.) = 19 I.A. 101 = 6 Sar. P.C.J. 171.

Gopi Krishna, the fourth son of Joygopal, died in 1860 intestate, leaving a son, Tejas Chander, who died in 1879, without a son, but leaving a widow, Bamasunderi, one of the present respondencs.

The sixth son of Joygopal, named Radha Krishna, died 1864, having executed a *niyam patro*, or settlement, and leaving two sons—Shib Chander and Ardha Chander.

Sri Krishna, the seventh and youngest son of Joygopal, died without issue in 1853, leaving a widow, Gobind Mohini, who was the plaintiff in the first of these suits, and a respondent in both appeals. He also left three daughters.

The earliest in date of the present suits was filed in 1880 by Gobind Mohini against Shib Chander and Ardha Chander, sons of Radha Krishna, to establish her right, as widow and heiress of Sri Krishna, to a four-anna share of the joint-family property inherited from Joygopal. She alleged that Shib Chander had taken possession of this property, and asked for an account on partition. The second of these suits was brought by Ardha Chander against Shib Chander, Sureswar, and other descendants of Jagat Chander, with the widows Bamasunderi, Kadambini, and Gobind Mohini. His object was to have the will of his deceased cousin Jagat construed, and to have it determined whether he had been validly adopted by the latter, or not; also to have his share in the family estate. He also claimed that he was entitled to one-half of his father's, Radha Krishna's, share, as well as to come in as a legatee under Jagat's will, his whole claim being for $\frac{27}{60}$ths of the joint estate.

Jagat's will, dated 13th Bhadro 1275, or 27th August 1868, referred to previous wills and dispositions made by members of the family. Among these that of Gauri Charan, dated 5th March 1800, charged the estate for religious ceremonies in the family; that of Joygopal, dated 2nd July 1826 gave the estate in equal shares to his seven sons, directing them to maintain the family worship as before; that of Ram Krishna gave his seventh share to his six surviving brothers. Sri Krishna left one-quarter of his fifth share **[455]** to Jagat, whom he made his executor as to the other three-fourths of the immoveable joint estate; giving him, also, the whole of his share of the moveables, for the benefit, after payment of debts, of his widow, Gobind Mohini, during her life, and after her death for the benefit of his daughters.

Raj Krishna, second son of Joygopal, died intestate and childless in 1855, his share devolving on the three surviving brothers—Pran Krishna, Gopi Krishna, and Radha Krishna.

The will, dated the 25th Magh 1270, or 6th February 1864, of Pran Krishna, the third of the brothers, and father of Jagat, appointed the latter to be manager of the whole joint estate. This he became, in supersession of Radha Krishna, the only surviving son of Joygopal, and he became also *shebait* of the family worship.

On the death of Pran Krishna, which occurred soon afterwards, Jagat, accordingly, became entitled to his father's share of the joint estate, in addition to what had been bequeathed to him by Sri Krishna, or, in all, to $\frac{19}{60}$ths of the whole. Gopi Krishna died intestate in 1860, his share descending to his only son, Tejas Chander, who died in 1879 without a son, his share devolving upon his widow, Bamasunderi Debi, one of the present respondents.

1892 MARCH 5. — PRIVY COUNCIL. — 19 C. 452 (P.C.) = 19 I.A. 101 = 6 Sar. P.C.J. 171.

The *niyam patro*, executed, as above stated, by Radha Krishna, was dated 6th February 1864, and in it he stated his intention of going on a pilgrimage to Gaya, and the necessity of his framing "rules with regard to his share of the zemindari and other properties for his own benefit and that of his minor sons." He authorized Jagat to take possession of his share of the joint estate for the benefit of Shib Chander and Ardha; and reserving an allowance for himself, he directed that their mother, his wife, Kasimoni, then in ill-health, should be maintained and treated with great care. At that time Shib Chander was aged about twelve years, and Ardha about four. In the month of Baisak, 1273, or April 1866, Jagat went through the ceremony of adopting Ardha. This was found by the Court of first instance not to have been effective; and the Court being of opinion that Ardha had continued to be the son of his natural father, held him to be entitled to a one-half share of his father's estate.

[456] The Court also held that Ardha, though not adopted, took, upon the true construction of Jagat's will, an estate for life in the property of the latter. Gobind Mohini was, in her suit, declared entitled to a two-anna and four-ganda share of the joint immoveable estate, and to a three-anna and four-ganda share of the joint moveables, subject to the trusts declared in Sri Krishna's will. Shib Chander, a defendant in both suits, appealed in both. Bireswar and others, sons and representatives of the daughters of Jagat, appealed also, contending that Ardha was not entitled under the will. There were thus three appeals which were heard together by a Divisional Bench (Pigot and Beverley, JJ.), who gave one judgment. The decision of the lower Court that there was no adoption was affirmed; and it was held that, notwithstanding this, Ardha took, as a person designated under the will of Jagat, an absolute estate, liable, however, to be divested in the event of his dying without leaving a son or male descendant through a male.

Upon the question as to the adoption, the Court was of opinion that there having been no gift and acceptance of the adopted boy in Radha Krishna's lifetime, and no giver in a legal sense at any rate, when the forms were gone through in Baisak 1273, no effective adoption had taken place. The case, *Venkata* v. *Subhadra* (1), cited to show that a gift and acceptance of a child may be perfected after the death of the giver by the due performance of the religious ceremonies, did not apply to the facts established here. There was, in that case, a gift and acceptance in the giver's lifetime. And at the time of the religious ceremonies, the act of giving was performed by a person competent to perform it, to whom authority was imputed by the Court. In this case there never had been a gift and acceptance at any time. On the question as to the effect of the will in regard to the bequest to Ardha, the judgment referred to *Fanindra Deb Raikat* v. *Rajeswar Das* (2) and to *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (3), distinguishing the first of these cases, where it was made a condition that the donee should be the adopted son, from the **[457]** present one, where the testator made the gift from motives of affection generally, and not because the donee was his adopted son. And the decision was that Ardha was within the intention of the will as a designated person. The judgment dealt with Gauri Charan's will, with Radha Krishna's *niyam patro*, and with other documents mentioned above.

In addition to the questions of adoption and of designation in the will, the only other matters required to be mentioned for the purposes of

(1) 7 M. 548. (2) 11 C. 463 = 12 I.A. 72. (3) 3 I.A. 253 = 26 W.R. 91.

this report are the High Court's decision as to the estate which Ardha took under the will, and as to the state of the family property as regarded jointness and separation and as regarded the subjection of part of it to trusts for religious purposes. In reference to these points, the following extracts from the judgment are material :—

1892 MARCH 5. — PRIVY COUNCIL. — 19 C. 452 (P.C.)= 19 I.A. 101= 6 Sar. P.C.J. 171.

"The property in which the testator was interested was of three kinds: (i) that left by Gouri Charan, which, it is argued, is *debuttur*; (ii) that self-acquired by Joygopal, left by him as such to his sons, and spoken of in some of the wills as the self-acquired property; and such other property self-acquired by other members of the family as had come down with the joint estate; (iii) that particular property self-acquired by Pran Krishna, Jagat's father, to which reference is made in para. 6.

"Jagat's will in the 1st paragraph states that he is about to dispose of the moveable and immoveable property of his ancestors. This includes the property left by Gauri Charan, so far as he could dispose of it, and the self-acquired and unpartitioned property not dedicated to religious purposes. He adds 'and the self-acquired moveable and immoveable property of myself and my father.'

"Now, in his bequest to Ardha, he gives everything; the proper share (*i.e.*, in the family property) of his late father, the 4 annas of Sri Krishna's property, and 'the self-acquired moveable and immoveable property of me and my father, which will be left.'

"But in the limitations which follow, in case of Ardha dying 'without leaving a son,' the 'share' of the ancestral and self-acquired property only are given, at any rate so far as the sons to be adopted by Kadambini are concerned.

"The 6th paragraph gives the self-acquired and separate property therein referred to (and which is already, as we have said, included **[458]** in the gift to Ardha) to 'the full-ownered after-taker, according to the statements in para. 4.' We think that, having regard to this, only those who are to take in case of Ardha dying sonless are referred to in this 6th paragraph. The determination of the heir (or fixing of the after-taker) relates to them only. The gift to Ardha, the fixing or determination, so far as he was concerned, was complete from the beginning, nor does the restriction on alienation conflict with this view; for by the terms of the gift to Ardha the estate granted to him would be defeated by his 'dying without leaving a son,' and would go over to the son adopted by Kadambini, or to the daughter's sons. Upon this point we shall only refer further to the last sentence in para. 8, relating to the Rs. 10,000 due to the testator by the estate. 'The sums being gradually paid off from the estate, my heir, the said Ardha, &c., *or* he who will be my heir according to the statements in para. 4, shall obtain it.'

"We think, therefore, that Ardha took an absolute estate defeasible upon his dying without leaving a son, which we construe to mean a male descendant in the male line."

On these appeals,—

Mr. *T. H. Cowie*, Q. C., and Mr. *J. H. A. Branson*, for Bireswar and Sureswar Mukerji, argued that the gift in the will to Ardha was to him in the character of adopted son. As he did not fill that character, the intention of the testator would not be carried out if he took under the will. They cited *Fanindra Deb Raikat* v. *Rajeswar Das* (1) and distinguished *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (2).

(1) 11 C. 463=12 I. A. 72.

(2) 3 I. A. 253=26 W. R. 91.

1892
MARCH 5.
——
PRIVY COUNCIL.
——
19 C. 452 (P.C.) = 19 I.A. 101 = 6 Sar. P.C.J. 171.

Mr. *C. W. Arathoon*, for Shib Chander, argued that the adoption was valid: also that, at all events, as the bequest to Ardha was expressed to be on the understanding that the share of Radha Krishna had been obtained by Shib Chander, the former brother could not take both by inheritance from his natural father, and also under the will. There were inconsistent advantages to Ardha in his so doing, and this should be held to involve election **[459]** on his part. *Venkata* v. *Subhadra* (1) *Atma Ram* v. *Madho Rao* (2), and *Codrington* v. *Codrington* (3) were referred to.

Sir *H. Davey*, Q.C., and Mr. *R. V. Doyne*, for the respondent Ardha, argued that he, if not entitled as having been validly adopted, was, at all events, designated in the will as the person to receive the testator's bequests. He had succeeded to one-half of the estate of his natural father before the will came into operation, and his title to that could not be divested by his taking afterwards under the will.

Mr. *H. Cowell*, for the respondents, Gobind Mohini and Bamasunderi, contended that the decree of the High Court should be upheld, as to the extent of the properties which were, respectively, joint and several; also, as to those properties which had been held subject to trusts for *deb-sheba*.

JUDGMENT.

Afterwards, on the 5th March 1892, their Lordships' judgment was delivered by

SIR R. COUCH.—The first three appellants in the first of these appeals —Bireswar Mukerji, Sureswar Mukerji, and Shib Pershad Banerji—are the grandsons of Jagat Chander Roy Chaudhri, who died on the 19th October 1869. He left two daughters—one, Hemangini, the mother of the first two grandsons, and the other, Ushamoyi, the mother of the third. The other two appellants are the daughters' husbands and guardians of their sons. The respondents, Ardha Chander and Shib Chander, are the sons of Radha Krishna, an uncle of Jagat Chander, who died in August 1865. The third respondent, Bamasunderi, is the widow of Tejas Chander, the son of Gopi Krishna, another uncle of Jagat Chander, and the respondent, Gobind Mohini, is the widow of Sri Krishna, another uncle. Pran Krishna, the father of Jagat Chander, Gopi Krishna, Radha Krishna, and Sri Krishna were four of the sons of Joygopal Roy, who died in 1826-27. He left three other sons who all died before Jagat Chander, and their shares in his property became vested in the four sons above named.

One of the suits, which are the subjects of the first of these appeals, was brought by Ardha Chander against Shib Chander **[460]** and the other persons who are parties to the appeal, and also against Kadambini, the widow of Jagat Chander, and Horendra his grand-daughter, the sister of Bireswar and Sureswar.

The plaint stated that Jagat Chander adopted the plaintiff Ardha Chander as his son in the year 1273 (April 1866 to April 1867) and made a will on the 13th Bhadro 1275 (27th August 1868) by which, after giving legacies and monthly stipends to some persons, he bequeathed all his remaining properties, moveable and immoveable, to the plaintiff. The plaint also stated that, as one of the sons of Radha Krishna, Ardha Chander was entitled to $\frac{8}{60}$th parts, and as devisee under Jagat Chander's will to $\frac{19}{60}$th parts, in all to $\frac{27}{60}$th parts of the joint estate, and it prayed that the will of Jagat Chander might be construed, and a declaration

(1) 7 M. 548. (2) 6 A. 276. (3) L. R. 7 H. L. Cas. 854.

1892 MARCH 5. — PRIVY COUNCIL. — 19 C. 452 (P.C.) = 19 I.A. 101 = 6 Sar. P.C.J. 171.

made as to what provisions in it are valid, and of the rights of the plaintiff and defendants in the estate left by Jagat Chander. It also prayed that the question whether the plaintiff being the son of Radha Krishna was entitled to a moiety of the share of the estate left by him, and whether the plaintiff was the legally adopted son of Jagat Chander, might be determined. Other consequent declarations and directions were asked for, but they need not be stated. At the settlement of issues ten were recorded, but of these only the fourth and fifth have to be considered in this appeal. The fourth is, "Is it a fact that plaintiff is the legally dattak (adopted) son of Jagat Chander?" The fifth is, "Has plaintiff any interest under the will of Jagat Chunder? If so, what is the nature of that interest?"

At the hearing before their Lordships the learned counsel for Ardha Chander did not rely upon the adoption. It was contrary to Ardha Chander's interest to do so, as Shib Chander, his natural brother in his written statement, alleged that Ardha Chander being the legally adopted son of Jagat Chander had no right and share in the estate left by his natural father, Radha Krishna. It was contended by Mr. Arathoon, who appeared for Shib Chander that the adoption was valid and this question had better be first determined.

The Subordinate Judge after observing in his judgment upon the evidence of what took place before the death of Radha Krishna and afterwards when Jagat Chander performed a grand ceremony [461] of adoption, held that the adoption was invalid, on the ground that there was no giving and taking. The High Court on appeal, after also observing fully upon the evidence, came to the conclusion that there was no gift and acceptance in Radha Krishna's lifetime, and no giver, in a legal sense at any rate (his widow being mentally incapable), when the ceremony was performed. Their Lordships see no reason to depart from the ordinary rule where there are concurrent findings of fact, and therefore decide that there was no adoption.

Mr. *Arathoon* also contended that in this case Ardha Chander should be put to his election, relying on the following passage in Jagat Chander's will:—"And the share of annas 4-5-1-1 which the late Radha Krishna Roy Chaudhri had in the same way has been obtained by his son, Shib Chunder Roy Chaudhri." This occurs in a paragraph of the will, in which the testator states the devolution of the property of his paternal grandfather. No case of election arises here. The testator had no power to dispose of Radha Krishna's share and did not intend to do so.

There remains the question of the effect of the will. Clause 4, which contains the bequest to Ardha Chander, begins: "Having no son, I loved and supported Ardha Chander Roy Chaudhri, the youngest son of the late Radha Krishna Roy Chaudhri, as my son. And as the said boy was very attached to me and my wife, and was an object of affection to us, I had a mind, granting to my daughters and daughters' sons a proper portion of my share of the ancestral property and self-acquired property, to give the remainder of the moveable and immoveable property to the said boy. Since then I have taken the said boy in adoption in virtue of the consent and gift of his father and mother, after getting the *vyavasthas* (opinions) of pundits, and on performing the ceremony of *jag* according to the Shastras." Here is a clear indication of his intention, before making an adoption, to give the greater portion of his property to Ardha Chander. He did not select him as being an adopted son, but for reasons independent of adoption, though they were likely to lead to it. The clause then continues: "Therefore the said dear boy, Ardha Chander, will be the heir to

1892 MARCH 5. — PRIVY COUNCIL. — 19 C. 452 (P.C.) = 19 I.A. 101 = 6 Sar. P.C.J. 171.

the whole of my moveable and immoveable property." It states the legal effect of the adoption, *viz.*, that Ardha Chander [462] would take the whole of his property, subject only to such duties of the maintenance of other persons as the law imposed. But this would not have been consistent with the testator's intention, and he proceeds to say:—"But I direct that, excepting the property granted by me as stated in paragraph 11 of this will, the said Sriman Ardha Chander Roy Chaudhri, and after him his son, and after him his grandson, and on the death of the latter, his great grandson shall obtain the proper share, ancestral, of my father, the late Pran Krishna, and the 4 anna share out of the proper share of my uncle the late Sri Krishna Roy Chaudhri, obtained by me by gift under his will, and the self- acquired moveable and immoveable property of me and my father which will be left. If, through my misfortune, *the said boy* die without leaving a son, which God forbid, then I give permission to my wife, Kadambini, that she may, for the purpose of providing for the presentation of funeral cakes and libations, take in adoption two sons in succession, one on the death of the other, from one of my paternal cousins who may have sons." And there is a direction that if no son be had of his paternal cousins, all his daughters' sons shall be in equal shares entitled to his paternal and self-acquired property.

It will be observed that he says, "the said boy die without leaving a son," not "said adopted son," or "my adopted son." The bequest is to Ardha Chander by name, and is not dependent upon the adoption. Both the lower Courts have so decided, and their Lordships are of opinion that their decision should be affirmed.

As to the second appeal, in which Shib Chander is the appellant, it was admitted by his learned counsel that, so far as it relates to the share of Sri Krishna Roy Chaudhri, it could not be supported, and should be dismissed. The other questions in it are raised in the first appeal and decided by the above judgment. Their Lordships will therefore humbly advise Her Majesty to dismiss both appeals, and to affirm the decree of the High Court made in the appeals to it. The appellants will pay the costs of these appeals.

Appeals dismissed.

Solicitors for the appellants, Bireswar Mukerji and others :
Messrs. *Barrow* and *Rogers*.

[463] Solicitor for the appellant, Shib Chander Roy Chaudhri :
Mr. *S. G. Stevens.*

Solicitors for the respondent, Ardha Chander Roy Chaudhri :
Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents, Gobind Mohini and Bamasunderi Debi :
Messrs. *Borrow* and *Rogers*.

C. B.

19 C. 463 (F.B.).

1892
MARCH 12.

FULL
BENCH.

19 C. 463
(F.B.).

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Tottenham, Mr. Justice Pigot and Mr. Justice Ghose.

DULHIN GOLAB KOER (*Defendant No.* 1) *v.* RADHA DULARI KOER (*Plaintiff*) AND OTHERS.*
[12th March, 1892.]

Appeal—Order declaring the rights of parties to a partition in certain specific shares appealable before actual partition made—Civil Procedure Code (*Act XIV of* 1882), *ss.* 2, 396—*Partition suit.*

Held by the FULL BENCH (PRINSEP, J., doubting)—That an order in a suit for partition, which declares the specific rights of the parties and the property to be partitioned, decides that the suit must be decreed, as after such an order the suit could not be dismissed by the Court by which it was made, and is therefore an order which adjudicates upon the rights claimed and the defence set up in the suit, and which, as far as the Court expressing it is concerned, decides the suit within the definition of a decree in s. 2 of the Civil Procedure Code, and is therefore appealable as a decree.

[N. F., 37 P.R. 1896; F., 23 C. 279 (283); 30 C. 683 (684); 25 M. 244 (297) (F.B.); R., 24 C. 725 (739); 29 C. 758=5 C.W.N. 617; 9 Ind. Cas. 1019=41 P.R. 1911 =115 P.L.R. 1911=179 P.W.R. 1911; 19 Ind. Cas. 922=6 S.L.R. 287; 49 P.R. 1902=56 P.L.R. 1902; D., 109 P.L.R. 1903.]

THE question argued before the Full Bench was, whether or not, in a suit for partition by metes and bounds, an order declaring the rights of the parties to partition in certain specific shares is appealable before the partition has been made.

The order of the Referring Bench (PRINSEP and O'KINEALY, JJ.) was as follows:—

"A preliminary objection has been raised to the hearing of this appeal that the order appealed is not a final order within the [464] definition of a decree as given in s. 2 of the Code of Civil Procedure, and that consequently it is not appealable. The order declares the specific rights of the parties and the property to be partitioned, but it leaves it open to the parties to state whether they desire that a complete partition by metes and bounds should be made. We have been referred to the case of *Bhoobun Moyi Dabea* v. *Shurut Sundery Dabea* (1), in which it was held in a similar case that no appeal would lie. Apparently, an appeal was allowed in the case of *Sakharam Mahadev Dange* v. *Hari Krishna Dange* (2), *Bhola Nath Dass* v. *Sonamoni Dasi* (3) and *Bepin Behari Moduck* v. *Lall Mohun Chattopadhya* (4). Again the reasons given by the Privy Council in *Rahimbhoy Habibhoy* v. *Turner* (5), which was a case of account, interpreting the term 'final decree' in s. 595, seem, however, to support the contention of the appellant. Having, therefore, some doubts in this matter, we accordingly refer to the Full Bench, whether in a suit for partition by metes and bounds an order declaring the rights of the parties to partition in certain specific shares is appealable before the actual partition has been made."

---

* Appeal from Original Decree No. 44 of 1891 against the decree of Babu Jodu Nath Das, Roy Bahadur, Second Subordinate Judge of zillah Tirhut, dated the 20th January 1891.

(1) 12 C. 275. (2) 6 B. 113. (3) 12 C. 273.
(4) 12 C. 209. (5) 15 B. 155=18 I.A. 7.

1892
MARCH 12.

FULL BENCH.

19 C. 463 (F.B.).

The order upon which the above question arose is set out below in the judgment of the Chief Justice:—

Mr. *Evans* (with him Mr. *Twidale*, Baboo *Hem Chunder Banerji*, and Baboo *Umakali Mookerji*) appeared for the appellants.

Mr. *W. C. Bonnerjee* (with him Dr. *Rashbehary Ghose*, Baboo *Saroda Churn Mitter*, Baboo *Degumber Chatterjee*, and Boboo *Raghunundun Pershad*) appeared for the respondents.

Mr. *W. C. Bonnerjee.*—Section 396 of the Code provides for commissions of partition, and a decree being passed in accordance with the report of the Commissioners, and s. 540 provides for an appeal from such a final decree. 'Decree' is defined by s. 2, which was introduced by Act XII of 1879. If it had been intended to allow appeals in cases of the present kind, there would have been a special reference to them similar to that to suits for an account in s. 2, the definition in which **[465]** was intended to be exhaustive and not illustrative only [*Coverji Luddha* v. *Morarji Punja* (1).] There can be no appeal except as against a decree, as defined by s. 2, or against an order mentioned in s. 588. It is the decree mentioned in s. 396 which decides the suit. Under s. 541, a copy of the decree is required to be annexed to the appeal. Section 396 only contemplates one decree, and is unambiguous. The preliminary decree in partition suits only decides certain preliminary questions. An appeal only lies from a final decree, *Ebrahim* v. *Fuckhrunnissa Begum* (2). I am not aware of any case in this Court where it was held that an appeal would lie from the preliminary decree in a partition suit. I rely on the decision in *Bhoobun Moyi Dabea* v. *Shurut Sundery Dabea* (3). There is but one decree under s. 396. Here there are various findings in the plaintiff's favour, and the Court will proceed to divide the property.

Mr. *Evans.*—The fallacy lies in treating the words 'deciding the suit' in s. 2 as equivalent to 'finally disposing of the suit.' The distinction is recognized in *Rahimbhoy Habibbhoy* v. *Turner* (4). It is argued that the suit is not disposed of until the arithmetical result is worked out. The practice in Chancery was to make decretal orders and afterwards final decrees. Here the decree consists of the order at the end of the judgment which can be made formal and complete. The doctrine that a party must wait till the suit is finally disposed of before an appeal can be preferred breaks down when applied to the case of a mortgage or a will. Where in a mortgage suit forgery is set up, and there is a decree for an account, it would be unjust to cause the defendant to wait until the account has been taken: so in a partition suit, where a will has to be construed, it would be unreasonable to preclude either party from appealing until the Commissioners have made their return. In the present case everything has been decided except what physical pieces of property will be the equivalent of certain shares. The intention which the other side would attribute to the Legislature is not a probable one. The case of *Gyan Chunder Sen* v. *Durga* **[466]** *Churn Sen* (5), illustrates how such matters were dealt with under the Code of 1877, where there was no definition of decree, and no one ever doubted then that there was an appeal. It is open to us to apply to the High Court under s. 622 of the Code or s. 15 of the Charter to have the decree drawn up in accordance with the terms of s. 206 of the Code. Under Act VIII of 1859 'decrees'

(1) 9 B. 183 (195). (2) 4 C. 531. (3) 12 C. 275.
(4) 15 B. 155=18 I.A. 6. (5) 7 C. 318.

1892 MARCH 12. — FULL BENCH. — 19 C. 463 (F.B.).

were not defined, but decrees containing orders for partition were constantly appealed. Under Act X of 1877, s. 396 merely dealt with the method of proceeding with Commissions. Act XII of 1879 was passed in consequence of a decree in a suit for accounts, in which it was held that no appeal lay, and the accounts are not finished yet. The reported cases are in my favour or are distinguishable.

Dr. *Rashbehary Ghose*, in reply.—The argument as to a mortgage suit is unsound, as s. 86 of Act IV of 1882 speaks of decrees and not of orders. The words in s. 2 of the Code are not to be regarded as merely explanatory or illustrative. The actual relief sought in a partition suit is possession in severalty. We raise no question as to the order being informal.

The Court (PETHERAM, C.J., (PRINSEP, TOTTENHAM, PIGOT, and GHOSE, JJ.) delivered the following

OPINIONS.

PETHERAM, C.J., (TOTTENHAM, PIGOT and GHOSE, JJ., concurring.) —No separate decree was drawn up in this case, but the last two paragraphs of the judgment of the Subordinate Judge are as follows:—

"For these reasons it is ordered that a partition of the properties mentioned in list No. 1 of the plaint, with the exception of the *thakurbari* and of the houses mentioned in list No. 2, be made. The defendant No. 3 through his pleader states that his share may be separated also. The defendant No. 2 does not want her share to be separated. Thus one share (one-fourth) will be given to the plaintiff. Another share (one-fourth) will be given to the defendant No. 3. The remaining share (half) belonging to the defendants Nos. 1 and 2 will be kept joint. The *thakurbari* and the *thakurs* specified in list No. 3 will be kept joint. **[467]** A scheme for the worship of the *thakurs* by turns by the co-sharers will be made at the time of the passing of the final decree. The costs of the partition will be borne by the parties in proportion to their respective shares. The parties are required to state within two days whether they desire that the partition should be made by one or more Commissioners."

The question which has been referred to this Bench is whether the order contained in these paragraphs is appealable.

It is admitted on all sides that it is not appealable as an order, as it is not included in the list of orders in s. 588 of the Code from which an appeal is given by that section, and the only question is whether it is within the definition of a decree in s. 2 and so appealable as a decree.

It has been said by the pleader for the plaintiff that he does not wish to argue that as no separate document has been drawn up and signed, giving effect to the decision of the Court, there has been no formal expression of an adjudication upon the rights claimed, and that point not being raised before us by him or referred to us by the Divisional Bench, we need not deal with it here.

Our answer to the question referred to us is that an order in a suit for a partition, which declares the specific rights of the parties and the property to be partitioned, decides that the suit must be decreed, as after such an order the suit could not be dismissed by the Court by which it was made, and is therefore an order which adjudicates upon the rights claimed and the defence set up in the suit, and which, as far as the Court expressing it is concerned, decides the suit within the definition of a decree in s. 2 of the Civil Procedure Code, and is therefore appealable as a decree.

1892
MARCH 12.
FULL BENCH.
19 C. 463 (F.B.).

PIGOT, J.—I must add that had the point been raised, I should have felt a difficulty in holding that a paragraph in the judgment, not drawn up in the form of a decree, and not embodied in a separate form, is, within the terms of the Code of Civil Procedure, a decree at all.

But the point is not raised before us, and I am not bound to deal with it.

PRINSEP, J.—I have had considerable difficulty in arriving at a satisfactory conclusion as to the effect that the Legislature **[468]** intended to give to an order within the terms of s. 396, Civil Procedure Code, directing a partition to be made by Commissioners, as in the case now before us. It is contended that the order of the Court declaring the several parties interested in immoveable property under partition and their several rights therein, amounts to a formal expression of an adjudication upon rights claimed, and that such adjudication, so far as regards the Court expressing it, decides the suit, and consequently that the order is a decree within the meaning of s. 2 of the Code. Section 396, however, provides that the Court in question shall pass a decree in accordance with the report of the Commissioners, if approved of. It would, therefore, seem that that section contemplates that the final decree in the suit should be passed after report made by the Commissioners. No doubt a similar course is provided by s. 215-A in a suit in which it is necessary to take an account. The definition of a decree as given in s. 2, however, specially declares that an order passed in such a case shall be within the definition of that term. I am inclined to agree with the Chief Justice of the Bombay High Court in holding that this part of the definition of a decree in s. 2 is exhaustive and not explanatory [*Coverji Luddha* v. *Morarji Punja* (1)], and, in that view, it would not, in my opinion, be impossible to include an order, such as I have described, in a suit for partition, as an adjudication deciding a suit. The actual decision of the suit would be when the decree of the Court was finally delivered, and this, it would seem, is declared by s. 396 to be after the report of the Commissioners. The observations of their Lordships of the Privy Council in the case of *Rahimbhoy Habibbhoy* v. *Turner* (2) refer to an order in a suit for accounts directing that such accounts be taken, and in considering whether such an order was appealable as a final decree under s. 595, their Lordships held that it complied with all the necessary essentials. Section 265, no doubt, describes as a decree for partition an order which leaves the partition itself to be made by the Collector where the property to be divided is an estate paying revenue to Government, but in such a case the **[469]** proceedings of the Civil Court are closed when such an order is passed, and therefore, so far as that Court is concerned, the order finally decides the suit. The order would consequently be a decree within the terms of s. 2. I observe that s. 265 is reproduced from the previous Code of 1859, whereas the terms of s. 396 are entirely new. The difficulty is increased by the definition of the term 'decree,' as it now stands, having been the result of a further modification of the Code. I think, therefore, that the matter before us is not without much difficulty. No doubt, for the convenience of the parties themselves, it is desirable that an order, such as that now before us, should be regarded as a decree and be a proper subject for appeal; so that the parties, who are in dispute in regard to the amount of their respective shares, may not be put to the expenses of a partition by metes and bounds, when such partition may turn out to be

(1) 9 B. 183 (196). (2) 15 B. 155 = 18 I.A. 6.

absolutely infructuous if the appellate Court should find that the shares have been wrongly determined. Consequently, as the large interpretation is open to us, and this interpretation is decidedly for the benefit of suitors, I think it should be adopted.

A.A.C.

---

19 C. 469.

REFERENCE FROM THE RECORDER OF RANGOON.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

MOUNG TSO MIN (*Petitioner*) v. MAH HTAH (*Respondent*).*
[27th April, 1892.]

Divorce—Burman Buddhists, Law as to Divorce among—Buddhist Law—Dhammathats, Authority of the—Menu Kyay, Authority of the—Desertion—Procedure.

In a suit for divorce instituted by a Burman husband on the ground that his wife had deserted him for no reason whatever, and had been living separate for the past eight months, refusing to resume cohabitation with him (there being no charge against the wife of misconduct affecting morality or of any bad habits), the wife pleaded in defence that the above [470] ground was, under Buddhist law, no ground for a divorce, and further pleaded the conduct of the petitioner as a justification for her refusal to cohabit with him. No division of property had taken place between husband and wife. *Held* upon a reference to the High Court—That upon the law as administered among Buddhists, the petitioner was not entitled to a divorce.

If the plaintiff in a suit for divorce governed by the above law establishes any of the grounds which the Dhammathats recognize as good grounds for a divorce, he will be entitled to a divorce. The Dhammathats contemplate grounds justifying a divorce other than those mentioned in the judgment of the Special Court in *Nga Nwe* v. *Mi Su Ma* (1), *viz.*, other than matricide, parricide, killing, stealing, shedding the blood of a Buddha, rahan, heresy, and adultery.

A desertion, properly so-called, by the wife is a good ground for divorce by the husband, provided that during the period of one year prescribed by the *Menu Kyay* (Bk. v, ch. 17) the husband has not supplied anything to the wife.

Suit for divorce between Burman Buddhists, being suits of a civil nature not governed by the Indian Divorce Act, should be commenced by a plaint and not by a petition.

The decision of the Special Court in *Nga Nwe* v. *Mi Su Ma* (1) observed upon. Passages in the *Menu Kyay* Dhammathat cited and commented upon.

[R., U.B.R. (1892—1896) Vol. II, p. 56.]

THE petitioner in this case sued in the Court of the Recorder of Rangoon for a divorce on the ground that his wife, the respondent, had left him and refused to live with him. The application being in the form of a petition, it was objected that it should have been in the form of a plaint, and leave was accordingly given to amend. The parties to the suit were both Burmese Buddhists.

On the part of the respondent it was not denied that she had left the petitioner and refused to live with him, but it was objected that this was not by Burmese law a ground for divorce, unless both parties were willing that there should be a divorce. The respondent further alleged that

---

* Civil Reference in Divorce Case No. 4 of 1891, made by W. F. Agnew, Esq., Recorder of Rangoon, dated the 4th of May 1891.

(1) Dated 18th August 1886 (Circular Order No. 35 of 1886).

1892 APRIL 27. — REFERENCE FROM THE RECORDER OF RANGOON. 19 C. 469.

she was justified in refusing to cohabit with the petitioner on the ground that when she lived with the petitioner he brought women of loose character to the house in which she and the petitioner were living, and thereby subjected the respondent to much indignity and anguish of mind [471] amounting in law to cruelty. Upon interrogatories being administered to the respondent, she gave the names of some of the women who were in the habit of visiting the petitioner.

The respondent's objection that desertion on the part of the wife does not by Burmese law amount to a ground for divorce was supported by a reference to the judgment of the Special Court in the case of *Nga Nwe* v. *Mi Su Ma* decided on the 18th August 1886 (1). The Recorder was of opinion that the effect of the decision of the Special Court was to unduly narrow the grounds upon which a divorce may be granted among Burmese Buddhists, and to confine those grounds to the grounds mentioned by Dr. Forchhammer, Professor of Pali, in a preface to the translation of the *Wagaru* Dhammathat contained in Mr. Jardine's notes on Buddist Law. Part IV (1883).

The Recorder made the following reference to the High Court under s. 42 of the Burma Court's Act (XI of 1889):—

"This is a suit by a Burman husband for divorce, the only ground alleged being that the respondent has left him, and refuses to return to cohabitation. The facts are not disputed, but it has been argued for the respondent that according to the judgment of the Special Court in *Nga Nwe* v. *Mi Su Ma* (1), dated the 18th August 1886, a copy of which is annexed, the suit must fail. The effect of that judgment is that a Burmese husband or wife can only obtain a divorce (except by consent) on some of the grounds mentioned in the Dhammathats, and that the only grounds are those particularized by Professor Forchhammer (2) and mentioned in the judgment. Undoubtedly the ground relied upon by the husband is not included in the grounds mentioned in the decision of the Special Court; and if divorce can only be granted upon some one of those grounds, this suit must be dismissed. It was also argued for the respondent that the proceedings are wrong in form; that a petition is only permissible in proceedings under the Indian Divorce Act, and that the Court has no power to make a decree upon a petition, and no power to allow the petitioner to amend [472] so as to convert the petition into a plaint. I know of no reported authority for converting a petition into a plaint, but it is a mere matter of form, and I think that the amendment might be allowed, especially as in this case the petition is actually overstamped.

"It is argued for the petitioner that the judgment of the special Court is not exhaustive, and that there are other grounds mentioned in the Dhammathats upon which divorce may be granted. Thus in Richardson's translation of the *Menu Kyay*, 2nd ed., pp. 355, 357, it is said (among other grounds) that a husband may divorce a wife who will not act according to his desires, and who has not equal love for him, and this is the text relied upon in the present case. So, again, cruelty is not included in the grounds mentioned in the Special Court judgment, though it is mentioned in the Dhammathats (Richardson, p. 343), where it is said that wise Judges may grant a divorce where the husband has oppressed his wife.

"It appears to me, with great respect for the judgment of the Special Court, that that Court was wrong in confining the grounds of divorce

(1) Circular Order No. 35 of 1886.

(2) Notes on Buddhist Law, by the Judicial Commissioner of British Burma; Part IV, Introductory Preface, by Dr. E. Forchhammer, Professor of Pali.

among Burmese to those mentioned by Professor Forchhammer, who, though a great Pali scholar, was not a lawyer, and that divorce ought to be granted upon any of the grounds to be found in the Dhammathats. The decision of the Special Court is certainly contrary to the law as administered hitherto in Burma. It is, however, binding upon me, and as I entertain doubts as to its correctness, and also as to whether the Court has power to grant a divorce between Burmans upon a petition, or to allow the petition to be converted into a plaint, I submit the following questions for the opinion of the High Court under s. 42 of the Lower Burma Courts' Act:—

"(i) Whether in suits for divorce the plaintiff is not entitled to a divorce upon any of the grounds mentioned in the Dhammathats, even though such grounds are not among those particularized in the judgment of the Special Court.

"(ii) Is it necessary that suits for divorce between Burman Buddhists should be commenced by a plaint?

"(iii) Has the Court power to allow a person who has wrongly instituted proceedings in the form of a petition to amend by converting the petition into a plaint?

[473] "Subject to the opinion of the High Court, I think that the petitioner is entitled to a decree for divorce, for a woman who refuses to return to cohabitation with her husband certainly does not act according to his desires, and that the amendment may be allowed. A petition for leave to amend has been filed by the petitioner."

Mr. *Acworth* and Baboo *Dwarka Nath Chuckerbutty* appeared for the petitioner.

The respondent was not represented.

Mr. *Acworth*.—By Burmese law marriage is a purely civil contract without religious sanction or ceremonies, and divorce can be obtained upon any of the grounds mentioned in the Dhammathats. The judgment of the Special Court does not limit the grounds of divorce to those specified by Professor Forchhammer, and the grounds quoted from Professor Forchhammer are quoted only as an authority for the proposition that divorce cannot be maintained on the ground of mere caprice, which was the question before the Special Court. The rules laid down by the *Menu Kyay* clearly contemplate a wife's refusal to live with her husband as a sufficient ground for divorce, and in such a case the husband is to have the whole of the property (see Richardson's *Menu Kyay*, pp. 159, 162, 357; also passages from the other Dhammathats cited at p. 23 of Mr. Jardine's second note). I contend that want of affection towards the husband, or refusing to live with him is a sufficient ground for a divorce. Here the wife objects to be divorced compulsorily, as in that case the husband will have all the joint property. As to the power of the Court to allow the petition to be amended, there can be no doubt.

JUDGMENT.

The judgment of the Court (PETHERAM, C. J., and GHOSE, J.) was delivered by

GHOSE, J.—This is reference by the Recorder of Rangoon. It has been made in an action for divorce instituted by a Burmese husband against his wife.

The ground alleged in the petition presented by the husband for obtaining a divorce is that the wife has deserted him for no reason whatever, and has been living separate for the last eight months, **[474]** and that

1892 APRIL 27. — REFERENCE FROM THE RECORDER OF RANGOON. — 19 C. 469.

she would not return to his house and resume cohabitation with him. The wife, however, pleads in her written statement that the ground alleged by the petitioner is no ground for divorce according to the Buddhist law, which governs the parties, and that she is justified in not returning to cohabitation with the petitioner, because while she was living with him he used to bring to the house women of loose character and habits, and thereby subjected her to much indignity and anguish of mind, amounting in law to cruelty.

The learned Recorder begins his judgment by stating that "the facts are not disputed;" he then refers to a judgment of the Special Court, dated the 18th August 1886 (1), and expresses his dissent from the law, which he understands to have been laid down therein; he then states that he is doubtful whether a decree for divorce may be given between Burmans upon a petition, and whether the petition may be allowed to be converted into a plaint, as asked for by the petitioner. And lastly, relying apparently upon certain passages in the *Menu Kyay* to the effect that a husband may put away his wife who has not equal love for him and would not act according to his desires, the Recorder is of opinion that the petitioner is entitled to a decree for divorce; but this opinion being, as he thinks, opposed to that of the Special Court, he has referred the following questions to this Court:—

(i) Whether in suits for divorce the plaintiff is not entitled to a divorce upon any of the grounds mentioned in the Dhammathats, even though such grounds are not among those particularized in the judgment of the Special Court.

(ii) Is it necessary that suits for divorce between Burman Buddhists should be commenced by a plaint?

(iii) Has the Court power to allow a person who has wrongly instituted proceedings in the form of a petition to amend by converting the petition into a plaint?

Now, the first observation that we have to make is that, unless the plea set up in the third paragraph of the defendant's written statement was waived, it cannot rightly be said that the facts [475] of the case are *not disputed.* But far from the plea set up therein being understood to have been waived, and which plea we may here say contains the justification for the defendant in leaving the house of the husband and refusing to return to cohabitation with him, she was asked by her adversary (the petitioner) to answer certain interrogatories, which she did answer, giving the names of some of the women whom the husband used to bring to the house while she lived with him. We refer to this matter, because we think it has an important bearing upon the question whether the husband is entitled, upon the present state of the record, and without any enquiry into the question of the justification pleaded by the wife, to obtain a decree for divorce, such as the Recorder proposes to make.

Referring to the judgment of the Special Court at Rangoon in the case of *Nga Nwe* v. *Mi Su Ma* (1), dated the 18th August 1886, we observe that the two questions which were decided in that case were:—

(i) Will a suit between a Burman Buddhist married couple for restitution of conjugal rights lie; and

(1) *Nga Nwe* v. *Mi Su Ma*, Circular Order No. 35 of 1886.

1892 APRIL 27. — REFERENCE FROM THE RECORDER OF RANGOON. — 19 C. 469.

(ii) if so, is this relief lost by the plaintiff's abandonment of the defendant for a shorter period than that mentioned in the *Menu Kyay*, Book 5, Chap. 17 ?

And it was held that a suit lies for restitution of conjugal rights, and that the relief is not lost to the plaintiff unless the case comes within the provisions of Book 5, Chap. 17.

In connection with the first of the two questions decided in that case, it seems to have been discussed whether either of the parties may divorce the other on mere caprice, and the Special Court, after an examination of the authorities on the subject, and especially the Dhammathat of *Menu Kyay* and a paper published by Dr. Forchhammer, a learned Professor of Pali (1), came to the conclusion that marriage between Burmese Buddhists may be dissolved at any time by mutual consent, and that where such [476] consent is wanting, it cannot be dissolved except on some ground recognized by the Dhammathats, and not by the mere volition of one of the parties.

So far as these conclusions are concerned, it seems to us that they are supported by the Dhammathats. But there are certain observations in the judgment which would seem to indicate that they intended to decide, while discussing the questions raised before them, that the only deeds on the part of the husband or wife which would justify a divorce are matricide, patricide, killing, stealing, shedding the blood of a Buddha, rahan, heresy, and adultery. But we do not understand the judgment really to go to that extent.

While discussing the question whether a divorce could be had on mere caprice, or that some offence or fault must be proved in one of the parties, the Court had to consider a certain passage in *Menu Kyay*, Book V, Chap. III, which runs thus :—"Thus has been laid down the law for the separation by mutual consent of a pair never before married when the husband wishes to separate and the wife does not, when there is no fault on either side, but their destinies are not cast together, the law for partition of the property is this, &c., &c. This is the law when there is no fault on either side, and when one wishes to separate." The members of the Special Court had to consider the words "destinies are not cast together (kammazat)," and they guided themselves by the explanation given by Dr. Forchhammer in his paper published in Mr. Jardine's notes, and the explanation given by him was as follows :—"Separation on account of *kammazat* may be *ex parte*, but always implies the commission of an evil deed on the part of the other party, which creates also for the innocent party a demerit for which he will have to suffer keenly through endless existences, &c. (1)," and that gentleman seems to have expressed an opinion that the deeds which justify a Buddhist to sever his destiny from that of his or her partner are matricide, patricide, killing, stealing, shedding the blood of a Buddha, rahan, heresy, and adultery. The Special Court, after quoting the words of Dr. Forchhammer, [477] observed :—"So that here we have from one of the best living authorities of the day an explanation of the text, coupled with a statement of the deeds which will justify a divorce amongst Buddhists, and this statement is consistent with the other texts of *Menu Kyay* above referred to." An observation to the same effect also occurs later on in their judgment.

---

(1) Notes on Buddhist Law, by the Judicial Commissioner of British Burma. Part IV, Introductory Preface, by Dr. Forchhammer, Professor of Pali, p. 8.

1892 APRIL 27. — REFERENCE FROM THE RECORDER OF RANGOON. — 19 C. 469.

But, as already pointed out, this was no part of the actual decision that the Special Court was called upon to pronounce in that case. If they meant to lay down that divorce could not be had, except for some one of the eight offences or faults mentioned in their judgment, this was extra judicial. And we may say that we are not prepared to agree with them in that respect; for the Dhammathats contemplate other cases in which divorce may be had.

On turning to the subject with which we are immediately concerned in this case, *viz.*, whether the husband is entitled to a decree for divorce because the wife has deserted him and refuses to return to cohabitation, it seems to us that there are texts in the *Menu Kyay*, a book of paramount authority in the Buddhist school, which show that a desertion, properly so called, is a good ground for divorce.

In Book V, Chap. 17, p. 141 (Richardson's edition), which is headed:—"The law when a husband and wife, having no affection for each other, separate." *Menu Kyay* says as follows:—

"Any husband and wife living together, if the husband, saying he does not wish her for a wife, shall have left the house, and for three years shall not have given her one leaf of vegetables or one stick of firewood, at the expiration of three years let each have the right to take another wife and husband. If the wife, not having affection for the husband, shall leave (the house) where they were living together, and if during one year he does not give her one leaf of vegetables or one stick of firewood, let each have the right of taking another husband and wife; they shall not claim each other as husband and wife; let them have the right to separate and marry again. If when the husband leaves the house, the wife shall take another within the three years, or when the wife has left the house, and within one year the husband shall take another wife—of the property of both, what [478] was brought at marriage and that which belongs to both, having counted one, two, and weighed by tickals, let all the property be demanded and taken from the person who failed in his or her duty as husband and wife, by the other who has become the lord of it; and if (the person in fault) comes to the house of the other (the person not in fault) may turn (the other) out, but not accuse (each other) of taking a paramour or seducing husband or wife."

It will be observed that in the case of a wife leaving the house of her husband, and in the event of the husband not supplying her with anything for one year, the right to separate and marry again is created in either of the parties. The second portion of the chapter, which refers to the parties marrying before the periods prescribed (as the case may be) clearly condemns that conduct.

The texts in the *Menu Kyay*, which the learned Recorder has, we suppose, relied upon, are to be found in Book XII, Chap. 43 (Richardson's edition), pp. 354, 355 and 357; and they are as follows:—

"The five kinds of wives who may be put away are these:—'If a man and wife have lived together eight or ten years and had no children, the wife is a barren woman; a woman who has had eight or ten female children and no son; a woman who is afflicted with leprosy or epilepsy; a woman who does not conform to the habits of her class; a woman who will not act according to the desires of her husband, who has not equal love for him,—these five women a husband may put away.'

"By putting away is not meant that he may take all the property and put her away, but if he wishes he may take another wife, and (a wife

as above) shall have no right to oppose his wishes; thus she may be said to be put away. This is one point in this matter." And in p. 357 the following passage occurs:— .

"Concerning putting away a woman who does not conform to the habits of her class, but addicts herself to low habits, it is thus said. If a woman, without regard to the credit of her family, takes a paramour, or without the knowledge of her husband steals or conceals his property, it is not said the husband shall only cease connubial intercourse with her; her habits are bad; she has certainly no regard to the honour of her family. For this reason, [479] let him take all the property and have a right to put her away. Of a woman who will not comply with her husband's desires, it is said her desires are not towards him, her wishes are not the same. As in the last instance, let him have a right to put such a woman away."

In the present case there is no charge of misconduct affecting morality or of any bad habits, against the wife, and the question we have to determine is whether, by reason of the wife living apart from the husband for eight months (as the petitioner alleges), and her refusal to return to cohabitation, is a sufficient ground for divorce.

Referring in the first place to the five kinds of wives who may be put away, one of them being "a woman who will not act according to the desires of her husband, who has not equal love for him," it will be observed that an explanation is given by *Menu Kyay*, which is to the effect that "by putting away is not meant that he may take all the property and put her away, but if he wishes he may take another wife, and (a wife as above) shall have no right to oppose his wishes; thus she may be put away." So that we have it clear that the husband is not entitled to divorce his wife for not complying with his desires, or for want of love for him; and that "putting away" does not necessarily mean *divorcing* the wife; and this seems to be emphasized by what is subsequently said in the same page (355) with reference to a wife, who has had eight or ten female children and no son, being put away, and it is this:—"It is not meant that the husband has a right to put her away without giving her property, animate and inanimate; but if he wishes for precious male children, which are superior to females; he shall take another woman, and the wife shall have no right to prevent him; he has only right to discontinue connubial connection with her. If she have borne without any male child eight, nine or ten female children, and the husband wishes to put her away, let him, having divided all the property of both into two parts, given one-half to the wife, and let them pay the debts in the same proportion, &c." The author then refers to the case of a diseased woman, the duty cast upon the husband to employ physicians to treat her, and to the partition of property in the event of separation, makes the following observation:—"It [480] is not said the husband has a right to take all the property and separate; he shall only cease connubial intercourse."

The passages in p. 357 referred to by the learned Recorder immediately follow the passage which has just been quoted, and it will be observed that, while the author in speaking of a woman who takes a paramour, or steals her husband's property, says "it is not said that the husband shall only cease connubial intercourse with her; her habits are bad; she has no regard to the honour of her family. For this reason let him take all the property and have a right to put her away." In speaking of a woman who does not comply with her husband's desires, he says "as in the last

1892 APRIL 27. — REFERENCE FROM THE RECORDER OF RANGOON. — 19 C. 469.

instance, let him have a right to put such a woman away," thus putting the two cases upon different footings.

In regard to the five kinds of women referred to in the *Menu Kyay*, who may be put away, we have a text in the *Manoo Wonnana*, which is also a Dhammathat of authority in the Buddhist school translated by Mr. Jardine in his valuable notes, p. 22 : it is as follows :—"A woman who is barren ; a woman who always brings forth female children ; also a woman who has bodily deficiencies ; a woman who bears neither daughters nor sons ; a woman with leprosy ; a woman of bad conduct ; a woman who has no love for her husband, or in other words, a women having no love for her husband has a paramour,—these five kinds of woman may be abandoned or divorced."

A somewhat similar passage is to be found in the *Manoo Ring* Dhammathat, published in Mr. Jardine's notes, p. 6, and it is this :—"A woman who is barren, a wife who gives birth to female children, a woman who has disease, a woman of bad conduct, and a woman who is not liked by good men ; such kinds of wives may be abandoned."

Upon a consideration of these texts, we are of opinion that a divorce cannot be had merely because one of the parties has no love for the other, or does not comply with the desires of the other. Desertion, according to the *Menu Kyay*, is no doubt a good ground for divorce, but, as already pointed out, there is this condition attached, *viz.*, during the periods of time prescribed therein the husband should not have supplied anything to the wife.

[481] In this case the period of eight months has only elapsed since the wife left, and it does not appear whether the husband has not supplied anything to the wife during this time. The principle which underlies this matter seems to be that it is not proper to allow a divorce if the wife or the husband has been living apart from the other for a comparatively short time ; and that if during the prescribed period, the husband has supplied the wife with any of her wants and kept communication with her, it should be presumed that the conduct of the wife is not blameable, and that the husband does not regard her living separate as a desertion properly so-called.

There are no doubt texts in the several Dhammathats which show that a divorce can be had by mutual consent, and that one of the parties can separate from the other, even if the latter does not consent, but in that case it is distinctly provided that the properties belonging to both and their liabilities should be divided. And in this connection we may refer to two texts—one from the *Manoo Wonnana*, and the other from *Wagaru* Dhammathat, translated in the notes by Mr. Jardine, and they are as follows :—

"If a husband or wife in a state of anger says to the other 'I do not love you,' such words shall not be sufficient to constitute a divorce. It is constituted only when they divorce and leave each other, after a division of the good and bad property in possession and not in possession to which they are entitled." (*Manoo Wonnana.*)

"If husband and wife have separated and no division of property has taken place, neither shall be free to live with another (man or woman). But if the property has been divided, they may do so. Thus *Manu* has decided." (*Wagaru.*)

The relevancy which those passages have upon this case is this—that, apparently, here no division of property has taken place between the parties—a circumstance which indicates that the separation which has

1892 APRIL 27. — REFERENCE FROM THE RECORDER OF RANGOON. — 19 C. 469.

taken place is not of that character which may be regarded as any way final. And as to the wife declining to return to cohabitation with the husband, if the facts stated in the last paragraph of the written statement be true (a matter which has not been gone into by the Recorder), it would appear that there is a justification in her conduct; and in that view a Court [482] of justice would not be disposed to pronounce a decree for divorce against the consent of the wife, thereby depriving her of the advantages which belong to the status of a wife. But it is not necessary to discuss this matter any further, nor to send back the case for the trial of the question of fact raised in the written statement, for we are of opinion that, upon the law as administered among the Buddhists, the petitioner has not made out a case for divorce.

In this view of the matter it is perhaps unnecessary to answer categorically the questions referred by the Recorder; but we may say, so far as the first question is concerned, that if a plaintiff in a suit for divorce establishes any of the grounds which the Dhammathats recognize as good grounds for divorce, he would be entitled to a divorce, even if such grounds are not among those particularized in the judgment of the Special Court. As regards the other question put, we are inclined to think that the proper procedure is to present a plaint, and not a petition for divorce, the case being not governed by the Indian Divorce Act, and the action being one of a civil nature. In this case, however, no difficulty could arise, because the petition was presented with the Court-fee required for a plaint, and it was perfectly open to the Recorder to treat the petition as a plaint in the cause, as was asked by the petitioner.

A. A. C.

---

19 C. 482.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

BROJO NATH SURMA (*Judgment-debtor*) v. ISSWAR CHUNDRA DUTT (FOR SELF AND AS GUARDIAN OF PROSSANO KUMAR DUTT, MINOR) (*Decree-holder*).* [12th May, 1892.]

Succession Certificate Act (VII of 1889), s. 4—Execution of decree—Application for execution by legal representative without certificate.

Section 4 of the Succession Certificate Act, 1889, merely provides that the Court shall not proceed upon an application of a person claiming to be [483] entitled to execute a decree, except on the production of a certificate or other authority of a like nature. But it does not follow from that section that an application might not be made without the production of a certificate, the certificate being supplied during the pendency of the proceedings.

Janaki Ballav Sen v. *Hafiz Mahomed Ali Khan* (1) followed.

[F., 16 A. 26 (28) = 13 A.W.N. 197; 20 B. 76 (77); R., 18 A. 34 (35) = 15 A.W.N. 148; D., 13 Ind. Cas. 78 = 10 M.L.T. 532 = (1911) 2 M.W.N. 559; 13 C.W.N. 533 = 9 C.L.J. 443 = 1 Ind. Cas. 57.]

THIS was an appeal from an order granting an application for the execution of a decree to the heir of a deceased decree-holder.

---

* Appeal from Appellate Order, No. 282 of 1891, against the order of H. Luttman-Johnson, Esq., District Judge of the Assam Valley Districts, dated the 26th of May, 1891, reversing the order of C. E. Pittar, Esq., Subordinate Judge of Sibsagar, dated the 14th of July 1890.

(1) 13 C. 47.

1892 MAY 12. — APPELLATE CIVIL. — 19 C. 482.

The facts are sufficiently stated in the judgment of the High Court.

Baboo *Jossoda Nundun Paramanick*, on behalf of the appellant, contended that the application for execution of the 26th November 1889 was barred, because it had been made more than three years after the first application of 13th July 1886, and that therefore no subsequent application such as that of March 1890 could be made; and, secondly, that in consequence of s. 4, cl. (*b*) of the Succession Certificate Act, 1889, no application for execution could be made by the heir of a deceased decree-holder without a succession certificate, and as at the time of the last application no such certificate had been obtained, it was not an application in accordance with law and within art. 179 of sch. II of the Limitation Act.

Baboo *Tara Kishore Chowdhry*, on behalf of the respondent, contended that the words in s. 4 of the Succession Certificate Act were:— "No Court shall *proceed* upon an application;" that these words should be construed liberally, and the true construction to be put upon them was that the Court might entertain an application for execution without a certificate, but should not proceed to pass any order until a certificate had been obtained; and that such an application should be held to be a good application within art. 179 of sch. II of the Limitation Act; that to construe these words otherwise would often result in great injustice, as, for instance, where a decree-holder died within two or three days of the three years it would be impossible for his heir to obtain a certificate and make his application in time to save limitation; and that this section was in accordance with the ruling in *Janaki Ballav Sen* v. *Hafiz Mohomed Ali Khan* (1).

JUDGMENT.

[484] The judgment of the Court (NORRIS and BEVERLEY, JJ.) was delivered by—

BEVERLEY, J.—This is an appeal against an order in respect of the execution of a decree which was made in August 1885. It appears that an application to execute that decree was made on the 13th July 1886. That application for some cause or other was struck off. The decree-holder then died, and on the 26th November 1889 his legal representative made a second application, which appears to have been struck off or rejected on the 15th February 1890. The present application was filed in the following month, March 1890.

The first Court held that, inasmuch as the second application of the 26th November 1889 was made by the legal representative of the deceased decree-holder, without the production of any certificate under Act VII of 1889 or other Act for the time being in force, the application was not in accordance with law, and that therefore the present application of March 1890, having been made more than three years from the first application of the 13th July 1886, is barred by limitation.

On appeal the District Judge has reversed this order, holding that under the terms of s. 4 of Act VII of 1889 it was competent for the legal representative of the deceased decree-holder to make his application without, at the same time, filing any certificate.

The judgment-debtors have appealed to this Court against that order of the District Judge; and two points have been taken before us, the first being that the application of the 26th November 1889 was itself barred,

(1) 13 C. 47.

as having been made more than three years subsequent to the first application of the 13th July 1886. 1892 MAY 12.

This point does not appear to have been argued, if indeed it was taken, in either of the lower Courts; and as its decision would depend upon facts and circumstances which are not before us, we do not think it right to express any opinion upon it. But, assuming that the application of the 26th November 1889 was made within time, we are of opinion that the order of the lower appellate Court, holding that that application was a good application in law, must be upheld. Section 4 of Act VII of 1889 merely provides that the Court shall not proceed upon an application of a [485] person claiming to be entitled to execute a decree, except on the production of a certificate or other authority of the like nature. But it does not follow from that section that an application might not be made without the production of a certificate, the certificate being supplied during the pendency of the proceedings; and this was the view taken by a Division Bench of this Court in the case of *Janaki Ballav Sen* v. *Hafiz Mahomed Ali Khan* (1).

APPELLATE CIVIL.

19 C. 482.

Under these circumstances we think that this appeal fails and must be dismissed with costs.

C. D. P. *Appeal dismissed.*

---

19 C. 485.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

PEARI MOHUN MUKERJI (*Petitioner*) *v.* BARODA CHURN CHUCKERBUTTI AND ANOTHER (*Opposite party*).
[16th May, 1892.]

Appeal from Order—Bengal Tenancy Act (VIII of 1885), s. 84, *Order made under, not appealable—Acquisition of land by landlord—Civil Procedure Code (Act XIV of* 1882), ss. 2, 588.

An order made by a Civil Court under s. 84 of the Bengal Tenancy Act is not appealable, not being a decree within the meaning of s. 2 of the Code of Civil Procedure, and no appeal being allowed by s. 588 of the Code, or by any special provision of the Bengal Tenancy Act.

Goghun Mollah v. *Rameshur Narain Mahta* (2) referred to and followed.

THE petitioner applied under s. 84 of the Bengal Tenancy Act to the Munsif of Serampore with a view to acquire the raiyati interest in 14 cottahs 12 chittaks of land held by the respondents in his zemindari, and prayed that the proper value of the land might be fixed by the Court, and all necessary orders passed for the transfer of the land in question which was required for the purpose of opening out a new road. In support of his application the petitioner filed the certificate granted by the Collector showing that the purpose above mentioned was reasonable and sufficient. The respondents appeared before the Munsif, and upon evidence being gone into, the Munsif held that the purpose for which the [486] land was required by the landlord was reasonable and sufficient, and that

---

* Appeal from Order No. 222 of 1891 against the order of J. Crawfurd, Esq., District Judge of Hooghly, dated the 28th of April 1891, affirming the order of Babu Loke Nath Nundee, Munsif of Serampore, dated the 3rd of April 1891.

(1) 13 C. 47. (2) 18 C. 271.

1892 MAY 16. — APPELLATE CIVIL. — 19 C. 485.

the acquisition would be for the good of the estate in which the land was comprised. The Munsif came to the conclusion that the sum of Rs. 516-4 would be a fair compensation in respect of the jamai right of the respondents, and ordered them to sell the land for that sum within two months to the petitioner.

Against this order the petitioner appealed to the District Judge, who refused to entertain the appeal for the following reasons :—"This purports to be an appeal against an order under s. 84 of the Bengal Tenancy Act. Schedule III, part 2, No. 4 of that Act provides the limitation for appeals from orders made under it, but does not determine which of such orders are appealable, nor does s. 184 of the Act. Appeals from decrees under the Act are given by s. 540 of the Civil Procedure Code, but s. 588 of the Code makes no provision for appeals from orders except those made under the Code itself. Section 158 (3) is an example of a case in which the Bengal Tenancy Act provides an appeal from an order under that Act. Section 153 also provides for appeals from certain other orders. I find no provision, however, giving an appeal against orders under the Act generally. The order now in question does not appear to me to come under the definition of 'decree' in s. 2 of the Civil Procedure Code, and regarding it as a mere order, I find no authority for my entertaining an appeal against it."

Against this order the petitioner appealed to the High Court.

Baboo *Pran Nath Pandit* appeared for the appellant.

Baboo *Opendro Gopal Mitter* appeared for the respondents.

JUDGMENT.

The judgment of the High Court (PETHERAM, C.J., and GHOSE, J.) was delivered by

PETHERAM, C.J.—The only question which has been argued before us is, whether an order made by the Munsif under s. 84 of the Bengal Tenancy Act authorizing the zemindar to acquire a certain portion of the raiyat's holding and fixing a price at which he is to acquire it is appealable under the law.

The point has already been decided in this Court in the case of *Goghun Mollah* v. *Rameshur Narain Mahta* (1), and it would be **[487]** sufficient for us to say that we agree with the mode in which that case was decided. But it may be as well to add that in our opinion it is clear that such an order as this is not a decree within the meaning of the definition in s. 2 of the Code of Civil Procedure, because, reading the whole of that section, it is clear, we think, that a decree can only be in a suit, and that this proceeding is not a suit. It not being a decree within that definition, it must be an order, and it remains then only to be seen whether any appeal is given either by s. 588 of the Code of Civil Procedure or some special provision of the Bengal Tenancy Act. No appeal is given by s. 588, nor is any given by any special provision of the Bengal Tenancy Act, and we think therefore that the Judge was right in deciding that no appeal lay in this case, and that this present appeal must be dismissed with costs.

A. A. C. *Appeal dismissed.*

(1) 18 C. 271.

19 C. 487.

1892
MARCH 22.

APPEL-
LATE
CIVIL.

19 C. 487.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

MOHIMA CHUNDER BISWAS (*Petitioner*) v. TARINI SUNKER GHOSE (*Objector*).* [22nd March, 1892.]

Appeal—Guardians and Wards Act (*VIII of* 1890), *s.* 47—*Removal of guardian—Order refusing to remove a guardian.*

No appeal lies under the Guardians and Wards Act (VIII of 1890) from an order of a District Judge refusing to remove a guardian.

[F., 23 C. 201 (205); 14 Ind. Cas. 56 = 195 P.W.R. 1912; R., 20 A. 433 (434) = 18 A.W.N. 97; D., 19 A. 131 (132).]

THIS was an appeal from an order dismissing an application of one Mohima Chunder Biswas, who stated in his petition that one Kali Prosonno Ghose Chowdhry, a minor, having lost his parents, Tarini Sunker Ghose, the minor's paternal uncle, obtained in the month of March 1883 a certificate under Act XL of 1858, appointing him guardian of the person and property of the minor: that Tarini Sunker Ghose had neglected the maintenance and education of the minor and was unfit to continue his guardian. The petitioner therefore prayed that Tarini Sunker Ghose might be ordered to file an inventory of the property and an account of the receipts and disbursements of the minor's estate, and that the petitioner or some other competent person might be appointed [488] guardian of the person and property of the minor under the Guardians and Wards Act (VIII of 1890). The petitioner was the husband of the minor's sister, and was supported in his application by three of the relatives of the minor.

Tarini Sunker Ghose in his petition of objections denied the above allegations, and submitted himself to the judgment of the Court.

Upon taking evidence on both sides the District Judge refused the application, holding that no cause had been made out for the removal of the minor's guardian, Tarini Sunker Ghose. Mohima Chunder Biswas appealed to the High Court.

Baboo *Mohini Mohan Chakravarti* appeared for the appellant.

The respondent did not appear.

JUDGMENT.

The judgment of the Court (PETHERAM, C. J., and GHOSE, J.) was delivered by

GHOSE, J.—This is an appeal against an order of the District Judge of Faridpur refusing to dismiss a guardian. The guardian had been appointed under Act XL of 1858, which has since been repealed by the Guardians and Wards Act (VIII of 1890); and the first question that we have to determine is whether an appeal lies to this Court against the order of the District Judge. Section 47 of Act VIII of 1890 gives an appeal in certain cases; and what we have to see is, whether the order complained against falls within any of the cases mentioned in that section.

---

* Appeal from Order, No. 227 of 1891, against the order of J. Posford, Esq., Judge of Faridpur, dated the 15th of June 1891.

1892 MARCH 22. — APPELLATE CIVIL. — 19 C. 487.

We have examined s. 47 and the other portions of the Act; but we have failed to discover that the Legislature has provided for an appeal to this Court from an order of the kind with which we are now concerned.

We may here mention that the question, as to whether an appeal lies to this Court from the order complained of, was very candidly brought to our notice by the learned vakeel, who appeared for the appellant, at the outset of his address; and we have come to the conclusion that no appeal lies.

The result is that this appeal will be dismissed upon that ground only, but without costs, as the respondent has not appeared.

A. A. C. *Appeal dismissed.*

---

19 C. 489.

[489] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

RANIGANJ COAL ASSOCIATION, LIMITED (*Defendants*) *v.* JUDOONATH GHOSE (*Plaintiff*).*
[8th April, 1892.]

Lease—Building lease not within purview of Bengal Tenancy Act—Coal depot, lease for, not agricultural or horticultural within meaning of Bengal Tenancy Act—Bengal Tenancy Act (*VIII of* 1885), *ss.* 3, 4, 5—*Limitation Act* (*XV of* 1877), *sch. II, art.* 116.

A registered lease granted for building purposes and for establishing a coal depot does not come within the purview of the Bengal Tenancy Act, not being a lease for agricultural or horticultural purposes.

The limitation applicable to a suit for the rent reserved in such a lease is that prescribed by art. 116 of the Limitation Act.

[**F.**, 28 C. 485 (487); 12 C.W.N. 724 (726); **Rel.**, 11 Ind Cas. 6 (7); **R.**, 17 C.L.J. 372 (380) = 19 Ind. Cas. 865 (869).]

THIS was a suit to recover the sum of Rs. 5,000, rent with interest, for six years from Jeyt 1290 to Bysack 1296 from the defendant Association in respect of 5 bighas of land held by them in dur-maurasi-mocurari settlement at a rent of Rs. 625 per annum. The land was held under a registered kabuliyat, dated the 25th September 1875, executed by Messrs. Schœne, Kilburn and Company, the managing agents of the defendants, in favour of the plaintiff, which kabuliyat contained the following clause:—"Being vested with your rights, we shall continue to hold and enjoy the said land for ever down to our heirs and representatives from generation to generation on payment of rent payable for the said land, either directly or through tenants, by raising buildings, digging tanks, planting gardens, establishing coal depots, or by using it in any other way we choose to which you or any of your heirs shall not be competent to raise any objection." The defendants pleaded, *inter alia*, relinquishment and limitation, and contended that in any event the special limitation provided by the Bengal Tenancy Act [sch. III, Part I, 2 (*b*)] was applicable to the case.

---

* Appeal from Appellate Decree, No. 847 of 1891, against the decree of J. Crawfurd, Esq., District Judge of Hooghly, dated the 16th of March 1891, affirming the decree of Babu Shambho Chundra Nag, Subordinate Judge of that district, dated the 31st of May 1890.

1892
APRIL 8.

APPELLATE CIVIL.

19 C.

The first instalment in suit was due on the 1st of Assar 1290 B.S., corresponding with the 14th of June 1883, and the plaint was filed on the 20th of May 1889, within six years of the first **[490]** instalment becoming due. The plaintiff contended that art. 116, sch. II of the Limitation Act (XV of 1877) governed the case, and the suit was therefore within time.

The Subordinate Judge decreed the suit in full, holding upon the question of limitation that the lease was of non-agricultural land and beyond the purview of the Tenancy Act. The Court relied upon the decision in *Judoonath Ghose* v. *Schœne, Kilburn and Company* (1), in which case the High Court observed of the lease there, which was the same lease as the one in this suit:—"The terms of this lease are wholly inconsistent with any idea of its creating a *raiyati* tenure. It is in the nature of a building lease of valuable property, because in addition to the yearly rental of Rs. 625, which is to be paid for 5 bighas of land, there was also a premium of Rs. 1,150 paid by the lessees," and held upon the authority of *Umesh Chunder Mundul* v. *Adarmoni Dasi* (2) and *Nobocoomar Mookhopadhaya* v. *Siru Mullick* (3) that the case was governed by art. 116 of sch. II of the Limitation Act (XV of 1877).

Upon appeal the defendant contended for the first time that the relationship of landlord and tenant had never been created between the parties, the kabuliyat sued on not being under seal as required by s. 42 of Act X of 1866 (the Indian Companies Act in force when the kabuliyat was executed). The lower appellate Court, upon reference to s. 107 of the Transfer of Property Act (IV of 1882), and the cases of *Gardiner* v. *Fell* (4), and *Freeman* v. *Fairlie* (5) held that the kabuliyat was not a necessary part of the transaction between the parties, nor was it necessary that it should be under seal, the fact that the defendant Company had taken possession under the lease being sufficient evidence of the acceptance of the grant.

Upon the question of limitation the Court observed as follows:—"It is admitted, and also proved by oral evidence, that the land was taken with the object of establishing a coal depot on it. It also appears that, when taken, part of the land was occupied by the dwelling-houses of tenants which were removed, compensation being given. No coal depot was in fact established, but the **[491]** evidence shows that the defendants did not use the land for any other purposes, did not settle raiyats upon it, and did not bring it under cultivation. What profits are derivable from the land besides the rent of the one pre-existing tenant, the evidence shows to be payments for permission to make bricks, hire of land to be used as wood yards, the produce of the trees, and of the tank on the land. I do not see how the case is to be distinguished from one in which the land is taken for manufacturing purposes as in the case last quoted [*Umesh Chunder Mundul* v. *Adarmoni Dasi* (2)]. The defendant Company comes under the general definition of 'tenant' given in paragraph 3, s. 3 of the Bengal Tenancy Act, but s. 4 shows that it is the intention of the Act to deal only with certain classes of tenants therein further defined. The defendant Company appears to me to come neither under the term 'tenure-holder' nor under that of 'raiyat' as there defined (s. 5). That being so, the Bengal Tenancy Act is not, in my opinion, applicable to the case."

The appeal was therefore dismissed. From this decision the defendants appealed to the High Court.

---

(1) 9 C. 671. (2) 15 C. 221. (3) 6 C. 94.
(4) 1 M.I.A. 299. (5) 1 M.I.A. 305.

1892 APRIL 8. — APPELLATE CIVIL. — 19 C. 489.

Mr. *L. P. Pugh*, Mr. *G. H. P. Evans*, Baboo *Jagodanand Mukerji*, and Baboo *Surendra Nath Mutty Lal* appeared for the appellants.

The Officiating Advocate-General (Mr. *J. T. Woodroffe*) and Baboo *Nilmadhub Bose* appeared for the respondent.

The following cases were referred to in the arguments:—*Umesh Chunder Mundul* v. *Adarmoni Dasi* (1), *Nobocoomar Mookhopadhaya* v. *Siru Mullick* (2), *Vythilinga Pillai* v. *Thetchanamurti Pillai* (3), *Khalut Chunder Ghose* v. *William Minto* (4) (and the cases there referred to), *Kalee Kishen Biswas* v. *Sreemutty Jankee* (5), *Ramdhun Khan* v. *Haradun Paramanick* (6), *Rani Durga Sundari Dasi* v. *Bibi Umdatannissa* (7), *Mackenzi* v. *Haji Syed Mahomed Ali Khan* (8), *Iswari Pershad Narain Sahi* v. *Crowdy* (9).

JUDGMENT.

[492] The judgment of the Court (PETHERAM, C. J., and GHOSE, J.) was delivered by—

GHOSE, J.—This appeal arises out of a suit for rent for six years, that is to say, from Jeyt 1290 to Bysack 1296, alleged to be due to the plaintiff under a lease dated the 25th September 1875. The defendants are the Raniganj Coal Company, Limited, and the kabuliyat which is produced by the plaintiff in support of his claim for rent was executed by Messrs. Schœne, Kilburn and Company, as the managing agents on behalf of the Raniganj Coal Company.

In their written statement the Raniganj Coal Company pleaded that no relationship of landlord and tenant existed between the parties; that the defendants had relinquished the leasehold by notice served upon the plaintiff; and that since then the plaintiff had possession of the lands comprised in the lease. They also pleaded that the plaintiff's claim was barred by limitation.

The Subordinate Judge gave a decree to the plaintiff, being of opinion that he was entitled to maintain the action as framed; that there was no acceptance by him of the so-called relinquishment; that it was not proved that the plaintiff had any possession of the lands since the lease to the defendants; that the lands demised to the defendants were not agricultural lands, so as to come within the purview of the Bengal Tenancy Act, and that therefore the three years' limitation, provided by art. 2 of the third schedule annexed to that Act, did not apply, and that under art. 116 of the Indian Limitation Act, the plaintiff was entitled to claim rent for six years.

It will be observed upon the judgment of the Subordinate Judge that apparently there was no issue between the parties whether the relationship of landlord and tenant existed between them. No doubt one of the issues that were originally framed by the Subordinate Judge was to that effect, but this was not one of those issues upon which that officer recorded his judgment. The issues which were discussed by him would seem to us to be the right issues which arose between the parties upon the pleadings. The defendants in their written statement did no doubt allege in the sixth paragraph that the relationship of landlord and tenant did not exist between the parties, but that was an allegation, [493] which, we think, was clearly based upon the ground that the defendants had relinquished the leasehold and the plaintiff had taken possession since the relinquishment.

(1) 15 C. 221. (2) 6 C. 94. (3) 3 M. 76.
(4) 1 Ind. Jur. N.S. 426. (5) 8 W.R. 250. (6) 12 W.R. 404=9 B.L.R. 107-*n*.
(7) 9 B.L.R. 101. (8) 19 C. 1. (9) 17 C. 469.

1892 APRIL 8. — APPELLATE CIVIL. — 19 C. 489.

And that was the way in which the Subordinate Judge dealt with the case, apparently, with the consent of both the parties.

On appeal, however, to the District Judge, the question was raised by the learned Counsel, who then appeared for the defendants, that the relationship of landlord and tenant did not exist between the parties, because under s. 42 of Act X of 1866 (an Act for the incorporation, regulation, and winding up of Trading Companies and other Associations), the lease, before it could be a binding transaction, should have been under the common seal of the company. This contention was not raised in the Court of first instance at the time of argument, and we do not think it was open to the defendants to raise it in appeal. We think further that the Judge has rightly held that the contention could not be supported. In order to make it good it must be shown, as observed by the Judge, that under the law in this country the lease was required to be in writing, and that under the English law such a document must be under seal. The lease was, as has already been mentioned, granted in the year 1875, long before the Transfer of Property Act came into operation; and whatever might be the true construction that should be put upon s. 107 of that Act, we think that, before that Act came into operation, a lease, or at any rate, the acceptance of a lease by the tenant was not required to be in writing; it might have been made without any writing, and we do not think that the English law, which requires a lease for a term exceeding three years to be in writing and under seal, applies to a transaction like this in this country.

But, as already observed, the true contention that was raised by the defendants was that they had relinquished the leasehold and the plaintiff had taken possession, and therefore they were not liable for rent. So far as the question of relinquishment is concerned, we think that both the Courts are right in holding that the lease with which we are concerned could not in law have been relinquished in the manner alleged by the defendant. It was a permanent lease, and it was not open to the defendants to **[494]** give it up at their pleasure; and there is nothing to show, as the lower appellate Court has found, that the plaintiff accepted the relinquishment or took possession of the property after the alleged relinquishment. That being so, it seems to be obvious that the plaintiff is entitled to recover rent from the defendant under the lease in question.

The only other question raised in this case is one of limitation. It was contended before us by the learned Counsel for the defendant-appellant that the land demised to the Raniganj Coal Company was land which came within the purview of the Bengal Tenancy Act, and therefore under art. 3 of the second schedule, read with s. 184 of that Act, the plaintiff could not recover rent for a longer period than three years.

In this connection the question we have first to apply ourselves to is, what is the character of the lease that was granted by the plaintiff to the defendants? This lease came before a Division Bench of this Court for consideration in the case of *Judoonath Ghose* v. *Schœne, Kilburn and Company* (1), and this Court held that this was not a lease of agricultural land; and Mr. Justice Field, who was one of the learned Judges who decided that case, held that as the lease was not a lease of agricultural land, the provisions of the Rent Act [VIII (B.C.) of 1869] had no application. The lease in question was a *dur-maurasi dur-mocurari* lease at an

(1) 9 C. 671.

1892 APRIL 8. — APPELLATE CIVIL. — 19 C. 489.

annual rent of Rs. 625; and it recites that the lessor had obtained from his landlord a *maurasi-mocurari* settlement; it states that a *dur-maurasi-mocurari* lease is granted to the lessee; and it then provides as follows:—"being vested with your (lessor's) right, we shall continue to hold and enjoy the said land for ever down to our heirs or representatives from generation to generation on payment of rent payable for the said land either directly or through tenants by raising building, digging tanks, planting gardens, establishing coal depots, or by using it in any other way we choose, to which you or any of your heirs shall not be competent to raise any objection; and even if you make any, it shall be inadmissible. And the rent of the said land shall never be subject to enhancement. Should you or your heirs claim any enhancement it shall be rejected as null and void." Later on **[495]** there is a covenant to the effect that no plea as to non-payment of rent should be allowed to be raised by the lessee on account of drought or inundation, or upon the ground of the land lying waste or being deserted, or from any other cause. And at the end of the lease the following passage occurs:—" you have granted us a *dur-maurasi-mocurari* pottah in respect of the said land on receiving due satisfaction—Rs. 800 as bonus and Rs. 350 as the price of the tanks, trees, &c., and other fixtures on the land as shown in the schedule below. As regards the tenants residing on the said land, we shall turn them out by paying the price of their houses, buildings, trees, &c., appurtenances from our own pockets." The Judge of the Court below, we observe, refused to consider the terms of the lease on the ground that the defendants had not produced their pottah; but upon a consideration of the oral evidence adduced, and upon the admission of the defendants, he held, as a matter of fact, that the land was taken with the object of establishing a coal depot upon it. Section 5 of the Bengal Tenancy Act, supposing it is applicable to this case, lays down in the fourth paragraph that, "in determining whether a tenant is a tenure holder or a raiyat, the Court shall have regard to (*a*) local custom, and (*b*) the purpose for which the right of tenancy was originally acquired;" and this is what the law was before the Bengal Tenancy Act came into operation; for it was always held, whenever the question arose whether the tenant was a middleman or a raiyat, that it must be enquired into and determined what was the character of the tenure in its very inception, *i.e.*, at the time when the grant was made.

We might here say that the plaintiff having produced the kabuliyat executed by the defendants in support of his claim of rent, the defendants are entitled to ask us to determine what, upon the terms of the lease itself, is the true character of the transaction; and looking at the terms of the lease, it seems to us that it could not have been granted for agricultural or horticultural purposes, but that it was a lease granted for building purposes and for the establishment of a coal depot. No doubt there are terms in the instrument which are often found in permanent leases of agricultural properties, *viz.*, as to the lessee being entitled to hold the land either directly, or through tenants, by raising buildings, digging **[496]** tanks, planting gardens, establishing coal depots, or by using it in any other way he chose; and as to the lessee not being entitled to plead drought, or inundation, and so forth. This is the common form which is generally used in all permanent leases, but we do not think that we should be justified in concluding from this that it was the intention of the parties that the lease should be for any purpose other than that for which it really purports to be, *i.e.*, a lease of the land for use as a coal depot. The concluding portion of the lease makes the matter, we think, abundantly clear

1892 APRIL 8. — APPELLATE CIVIL. — 19 C. 489.

for it provides that the lessees shall turn out the tenants who were then residing upon the land by paying the price of the houses and buildings. The land no doubt appertained to a revenue-paying estate; but it was not land that was being used for agricultural purposes—it was being used for habitation by certain tenants. That being so, and regard being had to the finding that has been come to by the learned District Judge, it seems to us that the land was not leased to the defendants for agricultural or horticultural purposes, but for building purposes and for the establishment of a coal depot.

That being the character of the lease with which we are concerned, the next question which we have to consider is, whether the land comprised in the lease is land which comes within the purview of the Bengal Tenancy Act. If the question had arisen either under Act X of 1859 or under Act VIII (B.C.) of 1869, there could be no doubt, regard being had to the whole current of rulings upon the subject, that the lands covered by this lease could not come within the Rent Act. In the case of *Khalat Chunder Ghose* v. *William Minto* (1) it was held by Phear, J., that the word "land" occurring in Act X of 1859 was "merely that which the ordinary raiyats or occupiers of the soil possess and hold under the zemindar, *viz.*, the surface of the earth in a condition such that, by the aid of natural agencies, it may be made use of for the purposes of vegetable or animal reproduction," and then the learned Judge observed as follows:—"I believe it has been held constantly that land covered entirely with houses and buildings not devoted to agricultural objects does not come within the application of the Act."

[497] To the same effect were the cases of *Kalee Kishen Biswas* v. *Sreemutty Jankee* (2) and *Ramdhun Khan* v. *Haradun Puramanick* (3), and the case decided by the Full Bench of this Court—*Rani Durga Sundari Dasi* v. *Bibi Umdatannissa* (4), where it was held that a suit for enhancement of *rent of land covered with buildings* would not lie in the Revenue Court under Act X of 1859. Act VIII (B. C.) of 1869 was but a re-enactment of the provisions of Act X of 1859 with this difference that the jurisdiction which under Act X of 1859 had been vested in the Collector was transferred to the ordinary Civil Courts. And we observe that in the case of *Judonath Ghose* v. *Schœne, Kilburn and Company* (5), which has already been referred to, it was held that, in respect of a *dar-maurasi-mocurari* lease of land which was not let for agricultural purposes, the provisions of the Rent Act [VIII (B.C.) of 1869] had no application, and that the lessee could not, under s. 20 of that Act, relinquish his leasehold. But it has been contended before us that whatever the word "land" meant in the Rent Acts of 1859 and 1869, the Bengal Tenancy Act has a much wider scope, and that it includes lands other than those let out for agricultural or horticultural purposes. We do not think we are called upon in the persent case to discuss this very large question. It will be sufficient for the purposes of the present case if we determine whether the tenancy which was created in favour of the defendants comes within the purview of the Bengal Tenancy Act. Now the word "tenant" has been defined in cl. 3, s. 3 of this Act to mean "a person who holds land under another person, and is, or but for special contract would be, liable to pay rent for that land to that person." It will be observed, upon a consideration of the

(1) 1 Ind. Jur, N.S 426. (2) 8 W.R. 250. (3) 12 W.R. 404=9 B.L.R. 107-*n*.
(4) 9 B.L.R. 101. (5) 9 C. 671.

1892 APRIL 8. — APPELLATE CIVIL. — 19 C. 489.

different parts of the Act, that the word "tenant" has been used as a generic term: it applies equally to tenure-holders and to raiyats. In the same s. 3, the word "rent" is defined, and it means "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant" The word "tenure" means "the interest of a tenure-holder or an under-tenure holder," **[498]** and the word "holding" has been defined to be "a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy." Then in chap. II we have the classes of tenants. Section 4 says:—"There shall be, for the purposes of this Act, the following classes of tenants, *viz.*, (1) tenure-holders, including under-tenure-holders, (2) raiyats, and (3) under-raiyats, that is to say, tenants holding whether immediately or mediately under raiyats." Section 5 defines who is a "tenure-holder," and it says it "means primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it," and so forth; and the word "raiyat" has been thus defined: it means "primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself or by members of his family, or by hired servants, or with the aid of partners," and so forth. Reading chap. II, as a whole, and other portions of the Act itself, it seems to us that the Legislature contemplated that only three classes of tenants should be regarded as holding lands within the meaning of the Bengal Tenancy Act, *viz.*, tenure-holders, raiyats, and under-raiyats; and we have to find out, in the case now before us, whether the defendants are tenure-holders, raiyats or under-raiyats. That they could not be raiyats or under-raiyats is perfectly clear, for as already pointed out, a raiyat is a person who has acquired a right to hold land for the purposes of cultivation. It is obvious that the defendants did not acquire this land for the purpose of cultivation. It was not land used for agricultural purposes, nor was it acquired for the purposes of cultivation, but it was acquired for the purpose of building and for establishing a coal depot. It was, however, contended before us that they could be regarded as tenure-holders within the meaning of s. 5. We think that they could not be so regarded, for they did not acquire from their landlord a right to hold the land for the purpose of collecting rent or bringing it under cultivation by establishing tenants on it. They acquired the land with the object of holding it themselves and using it as a coal depot, and not for any of the purposes mentioned in s. 5. Whether the words "collecting rent" as occurring **[499]** in that section should be taken as confined to collecting rents from raiyats, or should be taken to be applicable also to cases where rents are collected, not from raiyats but from under-tenants of the same class as the lessees, it is not necessary for us in the present case to decide.

Under these circumstances we think that the provision as to limitation contained in sch. II annexed to the Act has no application in this case. It has been held by a Full Bench of this Court [*Mackenzie* v. *Haji Syed Mahomed Ali Khan* (1)] that in suits for rent governed by the Bengal Tenancy Act, the limitation is three years, as provided in art. 2 of the third schedule, although the lease might be a registered lease; and in respect of cases not governed by the Bengal Tenancy Act, where there is a registered lease, it has been held, both in this Court and also in other High Courts, that the limitation is six years as prescribed by art. 116 of

(1) 19 C. 1.

the Indian Limitation Act, XV of 1877. In this case, the lease is a registered lease, and therefore, in accordance with these rulings, the plaintiff is entitled to recover rent for six years as sued for. The result is that this appeal will be dismissed with costs.

A. A. C. *Appeal dismissed.*

---

19 C. 499.

REFERENCE FROM THE BOARD OF REVENUE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep and Mr. Justice Pigot.

IN THE MATTER OF ACT I OF 1879 AND IN THE MATTER OF A REFERENCE FROM THE BOARD OF REVENUE, UNDER s. 46 OF THE INDIAN STAMP ACT.* [30th March, 1890.]

Stamp Act (I of 1879), *ss.* 3 (15), 25 (*c*) *and sch. I, art.* 49—*Policy of Insurance—Uncovenanted Service Family Pension Fund, stamp on entrance certificate of the.*

An Entrance Certificate granted under the rules of the Uncovenanted Service Family Pension Fund is a life policy within s. 3 (15) of the [500] Stamp Act for an amount not exceeding Rs. 1,000, and is therefore chargeable with a duty of 6 annas. Such an instrument is not within the scope of s. 25 (c) of the Stamp Act.

THIS was a reference from the Board of Revenue under s. 46 of the Indian Stamp Act (I of 1879).

The question referred was as to the stamp to be placed upon the following certificate :—

"UNCOVENANTED SERVICE FAMILY PENSION FUND.

ENTRANCE CERTIFICATE.

Widows Pension Fund.

No.

Certified that Mr. has been admitted a member of the Uncovenanted Service Family Pension Fund, and that, provided he conforms to the requirements of that institution, his widow will be entitled to a monthly pension of Rs.

Dated this day of 189 .

Board of Directors.
Secretary."

The Government of India, in forwarding to the Government of Bengal a copy of certain correspondence with the Government of Bombay upon this subject, observed that "it appears from this correspondence that the entrance certificate issued by the Uncovenanted Service Family Pension Fund in Calcutta is stamped with an 8-anna stamp, though properly chargeable under article 49 (*b*) of schedule I of the Indian Stamp Act, I of 1879, with a duty of 6 annas for every Rs. 1,000 secured by the certificate, the valuation of the annuity subscribed for being determined for assessment to duty under s. 25 (*c*) of the Act," and requested that the matter might be brought to the notice of the Directors of the Fund and of the Board of Revenue.

---

* Civil Reference No. 13 of 1891 made by the Board of Revenue, dated 20th of November 1891.

1892 MARCH 30. — REFERENCE FROM THE BOARD OF REVENUE. — 19 C. 499.

The Secretary to the Fund, under the instructions of the Directors, submitted to the Board representations to the effect that the provisions of the Stamp Act were inapplicable to such instruments. After some correspondence the Board were of opinion that the question of the proper stamp with which the certificate was [501] chargeable was one of considerable doubt and difficulty, and that it was desirable to refer the matter to the High Court.

In referring the above question the Board invited the attention of the Court to the specific character assigned to the certificate by rules 39 and 46 of the Association, which ran as follows: —

"*Rule* 39.— That mere payment of money shall not, in the event of lapse, entitle parties to the benefits of the Fund, as, in order to the validity of their claims, the usual entrance certificate must have been executed, the date of which document shall be taken to be the date of the admission of an applicant, provided he was in existence on that date.

Execution of certificate necessary for validity.

"*Rule* 46.—That before nominees can be admitted to the benefits of the Fund, the entrance certificate must be surrendered to the Directors, and certificates must be furnished of the subscriber's death and the cause of death from his medical attendant or other competent authority, and of the identity and existence of the nominees."

Documents required.

The Advocate-General (Sir *Charles Paul*) and the Officiating Standing Counsel (Mr. *Pugh*) appeared for the Government.

Mr. *G. H. P. Evans*, appeared for the Fund.

The Officiating Standing Counsel (Mr. *Pugh*—'Policy of Insurance' is defined by s. 3 (15) of the Stamp Act, and includes a life policy (see article 49 of the first schedule of the Act, and art. 43, sch. A, of Act XXXVI of 1860). Under the old Act there was an assessment of 8 annas: at present only 6 annas is levied. In the present case there is a contract of insurance. The method of levying the duty proposed by Government was by calculating it on twelve times the annual sum secured, having regard to s. 25 (*c*).

Mr. *G. H. P. Evans.*—The question is, whether or not the entrance certificate is a 'life policy' within the Act. The document itself is not in the nature of a contract, but is merely a certificate of admission. The Fund does not insure lives. In endeavouring to ascertain how much each person has to subscribe, it is necessary to enter into actuarial calculations in order to see the cheapest way of constructing a fund. There is no assurance in the ordinary sense of [502] the word, although the same contingencies have to be taken into consideration to secure the stability of the Fund. The certificate does not purport to be a contract, but only a certificate of admission into a society. The result of entering such a society is to benefit a man's children. Then why treat it as a contract? It is a receipt requiring a 1-anna stamp. If stampable otherwise than as a receipt, it must be a life policy which contemplates a sum certain, whereas it is not certain that anything will be paid here. All the current definitions of life insurance are collected in Crawley on Life Insurance (1882), p. 20, and support this argument. In the Madras case [*Anonymous Case referred by the Board of Revenue* (No. 2 of 1875) (1)] it was held that a certificate of sale cannot be converted into a conveyance. The Statute 33 and 34 Vict., c. 97, s. 117, includes

(1) 8 M.H.C. 112.

documents evidencing a contract, which is not the case here. The stamp must be fixed by what is stated in the instrument, and cannot depend upon collateral evidence—*Chandrakant Mookerjee* v. *Kartikcharan Chaile* (1). The Act only contemplates the ordinary case of a life insurance in which a sum certain is assured to a person upon the dropping of a life. Article 60 includes "Policy" under the head of Transfer. We do not carry on the business of life insurance and make no contract of any kind. In *Kraal* v. *Whymper* (2) and *Falle* v. *MacEwen* (3) the nature and object of those societies is defined. In a case under the Friendly Societies Act, it was held that the statute only contemplated a mutual contribution on the part of the members for their wives and children, the term "insurance" being incorrectly used—*Kelsall* v. *Tyler* (4). *Edwards* v. *Warden* (5) was a case on the Bomay Civil Service Fund. In the *East India Company* v. *Robertson* (6) the history of the Madras Civil Service Fund was examined. The nominees in the present case are really beneficiaries.

The Advocate-General (*Sir Charles Paul*) in reply.

OPINIONS.

PETHERAM, C. J.—The question referred to us by the Board of Revenue is, what is the stamp which an entrance certificate under the rules of the Uncovenanted Service Family Pension Fund [503] should bear. By the contract which is evidenced by the document, the person to whom the certificate is issued in consideration of a money payment secures an income after his death for a time to another person, subject to certain contingencies. This is, I think, a contract of assurance, and the document which evidences such a contract is, I think, a life policy, and is within s. 3 and sub-s. 15 of the Stamp Act. The amount insured is quite uncertain in every case, and it is impossible to predict whether any thing, or if any thing what, will ever become payable by the Fund under the contract, and the contract cannot, I think, be defined as an insurance for any particular amount, and therefore cannot be for an amount which exceeds Rs. 1,000. That being so and it being an insurance, it must be a life policy for an amount which does not exceed Rs. 1,000, and the stamp duty on such an instrument is 6 annas.

It is, I think, clear that such an instrument as this is not within the scope of s. 25. Sub-s. (*c*) of that section, which is the only one within which it has been said to be included, deals with contracts under which for some executed consideration money becomes immediately due, though payable by fixed periodical payments. And it is, I think, enough to say that that is not the present case, and there is no provision in the Act which can relate to the valuation of annuities secured by life policies.

My answer to the question is that the stamp duty which an entrance certificate under the rules of the Uncovenanted Service Family Pension Fund should bear is 6 annas.

PRINSEP, J.—I agree that, read with the rules of the Uncovenanted Service Family Pension Fund, this papar may be regarded as a life policy, and also that it does not come within s. 25 of the Stamp Act. We have not the means of ascertaining its value. That can be cbtained only by such a calculation as is not open to us. In tha absence of such information

(1) 5 B,L,R. 103 (105).
(2) 17 C. 786.
(3) 7 C. 1.
(4) 11 Exch. Rep. 513 (528, 532, 537).
(5) L. R. 1 Ap. Ca. 281.
(6) 12 Moo. P. C. 400.

1892 MARCH 30. — REFERENCE FROM THE BOARD OF REVENUE. — 19 C. 499.

we must take it in the most favourable way to the person being taxed, that is to say, we must assess it at the lowest possible value below Rs. 1,000, and it should therefore be assessed at 6 annas.

PIGOT, J.—I agree.

A. A. C.

---

19 C. 504.

[504] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Hill.

DURGA PROSAD BUNDOPADHYA AND OTHERS (*Plaintiffs*) *v.* BRINDABUN ROY AND OTHERS (*Defendants*).*
[28th March 1892.]

Bengal Tenancy Act (*VIII of* 1885), *ss.* 15 *and* 16—*Putni tenures—Rent suit.*

Sections 15 and 16 of the Bengal Tenancy Act of 1885 apply to putni tenures.

[R., 6 C.W.N. 794 (795); 15 C.W.N. 404=9 Ind. Cas. 489.]

THESE appeals, which were heard together, arose out of eight suits, brought by the plaintiffs (appellants) for the recovery of arrears of rent and cesses from 1293 to Pous 1295 for lands held by the defendants (respondents) within the plaintiffs' ancestral putni taluq.

The plaintiffs were the sons and representatives of one Pyari Mohan Bundopadhya, who died in Falgun 1295 (February-March 1889). The defendants, who were different in each suit and held separate jamas, took the preliminary objection that the plaintiffs had not complied with the provisions of s. 15 of the Bengal Tenancy Act, 1885, and that therefore under s. 16 of the same Act, they could not recover any rent payable to them as holders of the tenure by suit in Court. The plaintiffs contended that their father having died in Falgun 1295, those sections did not apply to the arrears due to them up to that date, since they claimed such arrears as the heirs of their father and not as tenure-holders.

The suits were heard together. It was admitted that the putni was a permanent tenure within the meaning of s. 15 of the Bengal Tenancy Act, and that the plaintiffs became entitled to it by succession. It was also admitted that the plaintiffs had not complied with the provisions of that section.

The Munsif was of opinion that ss. 15 and 16 applied to putni tenures, and dismissed all the suits.

On appeal to the District Judge, the plaintiffs urged—(i) that under s. 195 (*e*) of the Bengal Tenancy Act the provisions [505] of ss. 15 and 16 did not apply to them; and (ii) that at any rate they were not debarred by those sections from suing for the arrears due for the period prior to Falgun 1295, as such arrears were not payable to them as holders of the tenure, but as the representatives of their father's estate.

Regarding these contentions, the District Judge observed:—

"There can be no doubt that the second of those contentions is correct. Under s. 16 of the Bengal Tenancy Act, it is only rent payable to a person

* Appeal from Appellate decrees Nos. 333 and 356 to 362 of 1891, against the decrees of R. F. Rampini, Esq., Judge of Burdwan, dated the 30th December 1890, modifying the decrees of Babu Kalidhan Chatterjee, Munsif of Raniganj, dated the 27th of May 1890.

entitled to a permanent tenure by succession as the holder of the tenure, which cannot be recovered by suit until the provisions of s. 15 have been complied with. But the plaintiffs are not entitled to the arrears of rent due for the period prior to Falgun 1295 as the holders of the tenure. They are entitled to these arrears as the representatives of their father's estate, which it is not denied that they are. As the rent is agricultural rent, under the provisions of Act VII of 1889, s. 4, they can sue for this rent without obtaining a certificate of administration to their father's estate. I, however, agree with the Munsif that, as regards the rent accruing subsequently to Falgun 1295, they cannot recover this rent until they have complied with the provisions of s. 15, Act VIII of 1885, which, it is admitted, they have not done. I have been referred to the provisions of s. 195 (*e*) of the Tenancy Act, and to the case of *Gyanada Kantho Roy Bahadur* v. *Bromomoyi Dassi* (1). I do not, however, think they affect the matter. Section 195 (*e*) merely lays down that nothing in the Tenancy Act shall affect the provisions of any enactment relating to *putni* tenures so far as it relates to these tenures. But s. 15 of the Tenancy Act in no way affects any provision of Reg. VIII of 1819. Reg. VIII of 1819 provides no procedure for the registration of changes in the holders of *putni* tenures which are effected by death and the operation of law. The provisions of s. 5 of the Regulation which lays down that a zemindar shall not be competent to refuse to register and otherwise give effect to *alienations* by discharging the party transferring his interest from personal responsibility, and by accepting the engagements of the transferee, but that he shall be entitled to exact a fee upon **[506]** every such alienation, clearly apply only to voluntary alienations, and not to successions and transfers by operation by law. There is nothing in Reg. VIII of 1819 about changes by succession and the operation of law. It is not said that the zemindar must recognize such changes, or is entitled to exact a fee for registering them. Hence the provisions of s. 15 of the Bengal Tenancy Act, which do prescribe such a procedure, cannot be said in any way to affect any provisions of any enactment relating to putni tenures.

"For similar reasons the ruling in *Gyanada Roy Bahadur* v. *Bromomoyi Dassi* (1) does not apply to these cases. In that case it was laid down that s. 13 of the Tenancy Act does not apply to *putni taluqs*, for there is a special procedure laid down in Reg. VIII of 1819 for the admission to registry of voluntary transfers of such tenures. But that ruling does not lay down that s. 15 of the Tenancy Act shall not affect *putni* tenures. If the provisions of s. 15 of the Bengal Tenancy Act be given effect to in respect to successions to *putni* tenures, there will be no anomalous dual registry to press hardly on the heirs and representatives of deceased *putnidars*. Hence I see no reason why the provisions of s. 16 of the Bengal Tenancy Act should not be held applicable to these suits so far as the rent claimed for the period after Falgun 1295 is concerned."

The Judge accordingly decreed the appeals so far as the rent claimed previous to Falgun 1295 was concerned, and remanded the suits to the Munsif for disposal with respect to such rent. He upheld the decree of the Munsif with respect to the rent subsequent to Falgun 1295.

The plaintiffs appealed to the High Court.

Dr. Rash Behary Ghose and Baboo *Nolini Ranjan Chatterji*, for the appellants.

(1) 17 C. 162.

1892
MARCH 28.
APPELLATE
CIVIL.
19 C. 504.

Baboo *Jogendro Nath Bose*, for the respondents.

The judgment of the Court (PRINSEP and Hill, JJ.) was as follows:—

JUDGMENT.

We have the satisfaction of feeling that the arguments of the learned pleaders on both sides have placed before us everything [507] that could be said in this matter, which is of some importance. We agree with the District Judge in the opinion he has expressed regarding the application of ss. 15 and 16 of the Bengal Tenancy Act to putni tenures with due regard to s. 195 (*e*). In our opinion these provisions apply to putni tenures. It seems to us that the object of s. 195 (*e*) is that nothing in the Bengal Tenancy Act should interfere with the putni law in respect of putni tenures, but that in other respects the Bengal Tenancy Act should be held to apply as supplementing the putni law. The appeals are therefore dismissed with costs.

C. D. P. *Appeals dismissed.*

---

19 C. 507 (P.C.) = 19 I.A. 90 = 6 Sar. P.C.J. 185.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, and Hannen, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

INDUR CHUNDER SINGH AND OTHERS (*Plaintiffs*) *v.* RADHAKISHORE GHOSE (*Defendant*). [5th March, 1892.]

Guardian and Ward—Minor not bound by his guardian's contract—Appeal, complete change of case to that in issue in lower Courts not allowable.

Upon the death of an ijaradar, his mother and widow, as managers under his will, remained in possession of the land leased. Subsequently a son was adopted to him by the widow and succeeded to his estate. The lease having expired, a renewal for five years was taken by the managers, but was surrendered before that period elapsed, during the minority of the son, against whom, on his attaining full age, this suit was brought by the lessor to recover three years' rent of the renewed ijara.

The contract of the adoptive mother and guardian was not personally binding upon the adopted son, and had not been ratified by him after attaining full age. It did not purport to deal with the estate to which he afterwards succeeded, but was entered into by the managers in their own names.

Held, that the case, as originally made in the plaint and raised by the issues framed in the Court of first instance which covered a wider ground, *viz.*, that the son was personally bound by the contract as being beneficial [508] to him, and on the ground that he had ratified it after attaining full age, could not be altered in appeal into what would be a wholly different claim and raise entirely new issues, *viz.*, that the managers, having power under the will, had charged the estate with the rent of the ijara, and that such charge remained upon it in the possession of the heir, who was liable to the extent of the assets received by him. The latter would have been in fact a new suit.

The case that arose in *Hanoomanpersaud Panday v. Mussamat Babooee Munraj Koonweree* (1) distinguished.

[R., 35 C. 320 = 12 C.W.N. 256 (258) = 3 M.L.T. 156; 35 M. 692 (697) = 11 Ind. Cas. 79 = 14 Ind. Cas. 389 = 21 M.L.J. 620 = 11 M.L.T. 56 = (1911) 1 M.W.N. 385; 7 O.C. 46 (47); D., 26 M. 330 (331).]

---

(1) 6 M.I.A. 393.

APPEAL from a decree (10th January 1889) of the High Court, reversing a decree (31st December 1886) of the Subordinate Judge of the Murshidabad district. 1892 MARCH 5. PRIVY COUNCIL. 19 C. 507 (P.C.) = 19 I.A. 90 = 6 Sar. P.C.J. 185.

The suit out of which the appeal arose was brought by zemindars whom the appellants represented against the respondents in December 1885, he having attained full age in June of that year, to recover Rs. 10,529, arrears of rent (April 1882 to April 1885) for land held under an ijara taken, and also terminated during the respondent's minority, by the managers of the estate to which he afterwards succeeded.

The suit was brought against two defendants, the first being Radhakishore Ghose, the son whom the second defendant, Nrityashama Dasi, adopted to her deceased husband, Gopimohun Ghose, who died in 1869. The plaint stated that the latter had taken the land in ijara, but had died while it was running; that his widow and her mother, Naraini, who remained in possession as managers, in accordance with his will in 1874, took a renewal for five years at the annual rent of Rs. 3,484; and that the widow in 1885, Naraini being then dead, surrendered the ijara. The defendant Radhakishore answered that he was a minor during all the time of the ijara, which was taken by his adoptive mother and grandmother on their own account, and that his estate was not benefited by it.

The issues raised questions of the benefit to the minor's estate, and of ratification by him on coming of age. They are set forth in their Lordships' judgment, where all the facts are stated.

The Subordinate Judge found that the managers renewed the lease, having authority so to do under the will, for the benefit of the adopted son; but that there was no evidence of subsequent [509] ratification by him. He dismissed the suit as against Nrityashama, whom he found to have contracted, not on her own account, but for the first defendant. No appeal was filed against the dismissal of the suit as against this defendant.

It was not contended in Radhakishore's appeal to the High Court that a guardian of a minor could bind him personally by a contract, and the Judges (O'KINEALY and TREVELYAN, JJ.) said that he could not. They referred to *Waghela Rajsanji* v. *Shekh Masludin* (1) as an authority, if one were needed, for this. They concurred with the Subordinate Judge in finding that there had been no ratification by the second defendant on his coming of age. But they differed from him as to the supposed authority of his adoptive mother and grandmother to bind the minor by a contract to pay rent for the renewed ijāra. They held that he could not be so bound, and they therefore decreed the appeal, dismissing the suit.

The plaintiffs having appealed.

Mr. *T. H. Cowie, Q.C.*, and Mr. *W. A. Hunter*, for the appellants, argued that the ijara having been renewed in the course of authorized management of the estate, the renewal by the managers, for the time being, had charged the estate, which afterwards remained charged in the hands of the heir. They referred to the judgment in *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (2).

Mr. *R. V. Doyne*, for the respondent, argued that the case now suggested was different from the one originally stated in the plaint, and heard upon the issues fixed. In the first Court the respondent had been sued as personally and directly liable, in consequence of the contract entered into by his adoptive mother and guardian. It was not open to the appellants to change their ground, and make their suit a different one, founded upon a

(1) 11 B. 551 = 14 I.A. 89. (2) 6 M. I. A. 393.

1892 MARCH 5. — PRIVY COUNCIL. — 19 C. 507 (P.C.) = 19 I.A. 90 = 6 Sar. P.C.J. 185.

charge on the land to which the respondent had succeeded as heir, that constituting assets in his hands. That there would be answers to this latter case appeared from the evidence, to which reference was made.

Mr. *T. H. Cowie, Q.C.*, replied.

[510] Their Lordships' judgment was delivered by Lord HANNEN, at the conclusion of the arguments.

JUDGMENT.

LORD HANNEN.—In this suit, which was brought in the Court of the Subordinate Judge of Murshidabad, the plaintiffs claimed arrears of rent in respect of lands originally held for a term of years under the plaintiffs or their predecessors in title by one Gopi Mohun Ghose.

Before the expiration of the lease Gopi Mohun Ghose died (February 1869), leaving no issue. By his will (28th January 1869) he gave his wife, Nrityashama Dasi, power to adopt a son who was to be entitled to all his property, with an exception not material to this case. The will contained the following clause :—

"As long as the son begotten of my loins or my adopted son remains a minor and has not attained majority, all the property shall be in the possession of my adorable mother and my wife as their guardians." In 1870 the widow adopted Radhakishore Ghose, the respondent in this appeal, who only attained his majority on the 9th June 1885.

On the death of Gopi Mohun Ghose, his mother, Naraini Dasi, and his widow, continued in possession of the lands claimed during the remainder of the term and after its expiration.

On the 7th September 1874, they took a fresh lease for five years from the Manager of the Court of Wards, then in charge of the plaintiffs' estates. The lessees therein described themselves respectively as "mother of the late Gopi Mohun Ghose" and "mother of the minor adopted son," and they bound themselves to pay the rents reserved, and to pay interest on any arrears.

After the expiration of this term Naraini Dasi and Nrityashama Dasi continued to hold possession, but on the 13th April 1885, two months before the respondent came of age, Naraini Dasi having died, Nrityashama Dasi surrendered the lands, and the appellants accepted the surrender and recovered possession of them. There were at that time three years arrears of rent, which were sought to be recovered in this action against the respondent personally and also against his adoptive mother, Nrityashama Dasi.

The Subordinate Judge dismissed the suit as against Nrityashama Dasi, and against this decision no appeal has been brought, [511] but he held that the present respondent was liable for the arrears of rent with interest and costs of suit.

The issues raised were as follows :—"Was the ijara by Naraini and Nrityashama Dasi contracted for the benefit of defendant No. 1 ? Was it beneficial to him? Did defendant No. 2 take the lease in the *bona fide* belief that it would be beneficial to him ? Is he bound by their acts, and liable for the rent, cesses, and interest claimed ?"

The Subordinate Judge decided all these issues in the affirmative, that is, against the present respondent.

Another question was discussed, though not raised on the pleadings, namely, whether the respondent, after he attained his majority, ratified or adopted the acts of his adoptive mother and grandmother. The Subordinate Judge held that the respondent had not adopted or ratified these acts

It was, in fact, proved that the respondent, on coming of age, repudiated the act of his guardians, and refused to collect rents from the sub-tenants. 1892 MARCH 5.

On appeal to the High Court the learned counsel for the plaintiffs did not contend that the guardian of the minor could bind the minor by contract, but argued that the learned Judge was wrong in not finding that the respondent had, after he came of age, adopted the contract. On this point the High Court agreed with the Subordinate Judge, and this question of fact must be treated as finally determined. PRIVY COUNCIL. 19 C. 507 (P.C.) = 19 I.A 90 = 6 Sar. P.C.J. 185.

The contention that the mother and widow of Gopi Mohun Ghose had power to bind the minor by contract was abandoned in the Court below, and their Lordships are of opinion that such a contention could not be sustained.

But it was suggested that, under the terms of the will of Gopi Mohun Ghose, his mother and widow had power to bind his estate, and had done so, and that the respondent, having succeeded to that estate, is bound by the act of his adoptive mother and grandmother as his guardians, done in the *bona fide* belief that it was beneficial to the estate.

Their Lordships are of opinion that this is not the claim made by the plaintiff's plaint. It does not make any claim against the estate, but makes a personal claim against Nrityashama Dasi, and the [512] respondent whom, it states, she had adopted. While a liberal construction should be given to pleadings so as to give effect to their meaning to be collected from their whole tenor, they ought to be expressed with sufficient definiteness to enable the opposite party to understand the case he is called upon to meet, and their Lordships consider that neither in the plaint, nor in the issues which cover a wider ground than the plaint, is the claim made against the estate of the deceased Gopi Mohun Ghose. Indeed, if it was, and was sustained in that sense by the Subordinate Judge, it is difficult to see why the suit should have been dismissed against the widow and guardian. It is indeed now urged that the suit may be treated as a claim against the estate and against the heir, to the extent of assets received by him. But there is quite enough in the evidence to show that a claim so put would raise entirely new issues, both as to the extent of assets received and as to the extent to which the plaintiffs themselves were responsible for the renewal of the lease; that it would in fact, be a new suit, and that it would be improper to allow such a change of case at this period of the litigation.

But, further, their Lordships are of opinion that upon the facts proved, the suit, even if treated as one against the respondent in regard to the estate, cannot be sustained.

The kabuliyat executed by the mother and widow of Gopi Mohun Ghose, on which the plaintiffs' claim is founded, does not purport to bind the estate of the deceased. By it the lessees undertake themselves to pay the rents and interest on any arrears, and to observe the obligations of the lease. The learned Subordinate Judge, while admitting that there is nothing in the lease to show that it was taken for the benefit of the respondent, says that that fact is immaterial when it proved that the lease was really taken for the respondent, and that the lessees were in possession for his benefit; and he relies on the case of *Hanoomanpersaud Panday* v. *Mussamat Badooee Munraj Koonweree* (1) as an authority. In that case however the managers of an infant's estate were actually dealing by way of mortgage with a portion of that estate, and it was held that the manager

(1) 6 M. I. A. 393.

1892 MARCH 5. — PRIVY COUNCIL. — 19 C. 507 (P.C.) = 19 I.A. 90 = 6 Sar. P.C.J. 185.

might do so in a case of need or for the benefit of the estate, and that the [513] fact that the mortgage contained the inaccurate statement, that the mortgagor had a beneficial proprietary right, was immaterial. But in the present case the mother and widow of Gopi Mohun Ghose were not dealing with, and did not purport to deal with or affect his estate, but were incurring new obligations which it is now sought to transfer from them to the estate. It may be that, as between them and the infant, they might be able, in some circumstances, to show that the estate ought to bear the burden they had taken upon themselves, but that is not the question raised in this case, in which the plaintiffs seek to establish a direct relation between themselves and the estate of the infant, and a liability on the part of the infant now that he is of age, and of his estate, to fulfil the obligations entered into by the lessees in their own name.

Their Lordships are of opinion that this contention cannot be supported, and that the judgment appealed from, reversing that of the Subordinate Judge, should be affirmed with costs, and they will humbly advise Her Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants : Messrs. *Barrow and Rogers.*
Solicitors for the respondent : Messrs. *T.L. Wilson & Co.*

C. B.

---

19 C. 513 (P.C.) = 19 I.A. 108 = 6 Sar. P.C.J. 150.

PRIVY COUNCIL.

PRESENT :

Lords Watson, Hobhouse and Morris and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

SURENDRO KESHUB ROY (*Plaintiff*) *v.* DOORGASOONDERY DOSSEE AND ANOTHER (*Defendants*). [6th, 7th, 11th and 12th March 1891 and 6th February, 1892.]

Hindu law, Adoption—Adoptions by each of two widows ineffectual where simultaneously made to one father—Ikrarnama between widows in favour of the boys whose adoption failed, effect of—Bequest to a family Thakur—Office of shebait—Account—Contract—Rights of persons interested in a contract, though not formal parties,

By Hindu law, there cannot be simultaneous adoptions by two widows of two sons to one father.

A testator bequeathed all his property to a family thakur ; and, to secure the *debsheba*, directed that his two widows should each adopt a son to him, the sons to become *shebaits* of the property dedicated, of which [514] the widows, during the sons' minority, were to have control. When the two sons should have attained their majority, the two widows were, by the will, to make over to them, as *shebait*, all the property dedicated ; and out of the surplus income, after payment of the expenses of the *debsheba*, the two sons were to receive a fixed allowance, the residue being undisposed of.

The widows having purported to adopt according to the will, then bound themselves by an *ikrarnama*, each to the other, to bring up the sons as their mothers and guardian ; and, after payment of the expenses for the *debsheba*, to divide the surplus income into two equal shares, making accumulations, which should be handed over by each to the son adopted by her on his attaining majority.

In a suit by the son purported to have been adopted by the elder widow, who was then dead, against the younger widow, and the son purported to have been

1892 FEB. 6. — PRIVY COUNCIL. — 19 C. 513 (P.C.) = 19 I.A. 108 = 6 Sar. P.C.J. 150.

adopted by her in effect for the administration of the testator's estate with a claim for relief based on acts of the widows, including the *ikrarnama* executed by them; *held*—

First, that it being settled law, that such an adoption was not valid, the plaintiff could take nothing under the will, because there was no gift to him except in the character of *shebait*; there having been no intention on the part of the testator, who apparently had no doubt as to the legality of his scheme, to bring in a stranger as a *shebait*.

Monemothonath Day v. *Onauthnath Day* (1) distinguished.

Secondly, that, by the law of inheritance the widows, as heirs, took the office of *shebait*, and became entitled to the beneficial interest in the surplus income for their estates for life; so that each of them could contract to bind her own interest.

Thirdly, that there was no trust imposed upon the surviving widow independently of the contract which she had made; but that the *ikrarnama* taken as part of the series of acts gave to the boys, so far as the widows' interests extended, the same benefit that they would have taken had they been heirs; and although they were not, and could not have been at their age parties to the *ikrarnama*, yet that they could insist on the performance of the contract, by which each widow bound herself to the other to deal with the estate in their favour.

Fourthly, that each boy was entitled on attaining majority to half of the surplus income during the life of the surviving widow, and to the accumulations thereon; and accounts were accordingly directed against her.

This widow, however, having died pending the appeal, after it had been argued, the testator's heir was added to the record, it resting with the plaintiff to apply to the Court below to add necessary parties.

[**F.**, 21 A. 314 = 19 A.W.N. 86; **Cons.**, 24 C. 589 (607); **R.**, 21 B. 314; 25 C. 662 (685); 26 M. 101 (102) = 12 M.L.J. 435; 4 C.L.J. 537 (541) = 11 C.W.N. 147; 6 C.L.J. 547 (555); 9 C.W.N. 309 (318); 16 C.L.J. 304 = 17 C.W.N. 319 = 16 Ind. Cas. 817; 14 C.W.N. 759 = 6 Ind. Cas. 170.]

[515] APPEAL from a decree (27th April 1887) of the High Court reversing, on appeal, a decree (15th August 1885) of that Court in its ordinary original civil jurisdiction.

The questions now raised related to the property left by Raja Bejoy Keshub Roy of Andul, in the Hooghly district, who died childless on the 20th April 1879. Two widows, the elder, Rani Nobodurga Dossee, who died in 1884, and the younger, Rani Doorgasoondery Dossee, now respondent, survived him. The Raja's will, executed on the day before his death contained the direction,—"each of the two Ranis will adopt one son;" and in conformity with this, they went through the form, on the 20th May 1879, of each adopting a son to him.

The Raja's will dedicated his property to a family deity, and stated what he intended the adopted sons to have, appointing them *shebaits*. In the following year the two widows executed an *ikrarnama*, dated the 5th July 1880, and the boys were treated as sons till 1884, when the elder widow died. These were the principal facts affecting the parties to this suit, which was brought in 1884, and in which the plaintiff was the son whom the elder widow had purported to adopt, and the younger widow, who died while the present appeal was pending, was defendant, with her nominally adopted son.

On this appeal the main question was to what the plaintiff was entitled in this suit, which was brought, in effect, for the administration of the testator's estate, with a claim founded upon acts of his widows, including the *ikrarnama* of July 1880.

The original Court (NORRIS, J.) decided that the only authority to adopt was the direction in the will to the widows to adopt simultaneously,

(1) Bourke, 189; 2 Ind. Jur. 24.

1892 FEB. 6. — PRIVY COUNCIL. — 19 C. 513 (P.C.) = 19 I.A. 108 = 6 Sar. P.C.J. 150.

and following *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (1) that the adoptions were not valid. The Judge was, however, of opinion that the plaintiff took, as a designated person, rights under the will, on the authority of *Monemothonauth Day* v. *Onauthnauth Day* (2). His decree declared that the plaintiff and the second defendant became *shebaits*.

[516] The appellate Court (Garth, C. J., and Wilson, J.) also held the double adoption to be invalid. The Judges, however, were of opinion that it was only in the character of adopted son of the testator, with which character he never was invested, that the plaintiff could become *shebait*, and take under the will. The case seemed to them to fall within the authority of *Fanindra Deb Raikat* v. *Rajeswar Das* (3), and they held that the plaintiff could not take as a designated person. They remanded the suit under s. 566 of the Civil Procedure Code, for trial of the further question which had been raised, but not decided at the hearing whether the defendant Doorgasoondery Dossee had so acted as to be estopped from denying the plaintiff's title, or to have made herself a trustee for him to the extent of the interest which his claim might cover.

The subsequent judgment of the appellate Court (Petheram, C. J., Prinsep and Wilson, JJ.) delivered by Wilson, J., after referring to the reserve with which the case, on both sides, had been put forward in its earlier stages, stated how in the course of the proceedings, further explanations of the claim and of the answer to it had been given, and continued thus:—

"The plaintiff's case was put in four alternative ways: *first*, it was said that he was adopted before the second defendant, and that therefore his title at any rate was good, and good presumably in respect of the whole estate; *secondly*, it was contended that failing that, the two adoptions were good as simultaneous adoptions, and that he and his adoptive brother were therefore entitled to share equally in the estate; *thirdly*, it was contended that if, according to law, the adoptions were not valid, still the two boys took what was given them under the will as designated persons; *fourthly*, that failing all these, the younger widow had by reason of the *ikrarnama* and the transactions connected with it either estopped herself from denying the validity of the plaintiff's adoption, or constituted herself, to the extent, at any rate of her own life-interest in the property, a trustee for the plaintiff so as to put him in the same position as if he had been a validly adopted son.

[517] "An amendment was made in the pleadings in order to define more clearly the last of these four contentions of the plaintiff. Probably that amendment was not strictly necessary, because, in my judgment, if the plaintiff sets out in his plaint the facts on which he relies, and claims relief in terms sufficiently general, he is entitled to any relief which follows as a legal consequence from the facts which he so sets out and proves. But at any rate there was some convenience in making the amendment. The first defendant throughout the trial and ever since has denied the validity of either adoption, and opposed all the plaintiff's contentions.

"The learned Judge held, as a conclusion of fact on the evidence, that the plaintiff's adoption was not prior to the other boy's adoption, but that the two adoptions were simultaneous. He held, secondly, as a matter

(1) 12 C. 406 = 12 I. A. 198.

(2) Bourke 189; 2 Ind Jur. N. S. 24; followed by *Sreemuthy Siddesory Dossee* v. *Doorgachurn Sett*, Bourke 360; 2 Ind. Jur. N. S. 22.

(3) 11 C. 463 = 12 I. A. 72.

of law, that simultaneous adoptions are invalid, and that therefore neither of the boys was the adopted son of the deceased Raja. But he held, thirdly, on the construction of the will, that the two boys did take the benefit which the will purported to give to the adopted sons as designated persons. As to the fourth question of estoppel or trust, no conclusion was arrived at. He accordingly made a decree in the plaintiff's favour.

"That decree was appealed against, and the matter came on for hearing before the late Chief Justice and myself. We accepted (indeed, I think, there was no serious dispute about the matter), the correctness of the learned Judge's findings of fact, that the adoptions were simultaneous. We also agreed with the learned Judge in the proposition that simultaneous adoptions were invalid, and we did so on the authority of a case [*Fanindra Deb Raikat* v. *Rajeswar Das* (1)] which, at the time the matter was before us, had been decided by the Privy Council. With regard to the third question, namely, that of the intended adopted sons taking as designated persons, we differed from the learned Judge, and held that they did not. There remained then the fourth question which had been raised, that of estoppel, or trust.

"It was clear at the time when the matter was before us, as it is now, that the answer to that question depended mainly on the view to be taken of the *ikrarnama*; and we were not at that **[518]** time, as we thought, in a position to construe the *ikrarnama*, because we had no knowledge of the circumstances under which that document was made, or the facts which led to its being executed. The burden of proof being on the plaintiff, if we had been obliged to deal with the matter then and there, we should have had to decide it against him; but the issue had not been decided in the first Court, and we came to the conclusion that it not only had not been decided, but had not been tried; and that the parties not having given their evidence on that issue, they ought to have an opportunity of doing so. We came to that conclusion after examining all that appeared on the subject on the record of evidence, the minutes kept by the officer in the Court-book, certain notes of counsel on their briefs which were handed up to us, and an affidavit which we allowed the plaintiff to use, made by the plaintiff's attorney, setting out the names of certain witnesses, proofs of whose evidence, had been briefed to counsel before the trial, those proofs tending to show that the *ikrarnama* had been executed under circumstances which would favour the construction of it beneficial to the plaintiff, and that that evidence had been withheld in consequence of what the plaintiff's advisers considered to be an understanding arrived at in the course of the trial. We accordingly directed that the case should go back in order that the issue might be tried.

"These were the only questions that came before us on the previous occasion. Another question, about which there has been some discussion during the argument now, was never before us then, nor is it necessary to decide it now, namely, whether the power to adopt given in the will was absolutely and totally void or whether, on the other hand, it was a power which might have been validly exercised by one of the widows if she had adopted before the other widow. Evidence has been taken on the issue sent for trial, and the learned Judge who has tried it has stated the findings at which he has arrived.

(1) 11 C. 463 = 12 I.A. 72.

1892
FEB. 6.
—
PRIVY
COUNCIL.
—
19 C. 513
(P.C.) =
19 I.A. 108 =
6 Sar. P.C.J.
150.

"The precise issue which was to be tried was this, whether the defendant, Doorgasoondery, had so acted as to be estopped from denying the plaintiff's title, or had made herself a trustee for him to the extent of the interest which he claims. The learned Judge has found that issue as follows—'I have no hesitation in coming [519] to the conclusion that the Ranees agreed to execute the *ikrarnama* to preserve the rights of their adopted sons; ' and finally he has recorded a finding on the issue in these words—'I formally find the issue I have been directed to try in favour of the plaintiff.'

"Two questions, obviously, arise upon that: *first*, whether that finding can be supported, and, *secondly*, if it can, whether it entitles the plaintiff to any, and if so, to what, relief.

"The answer to the first question must depend mainly, no doubt, upon the construction of the *ikrarnama*; but it has been contended for the plaintiff that certain conclusions of fact have been established materially affecting the construction of that document; and therefore, before construing the document, it seems to be necessary to ascertain how far that contention has been made out.

"It was contended, in the first place, that before either of the boys was given in adoption, an agreement was arrived at between the parties concerned, one term of which was that an *ikrarnama* was to be executed after the adoption, securing to the boys, in some sense, the interest which they would have had if they had been validly adopted sons; that this arrangement was made in consequence of the knowledge which all the parties then had of the doubtfulness of the simultaneous adoptions, and that the boys were given in adoption on the faith of that undertaking.

"If that had been established, it might have been fairly contended (whether the contention would or would not have prevailed we need not now consider) that, by that arrangement prior to the adoption, each of the ladies had constituted herself, in some sense, a trustee for her own boy, so that a fiduciary relation was established apart from and prior to the *ikrarnama*; and that when the *ikrarnama* was entered into, dealing with the management of this property, it was a document executed by the two ladies, not merely on their own behalf, but as trustees for, and for the benefit of, the boys whom they represented. And that might perhaps have had a material bearing upon the construction and operation of the document. With regard to that it is enough to say that the judgment wholly fails upon the evidence."

The Judge then considered the evidence relating to the case suggested of an agreement prior to the adoption, and a trust, [520] anterior to the *ikrarnama*. He referred to the evidence as to what led to the transaction. All those who had taken an active, or responsible, part in the negotiations had said that the *ikrarnama* was made on account of the difficulties that had arisen about the management of the property, and was not made in consequence of doubts about the validity of the adoptions. The evidence of the *amla* had left the case where it was, also that of the witnesses who attested the *ikrarnama*; the result being that this instrument had been made to settle disputes and to provide for the ijaras being executed. The widows well knew that the effect of the adoptions was uncertain, but it was clear that the *ikrarnama* was a contract between them alone, no one else being a party to it. No estoppel, nor any trust, affecting the younger widow could be maintained. After referring to the religious trusts the judgment concluded that the suit must be dismissed.

It may be mentioned that this dismissal of the suit, resulting in the discharge of a receiver, previously appointed by the Court, led to the making of the order in *Surendro Keshub Roy* v. *Doorgasoondery Dossee* (1) as to a contract made by it during the management.

On this appeal—

Mr. *J. Rigby*, Q. C., and Mr. *J.H.A. Branson* for the appellant. The plaintiff is entitled to relief as against the surviving widow, in consequence of her having been in a fiduciary relation to him; and his right has been established by the transactions of which the *ikrarnama* of the 5th July 1880 formed a principal part. The preceding intention of the testator to provide for the succession to the office of *shebait*, followed by the attempted adoptions, the treatment of the boys for several years as adopted sons and the execution of the *ikrarnama*, arranged for their benefit, accord with that conclusion. The testator probably did not know that the so-called adoptions would be ineffectual; but at all events his will shows the results which he wished to be attained. The widows, on the other hand, apparently knew that the effect of the adoptions might be disputed. But they wished to benefit the boys and they, in executing the *ikrarnama*, discharged an obligation incurred [521] towards them. The principle of the arrangement was that they created a trust in favour of the boys, and rendered themselves liable to be held trustees. Although the boys were not parties to the *ikrarnama*, yet to enable them to benefit by it, enough was done, in their interests, by the widows agreeing together to hand over the accumulated income to them on their coming of age, with the acknowledgment that the widows regarded themselves as their "mothers and guardians." This *ikrarnama* was one of a series of acts of which the object and effect were to confer rights on the plaintiff. It might be said that the respondent widow was estopped from denying the appellant's claim by her conduct and representations. But we are not particular to insist on the use of the word estoppel. A father substantially setting up an adoption by giving his son for the purpose, cannot disaffirm it, according to the decision in *Sukhbasi Lal* v. *Guman Singh* (2); and the adopting father is also bound by his act and the widows' own acts, as they took part in the nominal adoptions, which were followed by the *ikrarnama*. But that on which the plaintiff relies is a general principle good all the world over, and shown in *Page* v. *Cox* (3), *viz.*, that an interest may well be created by an instrument in favour of a person not actually a party to it, without the use of words declaring a trust for him, provided that the intention to create such a trust appears, and the acts of the parties correspond with that intention. Now the terms of the *ikrarnama* show that the widows bound themselves, so far as their powers extended, to deal with the estate in favour of the boys; and their undertaking to make over, each to her son, the surplus accumulated, on his attaining majority, is the specified way. This should receive effect. The widows' interests under the will were that each should "control the properties;" in other words, the estate dedicated to the Thakur. They were also entitled to the interests of Hindu widows in all the property if the will failed, and in all the property undisposed of by the will, if it did not. The surviving widow, therefore, is the person against whom the *ikrarnama* is enforceable at the suit of the plaintiff.

As to the inability of the principal parties to an adoption to question it, reference was made to Strange's Hindu Law, chap. IV, [522]

(1) 15 C. 253. (2) 2 A. 366. (3) 10 Hare, 163.

1892 FEB. 6. PRIVY COUNCIL. 19 C. 513 (P.C.) = 19 I.A. 108 = 6 Sar. P.C.J 150.

and to Mayne's Hindu Law and Usage, chap. V, and to the cases in the notes at paragraphs 95 and 100 of the second adition; also to *Gopalayyan* v. *Raghupatiayyan* (1), *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (2), and cases cited in the latter. As to the invalidity of a contract that would injure the status of the *dattaka* son, *Eshan Kishor Acharjee Chowdhry* v. *Haris Chandra Chowdhry* (3) was cited; and as to other matters connected with adoption, *Sreemutty Rajcoomaree Dossee* v. *Nobocoomar Mullick* (4). As to a surplus after provision for *debsheba*, reference was made to *Monemothonauth Day* v. *Onauthnauth Day* (6), *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (7), and *Sreemutty Siddesory Dossee* v. *Doorgachurn Sett* (8) which were cited in the judgment of the first court were also referred to.

Mr. *T. H. Cowie*, Q.C,, and Sir *H. Davey*, Q.C., and Mr. *R. V. Doyne*, for the respondent, Doorgasoondery Dossee. The suit was rightly dismissed. The appellant not having been validly adopted cannot take as a *shebait*, or in any way under the will, and the testator's estate is represented by the surviving widow who holds it for her life-interest by inheritance from her deceased husband. In effect, both the boys can only be regarded as persons whom the widows have attempted to place in the position of *shebaits* under the will. The only function of the *shebait* is to administer, and the surviving widow is the sole one. The evidence has failed to establish that in virtue of the transactions, including the *ikrarnama*, the widow has constituted herself a trustee for the boys, and they never were qualified to become *shebaits* under the will. There is no estoppel, for of that, it is the essence that the person, who is to take advantage of it, has been induced to believe in the existence of a certain state of things, and has acted in that belief [*see* Evidence Act (I of 1872), s. 115]. No such case is presented here. To maintain, then, that the plaintiff has been **[523]** invested with a right in consequence of the execution of the *ikrarnama* it is necessary to show that a contract which enures to his benefit has been entered into by the widows. But, though they have made a contract between themselves, the plaintiff has not been a party to it. The *ikrarnama* between the widows cannot be treated as creating an interest in favour of a third party. It was no more than an agreement between the widows, having reference to the belief that the direction in the will, to adopt two boys at once, was a valid direction. It was in accordance with the view that the boys would come in according to the testator's intention. That view, however, is incorrect; and to support it, when the invalidity of the adoptions is apparent, the theory must be held that, in virtue of the widow's arrangements, a stranger has become *shebait*, notwithstanding the testator's intention to restrict this office to persons legally made members of the testator's own family. The plaintiff's case therefore fails.

In reference to adoption, *Rungama* v. *Atchama* (9), *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (10), *Gopee Lall* v. *Chundraolee Buhoojee* (11), *Fanindra Deb Raikat* v. *Rajeswar Das* (12), *Chowdry Pudum Singh* v. *Koer Oodey Singh* (13), *Akhoy Chunder Bagchi* v. *Kalapahar*

(1) 7 M. H. C. 250. (2) 11 B.H.C. 190. (3) 13 B.L.R. App. 42.
(4) 1 Boulnois 137; Sevestre, 641 note. (5) 13 M.I.A. 270.
(6) Bourke 181; 2 Ind. Jur. N.S. 24. (7) 12 C. 406 = 12 I.A. 198.
(8) Bourke 360; 2 Ind. Jur. N.S. 22. (9) 4 M. I. A. 1.
(10) 1 M. 174 = 4 I.A. 1. (11) 11 B. L. R. 391 = I.A. sup vol. 131.
(12) 11 C. 463 = 12 I. A. 72. (13) 12 M.I.A. 350.

Haji (1) were cited. In reference to succession to *shebaitship*, reference was made to *Gossami Sri Gridhariji* v. *Ramanlalji Gossami* (2).

1892
FEB. 6.
PRIVY COUNCIL.
19 C. 513 (P.C.) = 19 I.A. 108 = 6 Sar. P.C.J. 150.

Mr. *J. Rigby*, Q.C., in reply, argued that there was in the will sufficient indication of a person under the conditions of the appellant. He also relied on the *ikrarnama*, and the circumstances attending it, as affording evidence of a contract. As to a contract for the benefit of a third party and the right to sue, he referred to *Lloyd's* v. *Harper* (3), and as to directions in a will inconsistent with the interest given, to *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (4).

[524] After the appeal had been argued Doorgasoondery died, and by order of revivor, Khetter Kristo Mitter, heir of the late Raja, was brought on to the record.

On a subsequent date (February 6th 1892,) their Lordships' judgment was delivered by—

JUDGMENT.

LORD HOBHOUSE.—On the 19th April 1879, Raja Bejoy Keshub Roy, being at the point of death, made his will in the following terms:—

"I am now ill. God forbid it, but if any mishap occur therefrom, and from fear thereof, I do, while of sound mind, dedicate and give to Sree Sree Issur Annpoorna Thakuranee, the Thakur established by my deceased father, all the ancestral and self-acquired moveable and immoveable properties, zemindaries, and patni, &c., whether in my own name or benami, to which I am entitled and of which I am in possession. I have no sons or daughters of my loins. I have two wives living, *viz.*, Sreemutty Ranee Nobodurga, the elder, and Sreemutty Ranee Doorgasoondery, the younger. Each of the two Ranees will adopt one son. God forbid it but if the son adopted by either Ranee should die, or be unfit for duty by reason of illness of any kind, then in such a case she will be competent to take in adoption a second son, and so on to a third. The two adopted sons of both wives shall remain the *shebaits* of the whole of the moveable and immoveable property dedicated to Annapoorna Thakuranee aforesaid. They will carry out the supervision and the improvement of the said property. But they will do everything according to the advice of all the principal officers appointed by me. They will not be competent to make gift or sale of the different properties. Up to the time that the said two adopted sons do not attain their majority, my aforesaid two wives will exercise the care and control of all the said properties, and in carrying out these duties they shall take the advice of all the principal officers who have been appointed by me. They will not be competent to act otherwise. When the two adopted sons shall have attained their majority, and shall have acquired sufficient knowledge for the preservation of the property, my two wives shall make over to them as *shebaits* to their satisfaction, all the property dedicated to the *Issur Debsheba*. Out of the income of the property dedicated to the *debsheba*, &c., after [525] performing the *sheba* of the above-mentioned Annopoorna Thakurranee, and the Sree Sree Issurs established by my ancestors and myself, and after meeting the prescribed monthly allowances, and after performing the daily and fixed rites and ceremonies, as they are now performed and met, out of the profits which shall remain, each adopted son shall receive at the rate of 1,000 (one

(1) 12 C. 406 = 12 I.A. 198.
(2) 17 C. 3 = 16 I.A. 137.
(3) L.R. 16 Ch. Div. 290; see also pp. 302, 303.
(4) 5 C. 438 = 6 I.A. 182.

1892 FEB. 6. — PRIVY COUNCIL. — 19 C. 513 (P.C.) = 19 I.A. 108 = 6 Sar. P.C.J. 150.

thousand) rupees monthly. Therefore, while of sound mind and understanding, I execute this instrument of will. Finis, date 7th Bysack 1286."

The next day the Raja died, and the two Ranees mentioned in his will became his heirs-at-law. The estate is a large one. There is no precise evidence of its amount, but it is stated that the yearly income is not less than a lakh of rupees. The elder Ranee appears to have relied for advice mainly upon her brother, Kaliprosono, and a pleader, named Tarrucknath; the younger upon her father, Bhobodaini Mitter, and a pleader, named Upendra Bose. There was a long delay in obtaining probate of the will, which, however, was granted to the Ranees on the 30th December 1880.

Very soon after the Raja's death, Tarrucknath expressed an opinion that a simultaneous adoption of two boys, such as the Raja contemplated, was not lawful, and after some discussion within the walls of the Rajbari a case was prepared by Tarrucknath for an eminent barrister, Mr. Phillips, to advise both the Ranees as to their position. On the point of adoption, Mr. Phillips's opinion was to the effect that, though the law was not completely settled, a double adoption would not be valid, and that the will did not authorize any adoption other than a double one.

The ladies determined to make a double adoption. How far they were guided by legal advice, how far by a pious desire to fulfil the directions of their husband, we cannot tell. They and their advisers certainly knew of the legal doubts and difficulties attending a double adoption. But one thing was quite clear. If they were to procure sons for their husband at all, it must be by the simultaneous adoption of two, for the will authorized no other course. It was impossible even to try the question whether their husband's wishes could be fulfilled, unless two boys were found [526] whose parents were willing to give them in adoption, one for each Ranee.

The boys were found. On the 20th May 1879, one month after the Raja's death and the day of his *shradh*, the double adoption was made. The elder Ranee adopted the plaintiff, who is the natural son of one Mirtunjoy, and was then a boy of less than nine years. The younger Ranee adopted a child about a year old, the natural son of her cousin, Hurrydass Ghose. She and her adopted boy are the defendants in the suit.

No long time elapsed before there occurred the familiar incident of quarrels between the two wives. Some argument has turned upon these quarrels; but we do not know what they were about or what was their duration, or when there was peace and when war. Pearymohun, who was Kaliprosono's man of business, and went often to the Rajbari with communications to the Ranees, tells us—"The ladies were on good terms with each other for some time. . . . They were not on good terms at the time of the adoption; they had fallen out three or four days before. I heard there was a quarrel. I did not hear what it was about. They had made up, and were on good terms for ten and fourteen days, and then there was a quarrel, and this way it went on. When there are two co-wives these quarrels occur." That is a probable statement of the case. But whether in the intervals of peace, or notwithstanding quarrels, they managed to do business together.

On the 5th July 1879 they executed a document of great importance, *viz.*, an *ikrar* relating to their management and enjoyment of the estate. After referring to the Raja's will and stating that "he had made over to

both of us as *shebaits* the responsibility of looking after the property," and after mentioning the direction to adopt, they continue thus:—

"In accordance therewith on the 7th Joistee last we have together, at the same time and with reciprocal consent, each taken a son in adoption in accordance with the *Shasters* and general usage; that is to say, I, Sreemutty Ranee Nobodurga, have taken as a son Sree Keshub Lall Dutt, third son of Sree Mirtunjoy Dutt, inhabitant of Hautkhola in the town of Calcutta, by changing his former name and naming him Sreeman Coomar Surendro Keshub [527] Roy; and I, Sreemutty Ranee Doorgasoondery, have taken as a son the third son of Sreejoot Babu Hurrydas Ghose, inhabitant of Senhat in the district of Hooghly, and have had him named Sreeman Coomar Annoda Persaud Roy *alias* Coomar Norendro Keshub Roy. The said two Coomars have become the heirs and representatives of our deceased husband, in the same way as if they had been sons born of his loins. During the present minority of the two sons, we, as their mothers and guardians, will continue to rear and take care of them. With regard to the rights of the said two sons, neither we nor any of our heirs will ever be competent to raise any objection."

They then state that it is necessary to make rules for the preservation and supervision of the property, and covenant that they will in equal shares as *shebaits* of the Thakooranee continue in possession of and preserve the *debutter* property, paying in equal shares the various charges on or upon it; and that if either does not pay her share, she shall be liable to indemnify the other. Then they go on:—

"After the debts of the estate have been liquidated, then after meeting the fixed expenditure we will both of us divide and take in equal shares the money which shall be left in the joint *tovil* (till). And out of that money, meeting our respective necessary expenses and the expenses of the maintenance and education of our respective adopted sons, whatever surplus money remains, we will keep the same in our respective custody; and when our respective adopted son attains his majority, we will make the same over to him to his satisfaction. Besides this we will not be liable to any one else for an account of the said money. In order that the collections and supervision of the zemindaries and patni taluks and mokurrari and lakhiraj mehals, and all the other immoveable property left by our husband, may be performed without any hindrance, keeping a few of the properties in *khas tahsil*, we have given *ijara* of all the rest of the property. The expenditure which has been fixed for the performance of the *debsheva* and the daily and fixed ceremonies, &c., as well as all that will have to be performed in accordance with the will of our husband, the money for the said expenses, we will both of us provide in equal shares. And so that there may be no dispute in respect of [528] the performance of the said *debsheva*, and the daily and fixed ceremonies, &c., each of us will for one year at a time in rotation, take upon herself the whole responsibility of the *debsheva*, and the daily and fixed ceremonies, &c. And I, Sreemutty Ranee Nobodurga, being the elder, have taken the first turn."

The *ijara* mentioned in this *ikrar* was effected by two contemporaneous deeds. By one of them 13 mehals were demised for five years to Kaliprosono, and by the other 10 mehals were demised for a like term to Bhobodaini. The rents are reserved to the two Ranees in equal shares. The appellate Court below has thought that this transaction throws light on the object of the *ikrar* but their Lordships can hardly appreciate its bearing on the case.

1892 FEB. 6. — PRIVY COUNCIL. — 19 C. 513 (P.C.) = 19 I.A. 108 = 6 Sar. P.C.J. 150.

The two boys were taken into the Rajbari, and were there treated as adopted sons till after the death of the elder Ranee. That event happened on the 28th July 1884. Almost immediately afterwards disputes arose between the younger Ranee and the plaintiff or his friends, and this suit was commenced on the 20th August in that year.

The suit is in effect one for the administration of the Raja's will, but with an addition which was made by amendment for the purpose of raising a claim under the *ikrar*. At the hearing in the Original Court it was contended on the plaintiff's behalf, *first*, that his adoption was prior in point of time to that of the younger boy and valid on that ground; *secondly*, that a simultaneous adoption was valid in law; and, *thirdly*, that the will carried the *shebaitship* to any one who was adopted according to its terms, whether his adoption was or was not good in law. The Judge of the Original Court, Mr. Justice Norris, decided against the plaintiff on the first two points, and in his favour on the third.

Both parties appealed, and the Court of appeal agreed with the Original Court on the first two points, about which there is now no longer any question. On the third point they differed from the Original Court. But they considered that there were still questions arising on the acts of the defendant, the younger Ranee, and on the 19th March 1886, they made an order of remand in the following terms:—

"It is ordered that this suit be remanded to the Court below to try the following issue, that is to say,—whether the said defendant **[529]** (appellant) had so acted as to be estopped from denying the plaintiff's title, or to have made herself a trustee for him to the extent of the interest which he claims. And that the said Court do take any additional evidence that may be adduced by either party for that purpose, and do return its finding upon such issue to this Court, together with the evidence taken."

Upon this remand the case was again tried before Mr. Justice Norris, and a great quantity of evidence was taken, of which some is relevant, to show the knowledge possessed by the Ranees of their position in May and July 1879, and also to show the connection between the adoption and the *ikrar*. The Original Court concluded "that the Ranees agreed to execute the *ikrar* to preserve the rights of their adopted sons," and formally found the issue in favour of the plaintiff.

The defendant, the younger Ranee, then appealed, when the appellate Court reversed the finding of the Original Court, and dismissed the suit. Their views are expressed in a full and elaborate judgment, but, so far as they have been relied on by the younger Ranee at this bar, may be briefly summarized. It is not denied that both the Ranees knew of the invalidity, or doubtful validity, of the adoption they made. But it is said that the *ikrar* was not thought of before the adoption; that it was not made in consequence of the legal difficulty about the adoption, but to settle quarrels, to provide for the management of the estate, and to enable the brother of one Ranee and the father of the other to get the leases which they did get. It was therefore a separate contract between the Ranees, to which the boys were strangers, and which they could not enforce.

The plaintiff now appeals from the decree dismissing his suit, and the whole case is thus opened. It seems to their Lordships that the issue which was tried on remand is not conceived in very apt terms, because there may be no estoppel binding the younger Ranee, and no trust except in a somewhat strained use of the term, and yet she may have entered into a bargain which she is bound to make good to the extent of her

interest in the estate. But their Lordships, having the whole case before them, are at liberty to draw such conclusions as the allegations and proofs warrant. If the plaintiff has a good claim under the *ikrar*, he is [530] entitled to enforce it in this suit. The points substantially urged on his behalf at the bar are, *first*, that he takes as sufficiently described by the will, and, *secondly*, that he can sustain a claim against the younger Ranee personally by virtue of the *ikrar*. It is not now contended that his adoption is valid in law, as indeed it clearly is settled that it is not.

Their Lordships concur with the appellate Court in the opinion that the plaintiff can take nothing under the will. They do not find it necessary to give any opinion on the question whether a gift to persons whose description does not import that they should be born in the donor's lifetime can be valid, because they think the case rests on a clearer ground. There is no gift to the adopted sons except in the character of *shebaits*. And it would require very strong and clear expressions indeed to show that a Hindu gentleman contemplated introducing as *shebaits* of his family Thakur two persons unknown to himself and strangers to his family. There is not a trace in this will to show any such intention, or to show that the testator doubted the legality of his scheme, or thought of any adoption but a legal one.

The Original Court decided in favour of the plaintiff on this point, in reliance on the authority of *Monemothonauth Day* v. *Onauthnauth Day* (1). But in that case the testator had himself made a double adoption, and the boys lived with him and were called and treated as his adopted sons. As regarded them, there was strong ground for saying, as the Judges all agreed in saying, that a gift to his "adopted sons" was meant to go to the two boys whom he actually knew as such. Then the question arose as to another boy, who was substituted on the death of one of the original two, in pursuance of a power given by the testator to his widow. Was he too sufficiently described? The Court, though not unanimously, held that he was, on the ground that he answered the same description which was applicable to the boy for whom he was substituted, and fell within the same intention of the testator to give his property in moieties to the two who had gone through the form of adoption. Their Lordships need not say whether they would decide that case the same way if it were before them. It is sufficient that it differs from [531] the present case in an essential circumstance which governed the decision.

Adopted sons then being out of the question, what becomes of the property? The younger Ranee says that nothing can be more simple. All is given to the Thakoor, the heirs become *shebaits*, and manage the property in the usual way. But the matter is not quite so simple. It is true that by the first sentence of the will all is given to the Thakoor; and though in the plaint the question is mooted whether the gift is made *bona fide* (and of course such gifts may be a mere scheme for making the family property inalienable) it has not been really disputed. Nor, indeed, could it well be disputed in this case. For the last part of the will shows clearly enough that the income was to be applied first in performing the *sheba* of the Thakoor who is mentioned as the object of the gift, and of other family Thakoors, and in meeting the prescribed monthly allowances, and in performing the daily and fixed rites and ceremonies "as they are now performed and met." The testator must have been well aware that after all these charges had been met, there would be a very large surplus.

(1) Bourke, 189; 2 Ind. Jur. N. S. 24.

1892 Feb. 6. — Privy Council. — 19 C. 513 (P.C.) = 19 I.A. 108 = 6 Sar. P.C.J. 150.

In fact he directs that out of the surplus each adopted son shall receive Rs. 1,000 monthly; but of the residue after that he says nothing.

There is no indication that the testator intended any extension of the worship of the family Thakoors. He does not, as is sometimes done, admit others to the benefit of the worship. He does not direct any additional ceremonies. He shows no intention save that which may be reasonably attributed to a devout Hindu gentleman, *viz.*, to secure that his family worship shall be conducted in the accustomed way, by giving his property to one of the Thakoors whom he venerates most. But the effect of that when the estate is large is to leave some beneficial interest undisposed of, and that interest must be subject to the legal incidents of property.

In this case the Ranees were the testator's heirs. As heirs they would take the *shebaitship*. In some cases doubts have been expressed whether women ought to be *shebaits*; but whatever may be the force of those doubts, they can hardly apply to this case, seeing that the Rajah appoints nobody but his wives to perform [532] the duties which his sons cannot perform by reason of non-age. Neither in this case can any questions arise between the *shebaits* and the heir, for they are the same persons. It appears to their Lordships that after performing their prescribed duties as *shebaits*, the Ranees became entitled to the beneficial interest in the surplus for the widow's estate. If that is so, each of them could contract so as to bind her own interest. The question now is whether the younger Ranee has done so.

It was earnestly urged at the bar that the younger Ranee is estopped from denying the plaintiff's claim. Their Lordships cannot assent to that. They observe that the word "estop" is often used in Indian cases very loosely, to denote obligations which do not rest on estoppel at all. Such uses of the word are not countenanced by the definition of estoppel in s. 115 of the Indian Evidence Act. It would indeed be difficult to see how the younger Ranee, who represents the whole inheritance in an administration suit, could be prevented from pleading anything but the true state of the case. However that may be, it is not the fact that she has caused anybody to believe something to be true which she now alleges not to be true. She is entitled to raise any defence which the facts of the case will support.

The arguments to show that she has undertaken a trust appear to their Lordships to be verbal rather than substantial. The younger Ranee has not, by her dealings with the elder or with the boys, possessed herself of any property which she would not have got otherwise. The adoption indeed would, if it were legal, deprive her of property. There is no trust independently of the contract she has made. If that binds her to give the plaintiff certain benefits, she must give them; if it does not, she is not bound in any other way. The essential question in this case is one of contract.

To solve this question, let us first see what the position of the parties was. It is quite clear that, though aware of the risk of illegality, the Ranees were determined on a literal execution of their husband's wishes. For that purpose it was necessary, not only that they should act in combination together, but that they should procure two boys to take part in the operations. It is no slight matter for a boy to be passed from one family into another. [533] Even in England such a thing cannot be done without a serious effect, for good or ill, on the boy's welfare. In India the ties of family life are far stricter, and if a boy has been transplanted from his own family into another by a *de facto* adoption, and then the adoption turns

1892 FEB. 6. — PRIVY COUNCIL. — 19 C. 513 (P.C.) = 19 I.A. 108 = 6 Sar. P.C.J. 150.

out to be invalid in law, and he is rejected out of his adopted family, his relations to his natural family must be seriously disturbed. Whether his previously existing legal *status* would be taken away is a point not calling for any opinion. Assuming that the plaintiff could return after an absence of five years, and so resume his legal position, it is impossible that his personal position should be the same as if the tie to his family had never been broken.

Is then the *ikrar* a transaction standing entirely by itself, a mere arrangement for the convenience of the two Ranees, or is it the latest in a series of transactions, beginning with the resolve of the Ranees to make a double adoption? Tarrucknath, who prepared the draft, died before the remand, and therefore has given no evidence as to the connection between the adoption and the *ikrar*. His bill of costs is in evidence, which shows only that the *ikrar* was for control and management of the estate, and for effecting an amicable settlement between the Ranees. Kaliprosono says that, when the question of adoption was discussed before the adoption, it was first suggested that the *ikrar* should be executed; that the suggestion emanated from Tarrucknath, and Mr. Phillips's opinion had then been received. Pearymohun says that he explained the opinion to the Ranees, and communicated to them Tarrucknath's advice to take two boys in adoption, and afterwards execute an *ikrar*, and that the rights of the adopted sons would be preserved. He adds that the elder Ranee assented to that personally, and that Bhobodaini assented for the younger. Gobind Chunder, one of the amla, says, that he was present on that occasion; and he confirms Pearymohun in essentials. He differs, however, in saying that the younger Ranee expressed her assent, whereas Pearymohun says that she did not, but her father did. Hurrydass Ghose, the natural father of the younger boy, speaks to a conversation with the younger Ranee, in which she stated that "We two Ranees have agreed between us that we will take two boys, one each, according to the terms of the will [534] of our husband, and after taking two boys in adoption we will give them such a *pucka* writing that their interest will not be jeopardized, and even if such adoption should not be held valid, we will by the document we intend to give make over our respective rights to those boys." The same assurance, he says, was repeated by her in her father's presence on another occasion before the adoption. Answering questions in cross-examination, he says—"When she said she would give a writing, I consented. 'I said I will give you the child, and you can do what you think proper.' I did not make it a condition, but when she said she would give a writing, I was quite satisfied." This witness is commended and relied on by the original Judge.

On the other hand, the younger Ranee and Bhobodaini deny the whole story; but they were so entirely discredited before the Original Court that their denials are of no value, nor does the appellate Court rely on them. They rest principally on Tarrucknath's bill of costs, and on statements of Upendra Bose, who, though advising one of the parties, states that "nothing was said as to securing the rights of the adopted sons," and contradicts some statements made by Pearymohun respecting Mr. Phillips's opinion. They also rely on the fact that Mirtunjoy, the father of the plaintiff, and several members of the household, either knew nothing about the matter or have not been called as witnesses. It appears to their Lordships that the sole evidence of any weight against the connection between the adoption and the *ikrar* is that of Upendra Bose, who certainly might be expected to have known the facts. The

1892 FEB. 6. — PRIVY COUNCIL. — 19 C. 513 (P.C.)= 19 I.A. 103= 6 Sar. P.C.J. 150.

quantity of evidence, and, as the Judge who heard it thought, the quality of it, is in favour of that connection; and the appellate Court think it clear that the two things were connected but not in consequence of the invalidity of the adoption.

But after all the main evidence is that of the *ikrar* itself. How can it be explained? The views of the two Courts have been before stated. Their Lordships quite concur with the appellate Court thus far, that it may have been an object of the *ikrar* to settle quarrels between the Ranees, though it does not seem to have been efficacious for that purpose, nor particularly well adapted for it. They might still quarrel over every item of joint expenditure, and over the division of the surplus, as effectually as when their [535] interests remained joint. But their Lordships cannot understand how the *ikrar* facilitated the grants made to the relatives of the Ranees, nor how those grants tended to settle quarrels, seeing that it was not provided that the elder Ranee should take the whole rent reserved on Kaliprosono's lease, and the younger the whole reserved on Bhobodaini's, but the rents reserved on each lease were made payable to the two Ranees in equal shares. Nor are they able to understand in what way the *ikrar* was connected with the adoption, as the appellate Court think it clearly was, unless it were for the purpose of conferring an interest on the boys.

It is true that the document does not say outright that the adoption may be invalid, and that it is intended in that event to give the boys an interest in the widows' estate. Perhaps the framer of it did not choose to put on record the misgivings of the parties as to the legality of their action. Neither does it say that quarrels have arisen, and are to be settled in this way. The bolder course of stating the real motives and intentions would also have been the safer; but it is not followed. The deed does not on the face of it express either the motives supposed by the Original Court or those supposed by the appellate Court. But those supposed by the appellate Court do not account for the introduction of the boys, who on their theory have no place or part in the arrangement at all.

Nothing can be more explicit or precise than the recognition of the rights of the boys to nurture and to the enjoyment of the estate, while it is remarkable that they are not mentioned at all in the character of *shebaits*. According to the *ikrar*, the Ranees are *shebaits*. The boys are "heirs and representatives" of the Raja. During their minority "we, as their mothers and guardians, will continue to rear and take care of them." With regard to their rights, "neither we nor any of our heirs will ever be competent to raise any objection." Furthermore, the Ranees go on to effect a partition, not only between themselves, but between the boys until the younger attained majority. The surplus of each moiety is to be accumulated and handed over by each widow to her own son when he comes of age. If the boys were really heirs, such an arrangement as that would be futile; they would be joint heirs, and their property would be joint property. It could only take [536] effect out of the widows' interest, and on the footing that the boys were not the owners. And all this is done by persons who are advised that there has been no legal adoption, and who are stated by credible witnesses to have agreed to give a writing for the protection of the boys. The Ranees wished to make the boys the heirs of the Raja. In form they did so; they could not do it in substance. But they could, so far as their own interest would go, give them the same benefit out of the property as if they had actually been heirs. Their Lordships hold that the deed expresses this

1892 FEB. 6. — PRIVY COUNCIL. — 19 C. 513 (P.C.) = 19 I.A. 108 = 6 Sar. P.C.J. 150.

intention, and that by it the Ranees became bound to one another and to the boys to carry it into effect. It is a startling thing to be told that the Ranees could immediately afterwards turn the boys adrift, or that the survivor of them can do so after the arrangement has been in force for five years.

But it was strongly urged at the bar that the boys cannot enforce a contract to which they are not parties. It is true that they are not parties to the *ikrar* considered as an isolated transaction; nor could they be, by reason of their tender age. But if, as above shown, it is true that the *ikrar* is one of a series of transactions; that it is closely connected with the adoption; that the use of the boys was a necessary part of the attempt to accomplish the Raja's wishes, and that their position in life was substantially altered by taking them away from their natural families for an indefinite time, it seems to their Lordships impossible to maintain that they are strangers in the matter, and that they cannot insist on the performance of the contract by which each Ranee bound herself to the other to deal with the estate in their favour.

The decree of the Appellate Court dismissing the suit should be discharged. The decree of the Original Court cannot be restored, partly because it proceeds on the ground that the boys take under the will, and partly because the accounts directed by it are not applicable under the circumstances. Their Lordships think that the decree should take the following form:—

Declare that, according to the true construction of the testator's will, the property thereby given to the Thakoor therein mentioned was given for the purpose of securing the proper performance of the *sheba* of the said Thakoor and the other family Thakoors in the will mentioned, and the prescribed monthly allowances, and the [537] proper performance of the daily and fixed rites and ceremonies as they were performed and met in the testator's lifetime.

Declare that the other dispositions of the will are inoperative, and that on the testator's death his two widows were his heirs-at-law, and as such became *shebaits* of the Thakoor, and entitled for the widow's estate to such interests in the testator's property as remained undisposed of by the will.

Declare that according to the true construction of the *ikrar*, and in the events which have happened, the plaintiff on attaining his majority became entitled to the accumulations of one moiety of the surplus income of the testator's property after answering the various charges and outgoings in the *ikrar* in that behalf mentioned.

Declare that, upon attaining his majority, the plaintiff became entitled to receive one moiety of such surplus income during the life of the defendant Doorgasoondery.

Declare that the defendant Annoda Persaud Roy, also called Norendro Keshub Roy, is entitled to the other moiety of such surplus income during the life of the defendant Doorgasoondery and to the accumulations thereof.

Direct the Court below to order an account to be taken of the testator's property at his death, and of all the income thereof which has come to the hands of his widows, or of either of them, or of any person by their order or on their behalf or for their use during the life of defendant Doorgasoondery.

Also an account of what has been properly expended upon the *sheba*, and the monthly allowances, and the daily and fixed rites and ceremonies

1892 FEB. 6. — PRIVY COUNCIL. — 19 C. 513 (P.C.) = 19 I.A. 108 = 6 Sar. P.C.J. 150.

mentioned in the will, and upon the several outgoings and charges mentioned in the *ikrar* as precedent to the division of the property between the two widows, and of the respective necessary expenses of the widows, and of the maintenance and education of their respective adopted sons.

Any other questions arising out of the relief granted must be reserved for further directions by the Court below.

As regards costs, their Lordships consider that these unhappy disputes have arisen mainly out of the testator's will, and the apparently quite honest attempt of his widows and heirs to fulfil his intentions. It is only just that the costs of the parties in both **[538]** the Courts below, including the costs of this appeal, should be defrayed out of the corpus of his estate.

They will humbly advise Her Majesty accordingly.

After this case had been argued, their Lordships received an intimation that the defendant Doorgasoondery had died. This death made the suit defective in two respects; *first*, by the death of the then heir the inheritance ceased to be represented; *secondly*, there was no person in whose presence the accounts directed against the widows could properly be taken. The proceedings were suspended in order that these defects might be cured; but though the Raja's heir has been brought into the suit, there is still no representative of the widows. Their Lordships, however, think that it is not necessary on account of this defect to delay the decree any longer. It rests with the plaintiff to apply to the Court below for all such parties as are necessary for this purpose to be brought upon the record.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent: Messrs. *Barrow* and *Bogers.*

C. B.

---

19 C. 538.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Hill.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*) *v.* BUDHU NATH PODDAR AND OTHERS (*Plaintiffs*).*
[17th March, 1892.]

Indian Railway Act (IV of 1879), s. 11—*Railway Company, liability of—Carriage of gold and silver, etc.—Insurance, Increased charge for.*

Plaintiffs delivered a box of coins for carriage to the servants of a Railway, and declared the nature of the contents at the time of delivery. No demand was made on the part of the railway for any increased payment for insurance. The box having miscarried,—*Held*, on the authority of *The* **[539]** *Great Northern Railway Co.* v. *Behrens* (1), that the Railway were liable for the loss.

[Diss., 19 B. 165 (174); **R.**, 17 B. 723 (725).**]**

---

* Appeal from Appellate Decree No. 753 of 1891, against the decree of T. D. Beighton, Esq., District Judge of Dacca, dated the 16th of February 1891, reversing the decree of Babu Krishna Chunder Chatterji, Subordinate Judge of Dacca, dated the 12th of August 1889.

(1) 7 H. & N. 950.

1892
MARCH 17.

APPELLATE CIVIL.

19 C. 538.

ON the 15th March 1887 the plaintiffs despatched from Dacca station, by the Dacca and Mymensing State Railway, a wooden box, containing specie worth Rs. 4,291-14-5, addressed to their agent in Calcutta. From the findings of the lower Courts it appeared that the plaintiffs' gomastahs went to the booking office and delivered the box to the booking-clerk, asking him to weigh it. They informed him that it contained specie of a certain value, and asked what the fare would be for sending it *safely* (নিরাপদে) (nirápadē) to Calcutta. They were told the fare was Rs. 9-1, for which sum the box would be safely consigned. They then paid the fare and obtained a receipt. No demand was made on the part of the Railway for any increased charge for insurance. The box having been mislaid or stolen by the way, the Railway Company failed to give delivery to the Calcutta consignee. The plaintiffs sued to recover the sum of Rs. 4,291-14-5.

The defendants pleaded that no declaration under s. 11 of the Railway Act (IV of 1879) as to the nature and value of the property had been made by the sender at the time of delivery to the booking-clerk, nor any insurance fee paid and accepted for the safe conveyance of the same, and that the goods were sent at the owner's risk under an express written agreement signed by the consignor.

The Court of first instance held that the defendant was not liable, the plaintiffs having made no proposal to insure the specie and no insurance having been accepted by a Railway servant specially authorized in that behalf as provided by s. 11 of Act IV of 1879, and accordingly dismissed the suit on this ground.

The lower appellate Court decreed the plaintiffs' appeal principally upon the ground that the benefit of s. 11 was under the circumstances lost to the Railway Company, they having received the goods after declaration of value without demanding an extra charge for insurance and there being no evidence to show that the insurance charge was brought to the notice of the consignees. In support of this view the learned Judge relied on the case of **[540]** *Behrens* v. *Great Northern Railway Co.* (1) a decision upon the Statute 11 Geo. IV & 1 Wm. IV, c. 68, s. 1.

The defendant appealed to the High Court.

The Advocate-General (Sir *Charles Paul*), Baboo *Hem Chunder Banerji*, and Baboo *Ram Charan Mitter* appeared for the appellant.

Mr. *J. T. Woodroffe* and Baboo *Lal Mohun Das* appeared for the respondents.

The following authorities were referred to. The Indian Railway Act (IV of 1879), ss. 9, 10, 11 ; Macpherson on Railways, 1880, pp. 232—239, and the case of *Jeytu Nund* v. *Punjab R. C.*, Chief Court (Lahore), App. Civil 91, 1868, there cited ; the Carrier's Act (III of 1865) ; 11 Geo. IV & 1 Wm. IV, c. 68, s. 1, and 17 and 18 Vict., c. 31, s. 7 ; *Coggs* v. *Bernard* (2) and cases there cited ; *Behrens* v. *Great Northern Railway Co.* (1) cited in *Venkatachala Chetti* v. *South Indian Railway Co.* (3).

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and HILL, J.) was delivered by—

PETHERAM, C. J.—This was an action brought by the plaintiffs against the defendant as the owner of a Railway for the loss of a box of

(1) 30 L.J., Exch., 153 ; on appeal see 7 H. & N. 950.
(2) 1 Sm. L. C., 9th ed., p. 201.
(3) 5 M. 203 (213).

1892 MARCH 17. — APPELLATE CIVIL. — 19 C. 538.

coins delivered to them to be carried, and accepted by them for that purpose. The defence is that the defendant is protected from liability by reason of s. 11 of the Railway Act (IV of 1879), but the fact is that at the time of the delivery of the box to the railway people they were informed of what the nature of the contents was, and with that information they made no demand for any increased payment for insurance. That seems to me to be within the authority of the case of *The Great Northern Railway Co.* v. *Behrens* (1). The head-note of that case is, "Where a carrier receives goods of the description mentioned in the 11 Geo. IV & 1 Wm. IV, c. 68, and the person delivering the same has declared their value, and nature, he is not bound to tender, but the carrier must demand, the increased charge mentioned in the notice affixed in his office, warehouse or receiving house, whether the goods [541] are there delivered, or to a servant sent to fetch them ; and if no such demand is made the carrier is liable for the loss of or injury to the goods, although the increased charge has not been paid." The words of the English Act (2) and the words in this Act (3) are practically the same so far as this matter is concerned, and we think that the reasoning of that case applies to these cases in this country as well as in England, and that this appeal must be dismissed with costs.

A. A. C. *Appeal dismissed.*

---

19 C. 541.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Hill.

HARIPRIA DEBI (*Plaintiff*) *v.* RAM CHURN MYTI AND ANOTHER (*Defendants*).* [25th March, 1892.]

Bengal Tenancy Act (*VIII of* 1885), *s.* 188—*Ejectment—Joint-owners.*

Section 188 of the Bengal Tenancy Act of 1885 is no bar to a suit for ejectment by one of two joint-owners when the suit is brought under the contract law on a breach of the conditions of a lease by the tenant.

[R., 11 C.P.L.R. 144 (146) ; 2 N.L.R. 45 (47).]

THIS was a suit brought by one of two joint-owners of certain nij-jote land to eject a tenant after service of notice. Defendant No. 2, who was one of the joint-owners, refused to join the plaintiff in bringing the suit, and was therefore made a *pro forma* defendant. On the 15th Aughran 1284 (29th November 1877) the plaintiff granted a *potta* (for the purposes of cultivation and improvement) of her eight annas share of the property in the suit, containing 38 bighas and odd cottahs of land, and consisting of garden *dhosa* and *balu* lands and *gerias* (tanks), to Ram Churn Myti (defendant No. 1). The *potta*, which was duly registered, provided *inter alia* that defendant No. 1 should not, without the consent of the plaintiff, cut the trees in the garden, excavate tanks, turn *dhosa* land into *jul* land, alter the boundaries, or let any portion of the land to

---

* Appeal from Appellate Decree No. 338 of 1891 against the decree of Babu Dwarka Nath Bhuttacharjee, Subordinate Judge of Midnapore, dated the 31st of December 1890, affirming the decree of Babu Jogendra Nath Bose, Munsif of Contai, dated the 30th of April 1890.

(1) 7 H. & N. 950.

(2) See 11 Geo. IV. & 1 Wm. IV, c. 68, s. 1 ; and 17 & 18 Vict, c. 31, s. 7.

(3) See Act IV of 1879, s. 11.

tenants. On the 9th Magh 1294 **[542]** (22nd January 1888) the plaintiff served defendant No. 1 with a notice to quit within six months from the date of its receipt on the ground that he had, in contravention of the terms of his *potta*, and without the plaintiff's consent, cut trees, excavated a tank, turned *dhosa* land into *jul* land, and otherwise rendered the land unfit for the purposes of the tenancy, and that he had also granted leases to tenants.

The plaintiff contended that defendant No. 1 was a tenant-at-will, and that under ss. 25, 45 and 155 of the Bengal Tenancy Act, 1885, she was entitled to a decree for ejectment. Defendant No. 1 contended that, inasmuch as defendant No 2, the co-sharer of the plaintiff, had not joined in the notice and in bringing the suit, it was not maintainable under the provisions of s. 188 of the Tenancy Act.

After more than one remand by the lower appellate Court, the Court of first instance gave the plaintiff a decree under s. 155 for ejectment, subject to the condition that if defendant No. 1 paid, within six months from the date of the decree, a certain sum fixed as compensation for waste committed by him in breach of his contract, he should not be ejected.

The lower appellate Court upheld the decree for ejectment, modifying it by reducing the amount of compensation and by extending the time for compliance with its terms.

The plaintiff appealed to the High Court, and defendant No. 1 filed objections to the decree under s. 561 of the Code of Civil Procedure, putting forward the same contention as had been urged by him in the lower Courts.

Babu *Doorga Das Dutt* and Baboo *Mohini Mohun Roy*, for the appellant.

Baboo *Jagut Chunder Bannerjee*, for the respondent.

The judgment of the Court (PRINSEP and HILL, JJ.) was as follows :—

JUDGMENT.

This was a suit brought by one of two proprietors of some nij-jote land to eject a tenant after service of notice. After considerable delay in consequence of more than one remand by the lower appellate Court (we think the proceedings might have been somewhat shorter), the plaintiff has obtained a decree in the terms of s. 155 of the Bengal Tenancy Act for ejectment **[543]** of the tenant, in the event of his not paying within six months from the date of the decree a certain sum fixed as compensation in consequence of waste committed by him in breach of the terms of his contract.

The plaintiff appeals, contending that she is entitled to an absolute order for ejectment; and the defendant makes an objection under s. 561 of the Civil Procedure Code that the plaintiff's suit should have been dismissed, inasmuch as plaintiff is only one of two joint landlords, and, therefore, debarred by s. 188, Bengal Tenancy Act, from suing separately.

We are of opinion that the plaintiff was not so barred, and that the case does not come within the terms of s. 188. The right under which the plaintiff sues is not a thing which she, as landlord, is, under the Bengal Tenancy Act, required or authorised to do. The suit is brought under the contract law on breach of the conditions of a lease by the tenant. This disposes of the objection taken by the respondent.

The plaintiff's pleader contends that under the notice served by the plaintiff in Magh, she is entitled to eject the defendant, being a tenant-at-will on nij-jote land, and the ejectment is sought not merely on the ground of waste and breach of contract, but also on the ground of the termination of the tenancy. It seems to us that the notice is not a good notice so as

1892 MARCH 25. — APPELLATE CIVIL. — 19 C. 541.

to entitle the plaintiff to what she seeks. It requires the defendant to quit the lands occupied by him within six months from the date of the receipt of the notice. Now, if it be regarded as a notice of the termination of the lease, which, as we understand it, was an annual lease, it would be terminable only at the end of the year, and this would be some months later than the expiry of six months from the date of the service of the notice. We think, however, that the notice was intended, as it has been treated by both the lower Courts, as a notice of ejectment in consequence of breach of contract by the waste committed. We agree also with the lower appellate Court that the case should be dealt with under s. 155, Bengal Tenancy Act, and that, until the tenancy has been formally terminated by legal proceedings by declaring the lease at an end by reason of the expiry of the term for which it ran, the tenant is entitled to the benefit of s. 155. The appeal is, therefore, dismissed with costs.

C. D. P. *Appeal dismissed.*

---

19 C. 544 (F.B.)

[544] FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice O'Kinealy and Mr. Justice Ghose.

FADU JHALA (*Plaintiff*) *v.* GOUR MOHUN JHALA AND OTHERS (*Defendants*).* [21st May, 1892.]

Fishery—Immoveable property—Right of fishery—Possession—Specific Relief Act (I of 1877), s. 9—Construction of statute—"Objects and Reasons" of Bill, reference to.

Held by the Full Bench (PRINSEP and PIGOT, JJ., dissenting).

A suit for the possession of a right to fish in a khal, the soil of which does not belong to the plaintiff, does not come within the provisions of s. 9 of the Specific Relief Act.

The right to refer to the "Objects and Reasons" of a Bill discussed.

[**Diss.**, 12 C.P.L.R. 52; **F.**, 24 C. 449 (454); 5 M.L.J. 95 (97); **Rel.**, 29 C. 614 (617); **Appl.**, 20 C. 446 (448); **Appr.**, 23 B. 673 (675); **R.**, 29 C. 1 (18) = 5 C.W.N. 821 (**F B**); 10 C.L J. 30 = 13 C.W.N. 835 = 3 Ind. Cas. 466; 12 C.L.J. 483 = 15 C.W.N. 294 = 7 Ind. Cas. 924; 14 C.L.J. 572 = 12 Ind. Cas. 305; 12 Ind. Cas. 190 = 5 S.L R. 42; **D.**, 9 C.L.J. 336 = 13 C.W.N. 451 = 4 Ind. Cas. 116.]

THE petitioner brought a suit under s. 9 of the Specific Relief Act (I of 1877) in the Munsif's Court of Netrokona, in the district of Mymensingh, to recover possession of a portion of a khal, alleging that he had exercised the right of fishery in the khal during the rainy season, and had been dispossessed thereform by the defendants. The Munsif dismissed the suit on the ground that such a suit was not maintainable under the provisions of s. 9 of the Specific Relief Act.

The petitioner obtained a rule from a Division Bench of the High Court on the ground that the lower Court should not have declined jurisdiction.

Upon the rule being argued, the Division Bench (PIGOT and BEVERLEY, JJ.) referred the question to a Full Bench with the following remarks:—

"This is a rule calling upon the defendants in this suit to show cause why the judgment and decree of the Munsif in their favour should not be set aside.

---

* Rule No. 1335 of 1891, in the matter of suit No. 992 of 1890 of the second Munsif's Court, Netrokona, district Mymensingh.

1892 MAY 21.

FULL BENCH.

19 C. 544 (F.B.).

" The suit was brought for recovery of possession under s. 9 of the Specific Relief Act of a khal, in which plaintiff alleged a right of fishing during the rainy season.

[545] " The Munsif dismissed the suit on the ground that such a suit is not maintainable under the Act.

"In the case of *Natabar Parue* v. *Kubir Parue* (1) it was held by a Division Bench of this Court that a suit for the possession of a right to fish in a khal, the soil of which belongs to another, does not come within the provisions of s. 9 of the Specific Relief Act.

"In the case of *Bhundal Panda* v. *Pandol Pos Patil* (2) it was held that a right to fish is immoveable property within the meaning of s. 9 of the Specific Relief Act, and in the case of *Krishna* v. *Akilanda* (3) the High Court of Madras agreed with the principle of this decision.

"We agree with the decision in *Bhundal Panda* v. *Pandol Pos Patil* (2), and we think that a suit for possession of a right to fish in a khal, notwithstanding that the soil of it belongs to a person other than the plaintiff, does come within the provisions of s. 9 of the Specific Relief Act. We, therefore, refer the following question to a Full Bench.

"Whether a suit for the possession of a right to fish in a khal, the soil of which belongs to a person other than the plaintiff, or does not belong to the plaintiff, comes within the provisions of s. 9 of the Specific Relief Act?

"We add the alternative 'or does not belong to the plaintiff to meet a case in which the ownership of the soil might be unascertained, or be in the public."

Upon the hearing of the reference—

Baboo *Grish Chunder Chowdhry* and Baboo *Jogesh Chunder Roy* appeared for the petitioner.

Dr. *Rashbehary Ghose* and Baboo *Harendro Nath Mukerjee* appeared for the opposite party.

Babu *Grish Chunder Chowdhry*.—Immoveable property as defined in the General Clauses Act (I of 1868), s. 2, cl. (5), includes benefits arising out of land, and the Registration Act (III of 1877), s. 3, describes ferries and fisheries as benefits [546] arising out of land. I rely on the case of *Bhundal Panda* v. *Pandol Pos Patil* (2), which follows the earlier Bombay case of *Baban Mayacha* v. *Nagu Shravucha* (4), and on the case of *Krishna* v. *Akilanda* (3), which was a case of a ferry. Section 145 of the Criminal Procedure Code distinguishes immoveable property which is capable of physical possession as ' tangible ' immoveable property. No such distinction has been drawn in the Specific Relief Act. *Natabar Parue* v. *Kubir Parue* (1) is against me, but the above cases do not appear to have been cited. Section 9 of the Specific Relief Act is derived from s. 15 of Act XIV of 1859, under which Act it was held in *Haro Dyal Bose* v. *Kristo Gobind Sein* (5) that the section does not contemplate a suit to enforce a right of way; but that ruling was doubted in *Bhundal Panda* v. *Pandol Pos Patil* (2). Under Act IX of 1871, s. 27, it was held that a jalkar was not an easement, but an interest in immoveable property within the meaning of that Act.—*Parbutty Nath Roy Chowdhry* v. *Mudho Paroe* (6).

(1) 18 C. 80. (2) 12 B. 221. (3) 13 M. 54.
(4) 2 B. 19. (5) 17 W.R. 70. (6) 3 C. 276.

1892 MAY 21. — FULL BENCH. — 19 C. 544 (F.B.).

Dr. *Rashbehary Ghose.*—The Registration and Limitation Acts were special Acts for special purposes. The question here is whether a fishery is immoveable property within the meaning of s. 9 of the Specific Relief Act, which is an Act relating to certain kinds of specific relief obtainable in civil suits. Section 9 deals with ejectment. In England where a fishery is a mere *profit a prendre* ejectment will not lie to recover a right to fishery unless it is a territorial fishery ; that is to say, unless the right of fishery is connected with the ownership of the soil [See *Baban Mayacha* v. *Nagu Shravucha* (1)]. The plaintiff's remedy here is by injunction and damages. *Natabur Parue's* case (4) is an authority in my favour, but is not precisely in point. In *David* v. *Grish Chunder Guha* (2) it was held that a jalkar does not import any interest in the soil itself, and grants of jalkar import only the use and enjoyment of what have been termed purely aqueous rights—**[547]** *Radha Mohun Mundul* v. *Neel Madhub Mundul* (3). Section 4 of Act IV of 1840 refers to fisheries, and the reference is omitted in s. 15 of Act XIV of 1859, and in s. 9 of the Specific Relief Act. Under s. 263 of the Code of Civil Procedure possession of an incorporeal right cannot be delivered to the aggrieved party. The proper remedy is by injunction. It has been held that a jalkar is not tangible immoveable property—*Krishna Dhone Dutt* v. *Troilokia Nath Biswas* (4) —and there is no ground for including jalkars within the operation of s. 9 of the Specific Relief Act.

Babu *Grish Chunder Chowdhry* was heard in reply.

The following opinions were delivered by the Court (PETHERAM, C.J., PRINSEP, PIGOT, O'KINEALY, and GHOSE, JJ.) :—

OPINIONS.

PETHERAM, C.J.—The question which we have to determine is whether a person who has for a time exercised the exclusive right of fishing in waters which cover land which does not belong to him, and who is forcibly prevented from fishing in such waters, can maintain an action for such prevention under s. 9 of the Specific Relief Act (I of 1877) without proving his own title to the exclusive right which he claims.

I agree that a right of fishing in waters which cover land which belongs to another is within the definition of immoveable property in s. 2, sub-s. 5 of the General Clauses Act (I of 1868), and would therefore be included within s. 9 of the Specific Relief Act if there were not, to use the words of s. 2 of the General Clauses Act, "something repugnant in the subject or context." I am of opinion that the whole of s. 9 is repugnant to the idea that immoveable property *in that section* includes an incorporeal right such as a right of fishing in waters belonging to another. It is, I think, apparent from the section itself read as a whole that the immoveable property, intended to be dealt with by it, is something of which actual physical possession can be given and taken ; in other words, some piece of land or something permanently attached to the land, and that the words as they appear in the section cannot include an incorporeal right which must always remain in the possession of its owner, though he may **[548]** for any reason be prevented from exercising it. I think the answer to the question should be in the negative.

PRINSEP, J.—The matter referred for the opinion of this Full Bench is whether s. 9 of the Specific Relief Act can be applied to fisheries; that is to say, whether a person dispossessed without his consent of a

(1) 2 B. 19. (2) 9 C. 183. (3) 24 W. R. 200. (4) 12 C. 539.

1892 MAY 21. — FULL BENCH. — 19 C. 544 (F.B.).

fishery otherwise than in due course of law may sue to recover such possession within six months from the date of the alleged dispossession.

Section 9 of the Specific Relief Act (I of 1877) re-enacts s. 15, Act XIV of 1859.

It would seem that up to the legislation of 1859, the Civil Courts were not empowered to try possessory actions of a summary character independent of any question of the actual title of the person unlawfully dispossessed. Special provision was, however, made by Act IV of 1840 and previous Regulations which empowered Magistrates to take cognizance of complaints of forcible dispossession from land, premises, water, fisheries, crops or other produce of land, if made within one month from the time of the alleged dispossession, and the Magistrates were empowered to restore possession to any person so ejected from such property. Comparison between Act IV of 1840, s. 4, and Act XIV of 1859, s. 15, will show that the nature of the matters under enquiry is identical with the following exceptions. The Civil Court was, by the legislation of 1859, given jurisdiction where the Magistrate hitherto alone had summary jurisdiction. The dispossession, under the Act of 1840, must have been forcible dispossession, whereas, under the Act of 1859, the dispossession must have been "otherwise than by due course of law," and need not, therefore, have been accompanied by force. The property, the subject of dispossession by the Act of 1840, was described to be "land, premises, water, fisheries, crops or other produce of land." The Act of 1859 describes the property as "any immoveable property." As I have already mentioned, s. 9 of the Specific Relief Act is, in all material respects, identical in its terms with s. 15, Act XIV of 1859. It was not until the General Clauses Act (I of 1868) that any general definition was given of immoveable property, though in other special Acts, such as the Indian Succession Act of 1865, [549] a definition of this term was given applicable only to those Acts. The definition given of the term in the General Clauses Act of 1868 is, however, applicable only to the Specific Relief Act of 1877, and not to s. 15, Act XIV of 1859. But, so far as we can learn, it was not the intention of the legislature to effect any alteration in the existing law by the enactment of 1877 in this respect. In giving definitions of certain terms, and, amongst them, of immoveable property, the General Clauses Act declares that, unless there be something repugnant in the subject or context of any Act made by the Governor-General in Council thereafter, the terms specified shall have the meanings attached to them. There can be no question that immoveable property, as defined by the General Clauses Act, includes a fishery, being a benefit arising out of land, and, so far as I can see, there is nothing repugnant in the terms of the Specific Relief Act to limit this definition or to make it inapplicable to s. 9. The decisions, however, on this point are in conflict, and this has led to the reference to the Full Bench now under consideration. In *Natabar Parue* v. *Kubir Parue* (1) it was held that s. 9 of the Specific Relief Act does not refer to a suit for the possession of a jalkar, that is to say, a right of fishery over land belonging to a stranger. It was there held that the plaintiffs had no right to the land, nor were they in possession of the land, but that for certain parts of the year they had power or license to fish, and that consequently their suit for possession of a fishery would not come within s. 9 of the Specific Relief Act. On the other hand,

(1) 18 C. 80.

1892 MAY 21. — FULL BENCH. — 19 C. 544 (F.B.).

it has been held in *Bhundal Panda* v. *Pandol Pos Patil* (1) that such a suit to recover possession of a fishery by exclusive right thereto is cognizable under s. 9 of the Specific Relief Act, and this case has been followed in *Krishna* v. *Akilanda* (2) in a suit to obtain possession of a ferry. In both of these cases it was pointed out that suits of this description were not excluded by s. 9 of the Specific Relief Act, whereas such matters were expressly placed out of a Magistrate's jurisdiction by the introduction in s. 145 of the Code of Criminal Procedure, **[550]** 1882, of the expression "tangible immoveable property" as the property over disputes regarding the possession of which a Magistrate could take summary action. We have been also referred to the case of the *Collector of Thana* v. *Krishnanath Govind* (3) in which the question was raised whether a certain grant was immoveable property within s. 1, cl. 12, Act XIV of 1859.

In that case the learned Chief Justice and Mr. Justice Melvill differed. The former held that "immoveable property" not having been defined by law applicable to the Act of 1859, its meaning should be determined by the general law, and that inasmuch as this grant would be regarded as immoveable property under the Hindu law, it should be dealt with by s. 1, cl. 12, Act XIV of 1859. Mr. Justice Melvill, on the other hand, held that the terms "immoveable property" and "interest in immoveable property" must be interpreted on general principles of construction with reference to the nature of the thing sued for, and not the status, race, character, or religion of the parties to the suit; that the grant not being a charge upon land, would not, according to general principles of construction, be immoveable property; and therefore the case would not come within the terms of s. 1, cl. 12 of the Act of 1859. I do not think that the case of *Lalla Gobind Suhaye* v. *Munohur Misser* (4), *Oodoyessuree* v. *Huro Kishore Dutt* (5), *Haro Dyal Bose* v. *Kristo Gobind Sein* (6), *Mohunt Deo Surun Poory* v. *Moonshee Mahomed Ismail* (7), and *Kalee Chunder Sein* v. *Adoo Shaikh* (8) are in point. The first related to a suit for mesne profits, that is to say, a suit for damages, and consequently that would not be an interest in immoveable property. The next three cases relate to easements, and the question raised was not whether they were immoveable property within s. 15, but an interest in immoveable property within the terms of s. 1, cl. 12. The case of *Kalee Chunder Sein* v. *Adoo Shaikh* (8) related to a suit under s. 15 regarding the possession of land. I attach no importance to the provision made in s. 1, cl. 12, Act XIV **[551]** of 1859 for suits for the recovery of immoveable property or of any interest in immoveable property, whereas s. 15 relates only to summary suits for possession of immoveable property, for I do not understand that it was intended to draw any distinction. At that time Magistrates had a summary jurisdiction to determine possession and to restore possession, deprived through force, of not only lands, but water, fisheries, crops and other produce of land, and this jurisdiction existed concurrently with the jurisdiction conferred on Civil Courts by the Act of 1859 until the repeal of Act IV of 1840 by Act XVII of 1862. Act XIV of 1859, it may be stated, did not come into operation until the 1st January 1862, and the Code of Criminal Procedure (Act XXV of 1861), came into force on the same date. That Code re-enacted all the sections of Act IV

(1) 12 B. 221. (2) 13 M. 54. (3) 5 B. 322. (4) 1 W.R. 65.
(5) 4 W.R. 107. (6) 17 W.R. 70. (7) 24 W.R. 300. (8) 9 W.R. 602.

1892 MAY 21. — FULL BENCH. — 19 C. 544 (F.B.).

of 1840, except s. 4 which conferred on Magistrates a jurisdiction similar to that conferred on Civil Courts by Act XIV of 1859, s. 15. The Code, however, repeated the various kinds of property, including fisheries, on the disputed possession of which the Magistrate had jurisdiction to act, but the Act of 1859 gave the Civil Courts summary jurisdiction in cases of illegal dispossession of immoveable property. There is no indication that the legislature contemplated any change except the transfer of jurisdiction. The term "immoveable property" would include a fishery without any straining of language, and it does include a fishery under the definition contained in the General Clauses Act, 1868. In order to exclude a fishery from the operation of s. 9 of the Specific Relief Act, it is necessary to find that there is something repugnant in the subject or context to prevent the application of the definition as given in the General Clauses Act. I can find nothing repugnant in the Specific Relief Act itself, nor can I find that suits for the recovery of possession of fisheries were excluded by Act XIV of 1859, s. 15, so as to enable us to hold that by the re-enactment of that section in the Specific Relief Act it was intended to alter the previous law, and thus to prevent the application of the definition of immoveable property as given in the General Clauses Act of 1868. Reference has been made to the Objects and Reasons recorded when the Bill which has since become the Specific Relief Act was introduced into the Legislative Council. These reasons show an intention to [552] re-enact Act XIV of 1859, s. 15. But if any such reference to the proceedings of the Legislative Council be legitimate, I think that it would be appropriate to quote the remarks of Sir B. Peacock, who was in charge of the Bill, now Act XIV of 1859, and introduced s. 15 when that Bill was under consideration in the Legislative Council. These were made while the Bill was in committee, and the proceedings in committee in those days were held in public and were published. It is also important to notice that the remarks made by Sir B. Peacock were the only allusion made to s. 15, and that that section was enacted as introduced by him. Sir B. Peacock is reported to have said:—

"That he had originally intended to provide only for cases of possession disturbed by force or fraud, but upon the advice of the Honourable Member for the North-Western Provinces, he had made the section general in its application, so that upon proof of dispossession otherwise than by due course of law, the Civil Court would entertain a suit for the recovery of the possession: if a title to the property was set up afterwards, it would not in any way be prejudiced by the decision in the possession suit."

He also "thought that the proposed new section would transfer to the Civil Court, cases of the description which, under Act IV of 1840, were now heard by the Magistrate (1)."

That the law even now contemplates possession of a fishery being given or being maintained, is shown by the operation of Regulation VII of 1822, s. 14, cl. 4, and s. 34, which gave the Collector summary jurisdiction over disputes regarding such matters when any particular fishery concerns a settlement then being made by him. In the absence, therefore, of any direct authority to the contrary, I am inclined to think that no real alteration in the law except a transfer of jurisdiction was contemplated by the legislature, and that consequently the terms "immoveable property" as used in s. 15 of Act XIV of 1859, should be

(1) Proceedings of the Legislative Council of India, 1859 (Vol. V), Cols. 60, 61.

1892 MAY 21. — FULL BENCH. — 19 C. 544 (F.B.).

held to cover the full definition subsequently given by the General Clauses Act; in fact, to include all matters previously dealt with by Magistrates only under Act IV of 1840, [553] s. 4. The legislature, it seems to me, did not intend to deprive persons dispossessed of fisheries forcibly or, as it was expressed by Act XIV of 1859, without "due course of law," of the summary remedy that they had hitherto enjoyed. If s. 9 of the Specific Relief Act stood alone, and it be read with the definition of "immoveable property" as given in the General Clauses Act, admittedly it would include a fishery as immoveable property within that definition.

It has been lastly contended that the Specific Relief Act does not contemplate suits for possession of a fishery, because the relief to be given in such a case would not be one of the relief set out in s. 5. I cannot admit the force of this argument. There is nothing either in s. 5 or in the terms of the Code of Civil Procedure regarding the execution of decrees in such a case which would prevent relief being fully given to a successful party in a suit for possession of a fishery as immoveable property.

I would therefore answer the question put in the affirmative.

PIGOT, J.—I am of opinion that the answer of the Full Bench to the questions referred ought to be in the affirmative.

I had intended to limit myself to shortly expressing concurrence with the decisions of the High Courts of Madras and Bombay, and had prepared a short judgment expressing that concurrence. But I think I ought, having regard to the difference of opinion that exists, to state my reasons in greater detail than I had intended to do.

The General Clauses Act, in s. 2, cl. (5), enacts that "immoveable property" shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. By s. 2 this is the meaning to be attached to the term "in all Acts made after the General Clauses Act, unless there be something repugnant in the subject or context."

I take it to be clear that a fishery *in alieno solo* is within the definition of immoveable property in the General Clauses Act; the words in that definition "benefits to arise out of land" include such a fishery, according to familiar legal language; a fishery is a [554] benefit arising out of "land covered by water." The definition does not, of course, include easements.

Section 9 of the Specific Relief Act is as follows :—

"If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit.

"Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

"No suit under this section shall be brought against the Government.

"No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed."

This provision must apply to a fishery *in alieno solo*, that being immoveable property within the definition, unless there be such a repugnancy as is contemplated by s. 2 of the General Clauses Act.

The section contemplates the case of dispossession otherwise than by due course of law; and provides for the recovery of possession in such a

case by a summary suit in which, if the previous possession and the dispossession be established, the plaintiff is entitled to a decree.

The first question is:—Whether any repugnancy exists in, or arises from, *the nature of the property in question*, to a construction of the section which shall make it applicable to such property.

I understand that the contention with reference to this is, that this section cannot apply to incorporeal immoveable property, but only to some definite part of the earth's surface; to immoveable property which is susceptible of actual physical detention; that property "visible and corporeal," to use the English legal language, or "tangible immoveable property," to use the corresponding expression in Indian law, is alone contemplated by this section.

[555] I own that I should have supposed the contention that the section must be held to relate only to corporeal immoveable property to be conclusively negatived by the established practice of the Courts in this country. Decrees for the possession of jalkars are perfectly common in title suits brought on dispossession. What difficulty can exist as to the possession in a summary suit, when there is none in a title suit, I am unable to see. But apart from this consideration, I think this contention ought not to prevail.

I think it can only be held to be true, if it be shown, that the terms "possession" and "dispossession" used in the section are necessarily inapplicable to incorporeal property included in the definition enacted in the General Clauses Act. If so, they are inapplicable to the property now in question before us, which is of course incorporeal.

Whether or not possession, according to its strict philosophical meaning, can be predicated of incorporeal property, is a question which, I think, does not practically arise before us: it seems to me perfectly immaterial whether or not we should affirm that the term is in India strictly applicable to that species of property: or affirm, on the other hand, that according to Indian law, the term "possession" when applied to incorporeal property, means "*quasi* possession." One or the other we must, I think, adopt: it is, as it seems to me, a mere question of words. In repeated instances the Indian Legislature has used the terms "possession" and "dispossession" as applicable to the species of property now in question before us without regard to the incorporeal nature of it.

Before I refer to Indian legislation, I should notice the argument derived from English law which was addressed to us. Much reliance was placed upon the proposition that the action of ejectment will not lie in respect of a fishery. That is true; but I own that I do not see that it bears upon the question before us. If it did, it might perhaps be thought that it proves too much; for it would be quite as applicable to a suit on title for the possession of a fishery, as to a summary suit founded on possession alone. Yet suits for possession of jalkar property, founded on title, are a familiar mode in which the rights to this sort of property are **[556]** asserted and maintained. It is also true, as I pointed out during the argument, that the procedure in English law, by a writ of restitution after forcible entry, is not applicable to incorporeal property; the writ can only be awarded for possession of tenements visible and corporeal—see Russell on Crimes, 5th ed., vol. I, p. 414, citing the passage in Hawkins to which I referred during the argument.

It is not necessary to discuss the reasons which led the Courts to hold that these forms of procedure were inapplicable to incorporeal property. Even if they were held to be so inapplicable, by reason of there being

1892 MAY 21. — FULL BENCH. — 19 C. 544 (F.B.).

thought to be incompatibility between this sort of property and possession, as the word is used in English law, they would not furnish an argument applicable in this country, if it be the case, as I shall presently show that it is, that the Indian Legislature has repeatedly acted on the contrary principle.

But it is clear that in English Courts of Equity, a possessory suit *may* well lie in respect of an incorporeal tenement, although, in England, such a suit is rare. Possessory suits are referred to in the judgments of Lord Selborne at p. 146, and of Lord O'Hagan at p. 163, in the case of *Neill* v. *Duke of Devonshire* (1) in which the question before the House of Lords turned chiefly upon the admissibility in evidence of decrees in possessory suits brought in respect of two several fisheries in the river Blackwater, and in which such decrees were held admissible in evidence as proof of former possession. In that case also the case of *Hemphill* v. *M'Kenna* (2) before Lord Chancellor Sugden, which was a possessory suit with respect to a ferry, is mentioned; also, of course, relating to a property incorporeal in its nature.

It seems to me that a suit such as the possessory suits, the effect of the decrees in which the House of Lords had to consider in that case, is precisely, so far as the principle now under consideration goes, the same as that which it is contended cannot possibly lie under s. 9 of the Specific Relief Act. The nature of the property, and the character of the remedy, are the same; it may be, though I should doubt it, that a less degree of **[557]** disturbance would justify the interference of the Courts in such a possessory suit than would be required under the Specific Relief Act; and no doubt, to maintain a possessory suit, proof of three years' peaceable possession was necessary, but neither of these considerations affects the principle.

I now refer to some of the enactments of the Indian Legislature which show that according to Indian legal language "possession" may be had, and may be restored; that "dispossession" may take place of immoveable property of the kind now under consideration. Act IV of 1840 was referred to during the argument by Mr. Justice Prinsep. Section 2 of that Act is as follows:—

"And it is hereby enacted, that whenever any Magistrate or other officer exercising the powers of a Magistrate may be certified that a dispute likely to induce a breach of the peace exists concerning any land, premises, water, *fisheries*, crops, or other produce of land, within the limits of his jurisdiction, he shall record a proceeding stating the grounds of his being so certified, and shall call on all parties concerned in such dispute (whether proprietors, dependent *taluqdars*, farmers, under-farmers, raiyats or other persons) to attend his Court in person, or by agent, within a reasonable time, and to give in a written statement of their respective claims as respects the fact of actual possession of the subject of dispute. And the Magistrate or other officer as aforesaid shall without reference to the merits of the claims of any party to a right of possession proceed to enquire what party was in possession of the subject of dispute when the dispute arose, and after satisfying himself upon that point shall record a proceeding declaring the party whom he may decide to have been in such possession to be entitled to retain possession, until ousted by due course of law, and forbidding all disturbance of possession until such time; and, if necessary, the Magistrate or other officer as aforesaid shall

(1) L. R. 8 Ap. Ca. 135 (146), (163). (2) 3 Dr. and War. 183.

put such party into possession, and maintain him in possession until the rights of the parties disputing be determined by a competent Court." 1892 MAY 21.

Section 4 of that Act enacts "that if any party shall complain to a Magistrate. . . . that he has been without authority of law forcibly dispossessed of any land, premises, water, *fisheries*, crops, or other produce of lands, within the jurisdiction of such [558] Magistrate . . . whether the same were possessed by such party as proprietor . . . raiyat, or otherwise," the Magistrate shall call upon the parties complained against to make defence, and if the complaint appears to him to be substantiated, "he shall record a proceeding ordering the party complaining to be put again into possession of the subject of dispute and maintained in possession until the right to possession be determined by a competent Court." FULL BENCH. 19 C. 544 (F.B.).

Act IV of 1840 was repealed by Act XVII of 1862 from the 1st of January 1862. Section 318 of the Code of Criminal Procedure of 1861 took the place of s. 2 of the Act of 1840, and that section is made applicable to disputes concerning land, premises, water, *fisheries*, etc., and provision is made for an order relating to possession of the subject-matter of the dispute. Section 530 of the Criminal Procedure Code of 1872 contains similar provisions still applicable to fisheries amongst other things. The Code of Criminal Procedure of 1882 in s. 145, substituted for s. 530 of the Code of 1872, restricts for the first time, the powers of the Magistrate in such cases to *tangible* immoveable property. So far as to the criminal law.

By Regulation VII of 1822, s. XIV, cl. 4, "if any person shall complain to a Collector or other officer making or revising the settlement of any *mehal* that he has been wrongfully dispossessed from any lands, premises . . . *fisheries* . . . or that he has been wrongfully disturbed in the possession thereof, it shall be competent to the Collector . . . to enquire . . . and to restore or confirm him."—See also s. 34. This Regulation is, of course, still in force. In Bombay similar powers were conferred by Act XVI of 1838 upon the Revenue Courts, and by the Bombay Mamlutdars Act, V of 1864, s. 1, the mamlutdars had power to give immediate possession of all lands, crops, trees, *fisheries*, etc., to any parties dispossessed of the same or of the profits thereof otherwise than in the course of law.

It seems to me clear that the terms "possession" and "dispossession" are, according to the established use of those terms by the Legislature here, properly applicable to the property in question in this case, and, I would add, to all the property which is within the definition of "immoveable," in the General Clauses Act, whether [559] such property be "corporeal," or "tangible," or not: and that there is nothing in the nature of it repugnant to a construction of s. 9 of the Specific Relief Act, which shall make that section applicable to it.

I see no answer to Chief Justice Sargent's observation that had it been the intention of the Legislature to exclude incorporeal rights from the operation of s. 9, we might expect that it would have been done in express terms, or by confining the section to "tangible" immoveable property as is done in s. 145 of the Criminal Procedure Code (1).

I know of no decision that s. 15 of Act XIV of 1859 is not applicable to this species of property. The decision in *Huro Dyal Bose* v. *Kristo Gobind Sein* (2) related to a right of way and is of course inapplicable, and

(1) 12 B. 221 (225). (2) 17 W.R. 70.

1892 MAY 21. — FULL BENCH. — 19 C. 544 (F.B.).

were a question similar to the question there decided to arise under the Specific Relief Act, s. 9, it must be decided in the same way, since easements are not within the definition of immoveable property in the General Clauses Act. I do not think, however, that a decision either way under Act XIV of 1859, s. 15, could affect the question before us. We are here construing an Act passed after the General Clauses Act, by the definition in which we are imperatively bound, in the absence of any repugnancy such as is contemplated by s. 2 of that Act.

I think I ought to express, with great respect, my dissent from the opinion (not, I think, suggested in argument) that in the language of Act XIV of 1859 a distinction is made between immoveable property, and interests in immoveable property, as different classes of property: I dissent, too, from the opinion that such a distinction was affirmed by judicial decision.

Then with regard to any supposed repugnancy arising from the context, that, I think, could only arise if it should appear that the nature of the relief provided by the Act is repugnant to the character of the property in question, and this, it seems to me, cannot for a moment be contended. In decrees in suits on title for possession of jalkars possession is in practice habitually awarded to the plaintiff, if successful. But even were this not so, the relief in s. 5 (*b*) and (*c*) is, I think, appropriate to the nature of incorporeal property; it is granted by the issue of an **[560]** injunction, just as the interdict was issued to protect the *quasi* possession of incorporeal rights under the Civil law, a remedy which was by that law given in the case of servitudes including what we call easements: just as a possessory suit has been held [*Anonymous* (1)] to apply to water-courses.

I have been led to deal with this case at some length. I do not see how that could be avoided if the question was to be gone into at all. It is an important one, if for no other reason, for this, that the jalkar property in Bengal is of great extent and value and it is a question of serious importance whether the possession of such property is or is not within the protection afforded by a summary suit under s. 9. Jalkar rights are, I believe, often settled as separate estates; are sometimes liable to be sold for arrears of revenue, and are habitually treated (as according to the view I take they ought to be) as immoveable property as fully as any property can be. It is a serious matter to the owners of such property if they are, under the law as it now stands, without any summary remedy for dispossession unless when such dispossession is brought about by criminal force, in respect of which a conviction has taken place—see s. 522, Criminal Procedure Code. That I think, must be the result, if the questions referred are answered in the negative.

It was proposed to use the Objects and Reasons of the Bill before it became law, to show that the section had no application here. One of the learned Judges of this Bench holds that this may be done. I have repeatedly known it to be held inadmissible in argument in this Court, both in Full Benches and in Division Benches. The point is not for decision before this Full Bench and cannot be here decided, and I shall say nothing more upon it than that, should it come for decision before any Bench of which I am a member, I shall feel a difficulty in adhering to my own opinion that the Objects and Reasons of a Bill should not be looked at, in

(1) 2 Ves. Sen. (4h ed., 1818), p. 415, note.

1892 MAY 21. — FULL BENCH. — 19 C. 544 (F.B.).

the face of the opinion of Chief Justice Sargent and Mr. Justice Bayley, which I of course regard with the utmost deference.

I should add, however, that I do not think that, in the present case, there is any ambiguity or difficulty in the terms of the Act [561] which should lead the Court to refer to any proceedings of the Legislature which might, according to whatever the correct practice of the Court may be, be otherwise properly consulted.

I would answer the questions referred in the affirmative.

O'KINEALY, J.—It appears from the record of this case that Fadu Jhala brought a suit against Gour Mohun Jhala and others in the Court of the Munsif of Netrokona in the district of Mymensingh, under s. 9 of the Specific Relief Act (Act I of 1877), for possession of a jalkar. Admittedly, plaintiff had no right to the soil where the fishery existed, and the Munsif being of opinion that such a suit did not fall within the purview of that section, dismissed it.

The plaintiff did not appeal, but he obtained a rule in this Court calling upon the other side to show cause why the judgment of the Munsif should not be set aside on the ground that he had declined to exercise a jurisdiction under which he was competent to try the case. But the Munsif had jurisdiction over the subject-matter of the litigation, he exercised that jurisdiction, tried the case and decided it, and though his decision may be wrong, yet, as pointed out in *In re Bagnam* (1), *Amir Hassan Khan* v. *Sheo Baksh Singh* (2), it is not subject to revision.

Two views have been taken of the scope of s. 9 of the Specific Relief Act. In the case of *Bhandal Panda* v. *Pandol Pos Patil* (3), it was held that the right to fish in another man's land fell within the section; and the principle of that decision was followed in the case of *Krishna* v. *Akilanda* (4). On the other hand, in the case of *Natabar Parue* v. *Kubir Parue* (5) it was held by a Division Bench of this Court that the right of fishing in land which is the property of another, is not immoveable property within the meaning of that section.

In this state of the authorities the Judges of the Division Bench who heard the rule referred the following question for our decision :—

"Whether a suit for the possession of a right to fish in a khal, the soil of which belongs to a person other than the plaintiff, or [562] does not belong to the plaintiff, comes within the provisions of s. 9 of the Specific Relief Act?"

In order to arrive at a proper decision of the question, it is necessary to go back to Act XIV of 1859, from the 15th and 17th sections of which Act s. 9 of the Specific Relief Act was taken. Clause 12 of s. 1 of that Act declared that in suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of the Act applied, the period of 12 years from the time of the cause of action was the period of limitation ; and s. 15 provided that if any person was dispossessed of immoveable property, he could institute a suit to recover possession of such property within six months from the date of dispossession. There were thus two classes of suits dealt with in the Act separately and distinctly ; one class referred to immoveable property only ; the other not referring to immoveable property but what was termed an interest in immoveable property.

The distinction between these two kinds of property was the subject

(1) 20 W.R. 10. (2) 11 C. 6. (3) 12 B. 221.
(4) 13 M. 54. (5) 18 C. 80.

1892 MAY 21. — FULL BENCH. — 19 C. 544 (F.B.).

of several decisions under that Act. One of the most elaborate discussions is to be found in the case of the *Collector of Thana* v. *Krishnanath Govind* (1). There Mr. Justice Melvill, referring to cl. 12, s. 1 of Act XIV of 1859, held that "the terms 'immoveable property' and 'interest in immoveable property' are to be held to include not only lands and houses, and such other things as are physically incapable of being moved, but also such incorporeal hereditaments as issue out of, or are connected with, immoveable property, properly so called, and, therefore, to use the language of the English lawyers, 'savour of the realty.' Incorporeal hereditaments, which are of a purely personal nature, and do not savour of the realty, are moveable property. If regard be had only to ordinary principles of construction, it will not generally be difficult to say within which of these two classes the subject-matter of a suit should be placed. Rights of common, rights of way, and other profits *in alieno solo*, rents, pensions and annuities secured upon land,—all these clearly constitute an interest in immoveable property. Pensions and [563] annuities not secured upon land, houses, or the like, as clearly do not constitute such an interest."

In that case there was a difference of opinion between the Chief Justice and Mr. Justice Melvill as to whether the subject-matter of the suit was an interest in immoveable property. This difference of opinion was decided ultimately in favour of the opinion held by the Chief Justice, but the decision in no way turned upon any distinction between immoveable property and an interest in immoveable property.

A similar opinion in regard to the same words was expressed by a Division Bench of this Court in the case of *Lalla Gobind Suhaye* v. *Munohur Misser* (2), in which it was held that the words "interest in immoveable property" used in cl. 12, s. 1 of Act XIV of 1859, referred to an estate or interest less than the fee simple which a party might have in the corpus of any property. It is clear, therefore, that if the principle of these judgments be followed, a right to open a water-course or an easement as was held in *Oodoyessuree* v. *Huro Kishore Dutt* (3) and *Mohunt Deo Surun Poory* v. *Moonshee Mahomed Ismail* (4) would not be immoveable property, but only an interest in it; and the same conclusion must be drawn in regard to fisheries in the property of another—*Parbutty Nath Roy Chowdhry* v. *Madho Paroe* (5).

The very few decisions which we have in regard to s. 15 of that Act are in favour of the same view. In the case of *Kalee Chunder Sein* v. *Adoo Shaik* (6), Mr. Justice Phear, in delivering the judgment of the Division Bench, said, in regard to this section,—"We think that it was intended by that section solely to give a special remedy for a particular kind of grievance, supposing the party aggrieved chose to go into Court for the purpose within a very limited time, namely, six months. Were it not for the advantages given by that Act, it might happen that a person in undisturbed possession of landed property might be turned out by a stranger, and might not be able to get back again without invoking the assistance of a Court of Law." And in [564] the case of *Haro Dyal Bose* v. *Kristo Gobind Sein* (7) it was held that a right of way did not fall within the section.

Thus we see that, so long as Act XIV of 1859 was in force, the words "immoveable property" in that Act were never held to include easements and rights in the lands of others.

(1) 5 B. 322 (335). (2) 1 W. R. 65 (66). (3) 4 W. R. 107.
(4) 24 W. R. 300. (5) 3 C. 276. (6) 9 W. R. 602.
(7) 17 W. R. 70.

1892 MAY 21. FULL BENCH. 19 C. 544 (F.B.).

Section 15 of Act XIV of 1859 was repealed by the Specific Relief Act (I of 1877), but re-enacted in almost the same language; and what we have now to decide is, what is the meaning of the words "immoveable property" in s. 9 of the latter Act? We know that, up to the date of the passing of that Act, they were never held to cover rights of the nature referred to in the present suit. Whether the Legislature intended that the words "immoveable property," which had already had a meaning determined by the Courts of Justice, should be used in that sense or in some other sense, is the question for our decision.

Section 5 of the Specific Relief Act provides different kinds of specific relief, and the first is, by taking possession of certain property and delivering it to the claimant; so that we see that the Act did not cover all kinds of property, moveable and immoveable, but only such as were capable of being taken possession of, and of which possession could be delivered. It is unnecessary, at present, to refer to the other modes of relief given in s. 5. Section 8 shows clearly that a person entitled to possession of specific immoveable property may recover it in the ordinary manner provided by the Code of Civil Procedure. In s. 9 the word "specific" does not appear, but, looking at s. 5 and at s. 8 of the Act, the words "immoveable property" in s. 9 have, in my opinion, the same meaning as the words "specific immoveable property" in s. 8.

We find in the Procedure Code the same distinction between immoveable property and an interest in immoveable property as existed in Act XIV of 1859. Section 16 clearly distinguishes between these two classes of suits. The change was introduced in the Code of 1877. During that year there was a general revision of the Codes, and the Acts relating to Specific Relief, Civil Procedure, and Limitation were passed within a limited **[565]** period. All these Acts must, if possible, be read as consistent with each other, and we should expect from ss. 50 and 54 of the Code that, as is the case, the distinction between suits for immoveable property and suits for an interest in it referred to in the Limitation Act correspond to a similar distinction in the Code of Civil Procedure.

In the same way the further division of immoveable property into two sub-divisions, namely, specific immoveable property and immoveable property (not specific), is found both in the Specific Relief Act and the Code of Civil Procedure, and for the first time. On turning, as directed in s. 8, to the present Code of Civil Procedure, which on this point does not differ from the Code of 1877, to find what property comes under the description "specific immoveable property," we find for the first time, in No. 94 of sch. IV of that Code, the forms of plaints in suits for specific immoveable property, and they all refer to houses or estates in land. The current of decisions and the legislation in regard to fisheries in the soil of another is in favour of the same view. Before the passing of Act IX of 1871, such fisheries were looked upon by their Lordships of the Privy Council as incorporeal hereditaments, importing no right to the soil—*Forbes* v. *Meer Mahomed Hossein* (1); *Baradacant Roy* v. *Chandra Kumar Roy* (2); and under Act IX of 1871, they were looked upon as an interest in immoveable property for the purposes of limitation. When this Act was with other Acts recast in 1877, they were reduced to the position of easements—not only for the purpose of limitation, but also in regard to their nature and mode of acquisition—*Chundee Churn Roy* v. *Shib Chunder Mundul* (3). If, therefore, s. 9

(1) 12 B. L. R. 210. (2) 2 B. L. R. P.C. 1. (3) 5 C. 945.

1892 May 21. — Full Bench. — 19 C. 544 (F.B.).

of Act I of 1877 applied to such rights, we should have this anomalous condition of things that in a possessory action they would be dealt with as specific immoveable property, while in suits on title they would be treated as easements, and in each case the proof would be essentially different. In the possessory action previous possession would suffice, while in an action on title possession would not enter into the question, and instead of [566] getting a title by 12 years' adverse possession, the plaintiff would be compelled to prove 20 years' "user" of the right—*Chundee Churn Roy* v. *Shib Chunder Mundul* (1), *Lachmeswar Singh* v. *Manowar Hossein* (2). Nor is this anomalous result confined to those Acts. There is another General Act, namely, Act IV of 1882, which deals with the transfers of property. By it property of every kind (moveable and immoveable) may be transferred subject to certain exceptions, and one of them is, that an easement cannot be transferred without the dominant heritage. An easement with which the interest in the present litigation is ranked, is consequently an interest of the lowest grade of the weakest kind. But although every kind of immoveable property is, subject to the limitation prescribed by s. 6 of that Act, capable of being transferred, every kind of immoveable property which is transferable cannot be the subject of a mortgage. The law confines the right of mortgage to "specific immoveable property." If the view contended for by the party who obtained this rule be correct, we are forced to hold that easements, though incapable of transfer, can be the subject-matter of a mortgage. These are the only Acts, in which the words "specific immoveable property" are found. So far, therefore, as can be gathered from a comparison of these Acts, it would appear that the Legislature in 1877 decided on dividing immoveable property into two classes, "specific immoveable property" and "ordinary immoveable property (not specific)," and described the higher class, namely, specific immoveable property, as land or property in the nature of land and limited the possessory action given by s. 9, Act I of 1877, to property of this nature.

This opinion is strengthened by the second portion of Chapter I which refers to an action in detinue, namely, the possession of specific moveable property. The nature of this action, which was introduced from the English law, is well known. It would not lie for moveables which were mixed up and not ascertained; nor does it lie now under s. 11 of the Specific Relief Act. It would only lie for some particular article of moveable property capable of being seized and delivered up to the winning party. Moreover, [567] it appears clear that, in regard, at least, to some incorporeal rights, the Legislature of the period did not think that possession under s. 9 of the Specific Relief Act was the proper form of relief. Section 54 of that Act refers to injunctions, and under illustration (*p*) of that section it would appear that a declaration and injunction would be the proper form of relief; and if we compare this with the forms in sch. IV of the Procedure Code, there is reason to conclude that the Legislature of the period intended to afford nothing more than the ordinary relief given by English law for injuries to incorporeal rights, namely, damages for trespass and injunction, but not possession.

At the hearing of the case the pleader who showed cause against the rule asked leave to refer to the Statement of Objects and Reasons made by the Legal Member of Council in the Specific Relief Bill which he introduced in the Council. Upon being asked whether he pressed to have the

---

(1) 5 C. 945. (2) 19 C. 253 = 19 I.A. 48.

1892 MAY 21. — FULL BENCH. — 19 C. 544 (F.B.).

document referred to, he withdrew his request. Perhaps it might be considered from the manner in which it was met, and from the withdrawal of his request, that there is some legal objection to a Judge referring to the document, and it is in order to show that none exists that I refer to the several cases in which the proceedings of the Legislative Council have been referred to.

In the case of *Shaik Moosa* v. *Shaik Essa* (1) the question as to whether the Objects and Reasons of a Bill could be referred to was raised and decided at p. 247. There Sargent, C. J., in delivering the judgment of the Court said, " On the authority of *In re Mew* (2), I think the objects and reasons may be referred to. I think they may be regarded as in the same position as the documents permitted to be used in that case. I would, however, base my decision on the established practice of this Court, where it has for many years been our custom, in cases like the present, to refer to the Objects and Reasons presented to the Legislature. Here we are asked to look at them for the purpose of ascertaining the intention of the Legislature in a case in which that intention, so far as appears from the Act itself, appears doubtful. Considering that these Objects and Reasons are really the formal statement made by the Legal Member of Council who introduced the Bill, I think **[568]** we cannot refuse to allow them to be used. I do not, however, think we can go further and look at the various forms in which the Bill was brought before the Legislature." Again, in the case of *Yesu Ranji Kalnath* v. *Balkrishna Lakshman* (3), the Chief Justice in delivering judgment said, "We may, however, draw attention (as has been frequently done in deciding difficult questions of construction arising on Acts of the Indian Legislature) to the last report of the Special Committee to whom the Bill was referred during the passing of the Act of 1887 through the Legislative Council (See Vol. XVI, p. 466. of Proceedings of the Legislative Council), which points to the conclusion that the words '*bona fide*' were advisedly omitted from the article, to exclude the possible inference that absence of such notice was necessary to enable the purchaser to avail himself of the article."

So far, therefore, as the Bombay Presidency is concerned, reference to some of the Proceedings of the Legislative Council has been allowed from a very long time to be made even by counsel, and this is the setled practice in that Court.

Nor is there much reason to conclude that the question is on a less firm basis in regard to Bengal. So far back as 1883, in the case of *Mathura Kant Shaw* v. *The India General Steam Navigation Co.* (4), Mr. Justice Prinsep, though considering it then unusual, referred to the Objects and Reasons of the Contract Act in order to find out the intention of the Legislature ; and in the case of the *Queen-Empress* v. *Kartick Chunder Das* (5), the Judges constituting a Full Bench of this Court, in dealing with the intention of the Legislature, said at p. 728 : " But we thought it right from the Proceedings of the Legislative Council at the time this measure was in preparation, to obtain such light as they could throw on the intention and scope of the section in question. Such a course has been more than once taken by the Courts here in recent times; and in a case of such difficulty and importance as this appeared to be we felt bound to adopt it."

(1) 8 B. 241 (247). (2) 31 L. J. Bkcy. 87. (3) 15 B. 583.
(4) 10 C. 166. (5) 14 C. 721.

1892 MAY 21. — FULL BENCH. — 19 C. 544 (F.B.).

Subsequently after referring to the two reports made by the Legislative Council, the Judges decided the question before them.

[569] If the reports of these cases are correct, in neither of them was any reference made to the proceedings of the Legislative Assembly during the course of argument.

It would, therefore, appear that unless these two Full Bench decisions are overruled, which cannot be done by any Full Bench of this Court, like the present, that the right of a Judge to refer to some of the proceedings of the Legislative Council in order to arrive at the intention of the Legislature, cannot now be questioned in this Full Bench.

If then we turn to the Objects and Reasons assigned by Sir Arthur Hobhouse when introducing the Bill for Specific Relief, a Bill which was carried in the form in which it was introduced, we find in paragraph 4 the following statement :—" The chapter relating to the recovery of possession of specific property embodies the English rules as to detinue, and the useful provision of the Indian Act XIV of 1859, s. 15, as to the right of persons informally dispossessed of land to recover possession by a summary suit. Words have been introduced to show expressly that this provision does not apply to lands claimed to belong to Government. This exemption in effect resulted from s. 17 of Act XIV of 1859 (1)."

Here, then, we have an express statement that in the opinion of the Member of Council who introduced the Bill, Act XIV of 1859, s. 15, referred to persons informally dispossessed of land. He did not say it referred to immoveable property in general, and the manner in which he framed the forms in the Procedure Code is opposed to the idea that this was his view. There seems nothing unreasonable in supposing that the Legal Member was as well aware of the General Clauses Act as we are. It was in conformity with this interpretation that he introduced that section into s. 9 of the Specific Relief Act. This intention may be assumed to have been known to all the Members of Council when the Bill was introduced and the section was passed as it stood in the Bill. If the subject-matter under consideration were the intention of parties to an agreement, the evidence would be conclusive, and as it is, it seems almost conclusive, as to the intention of the members constituting the Legislative Assembly as to the [570] object of the Act. It would, therefore, appear that the words "immoveable property" in s. 9 of Act I of 1877, do not include rights of the nature involved in this litigation. The conclusion at which, in my opinion, we should arrive is, that the Rule should be discharged.

GHOSE, J.—I am of opinion that a suit for the possession of a right to fish in a khal, the soil of which belongs to another person, does not come within s. 9 of the Specific Relief Act; but I must confess that it is after some hesitation that I have arrived at this conclusion. The hesitation has been owing chiefly to the fact that a case like this was cognizable by a Criminal Court under s. 4, Act IV of 1840; and s. 15, Act XIV of 1859 (re-enacted in s. 9 of the Specific Relief Act) suggests the idea that the Legislature in framing that section probably intended to transfer to the Civil Court the summary powers which were then vested in the Criminal Courts in cases mentioned in s. 4, Act IV of 1840—cases relating not only to lands and other immoveable properties of that nature, but also cases of the other descriptions, *i.e.*, fisheries, etc., referred to therein. But I observe that s. 4 of Act IV of 1840 was not repealed by Act XIV of 1859, and

(1) *Gazette of India*, Dec. 11, 1875, Part V, p. 258.

apparently the Criminal Courts, notwithstanding s. 15 of that Act, continued to have the summary powers vested in them by s. 4, Act IV of 1840, until the passing of the Criminal Procedure Code, Act XXV of 1861, when the said powers were practically taken away, there being no section in the Criminal Procedure Code corresponding to s. 4 of Act IV of 1840, and s. 318 of the Code being limited to cases where, in consequence of disputes relating to possession of immoveable property, one of the parties had to be maintained in possession. Act IV of 1840 was not, however, expressly repealed until the passing of Act XVII of 1862. It seems to me, therefore, that it could not be rightly said that the summary powers of restoring a party to possession of lands, fisheries, etc., were transferred from the Criminal Courts to the Civil Courts. It will also be observed that the language of s. 15, Act XIV of 1859, is somewhat different from s. 4, Act IV of 1840. The former uses the words "immoveable property," the latter, "land, premises, water, fisheries, crops or other produce of land;" and I am not prepared to **[571]** say that the Legislature, in using the words "immoveable property" in s. 15 meant to refer exactly to the same classes of cases which were mentioned in s. 4, Act IV of 1840.

The General Clauses Act was not passed until some years afterwards; and although no doubt a fishery, or a right to fish in another person's property, may be brought within the definition of "immoveable property," as given in that Act, still the question is whether s. 15, Act XIV of 1859, contemplated, and s. 9 of the Specific Relief Act contemplates, cases where the party aggrieved does not and cannot claim actual or physical possession of the immoveable property, but merely claims a certain "interest in immoveable property," or a right with respect to it. I agree with the Chief Justice and O'Kinealy, J., whose judgments I have had the opportunity of reading, in thinking that the section refers only to such properties of which physical possession could be delivered—and this is substantially the view that was expressed in *Haro Dyal Bose* v. *Kristo Gobind Sein* (1), a case under s. 15, Act XIV of 1859, and in *Tarini Mohun Mozumdar* v. *Gunga Prosad Chuckerbutty*, (2), with reference to s. 9 of the Specific Relief Act. And this view seems to be supported by the Objects and Reasons given by the then Law Member of the Legislative Council, when he introduced the Bill for Specific Relief. The words which occur therein are :—

"The chapter relating to the recovery of possession of specific property embodies the English rules as to detinue and the useful provisions of the Indian Act XIV of 1859, s. 15, as to the right of persons informally dispossessed of land to recover possession by a summary suit (3)."

The words "recovery of possession of specific property," "informally dispossessed of land," are to my mind significant as indicating the intention of the Legislature. And I might here say that I agree with O'Kinealy, J., in thinking that in determining what was the intention of the Legislature, we might properly refer to the Objects and Reasons.

It has been said that, although no actual possession of the property could be delivered to the party aggrieved in a case under **[572]** s. 9, still specific relief could be given by injunction in one of the two modes (*b*) and (*c*) indicated by s. 5 of the Act. These two clauses speak of an "obligation" to do, or to refrain from doing, an act; and they, therefore, presuppose a determination of the question of the legal obligation of the

(1) 17 W.R. 70. (2) 14 C. 649.
(3) *Gazette of India*, Dec. 11, 1875, Part V, p. 258.

1892 MAY 21. — FULL BENCH. — 19 C. 544 (F.B.).

party upon whom an order for specific relief is to be made; but I do not think that the Civil Court in a case under s. 9, could be called upon to determine (as I think it would be bound to determine if an order under cls. (*b*) or (*c*) has to be made) the question whether the defendant is under an "obligation" to allow the plaintiff to fish or to refrain from obstructing him to fish. The enquiry under s. 9 is expressly a summary enquiry: it says "If a person is dispossessed. . . . he may recover possession thereof, notwithstanding any other title that may be set up in such suit.' So that the section itself precludes the determination of the question of the "obligation" of the defendant. I am inclined to think that cl. (*a*) in s. 5 is the only clause which provides for the specific relief contemplated by s. 9 of the Act, *viz.*, "by taking possession of certain property and delivering it to a claimant."

PETHERAM, C.J.—As the opinion of the majority of the Court is that the suit is not maintainable under the Act, the rule will be discharged. We make no order as to costs.

A. A. C. *Rule discharged.*

---

19 C. 572.

CRIMINAL MOTION.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Norris and Mr. Justice Beverley.

MADAN MOHAN BISWAS (*Petitioner*) *v.* QUEEN-EMPRESS (*Opposite Party*).* [20th April, 1892.]

Unlawful compulsory labour—Criminal force—Slavery—Wrongful confinement—Pena Code Act (XLV of 1860), *ss.* 344, 352, 370 *and* 374.

The accused induced the complainants, who he alleged were indebted to him in various sums of money, to consent to live on his premises and to [573] work off their debts. The complainants were to, and did in fact receive no pay, but were fed by the accused as his servants. He insisted on their working for him, and punished them by beating them if they did not do so. The complainants in addition alleged that they were prevented leaving the accused's premises, and that they were locked up at night. On these allegations the accused was convicted by the first Court of offences under ss. 344, 370 and 374 of the Penal Code. On appeal the convictions under the two former sections were quashed, the evidence as to detention being disbelieved, but that under s. 374 was upheld, on the ground, that by magnifying the complainants' debts to him and never settling their accounts, the accused had unlawfully compelled them to go on working for him against their wills.

On a rule to show cause why the conviction should not be quashed.

Held, (by PETHERAM, C.J., and BEVERLEY, J.) that the conviction was erroneous and must be set aside.

PETHERAM, C.J.—A person who insists that another, who has consented to serve him, shall perform his work, does not unlawfully compel such person to labour against his will within the meaning of s. 374 of the Penal Code, because it is a thing which such person has agreed to do; but if he assault such person for not working to his satisfaction, he commits an offence punishable under s. 352.

Held, by NORRIS, J.—That upon the facts of the case the complainants never gave their full and free consent to work and labour for the accused, and that the accused therefore did unlawfully compel them to labour against their wills, and that the conviction under s. 374 was right.

---

* Criminal Rule No. 65 of 1892, against the order passed by A. A. Wace, Esq., Judge of the Assam Valley Districts, dated the 14th of November 1891, modifying the order passed by Major A. Gray, Deputy Commissioner of Nowgong, dated the 28th of September 1891.

1892 APRIL 20. — CRIMINAL MOTION. — 19 C. 572.

THIS case arose under the following circumstances :—One Mr. Brodrick, who was in charge of the Nowgong police, while out on inspection at Dhurrumtal, received certain information regarding the petitioner, Madan Mohan Biswas, in consequence of which he proceeded to the premises of Madan Mohan the accused. There he inspected the cooly-lines, visited the house in which the complainants Honto Lahang, Hoibori Lahingani and Bagi Musulmani were said to be confined at night, and also saw marks of ill-usage on their persons. Madan Mohan was arrested and eventually placed on his trial before the Deputy Commissioner of Nowgong. He was charged with offences under ss. 344, 370 and 374 of the Penal Code for having detained the complainants as slaves, for having wrongfully confined them for a period considerably exceeding ten days, and for having for a considerable period past unlawfully compelled them to labour against their wills.

[574] The evidence showed that the complainant Honto Lahang had borrowed some money from Madan Mohan on the understanding that he was to work off that amount in labour. He had first lived in his own house, but was subsequently removed to the premises of Madan Mohan to work. The complainants Hoibori and Bagi Musulmani both lived in the premises of Madan Mohan with their husbands and children, and on the death of their husbands, Madan Mohan made them work off the debts alleged to be due to him by their husbands. All the three complainants asserted that Madan Mohan insisted upon their working for him, and punished them by beating them if they did not do so.

The Deputy Commissioner convicted Madan Mohan under each of the above sections, and sentenced him to one year's rigorous imprisonment and a fine of Rs. 500. On appeal the Judge of the Assam Valley Districts acquitted him of keeping the complainants in confinement and slavery, but upheld the conviction and sentence under s. 374 of the Indian Penal Code, for having unlawfully compelled them to labour against their wills.

The accused then applied to the High Court (BEVERLEY and HILL, JJ.) for a rule to set aside the above conviction and sentence upon amongst other grounds, that as the learned Judge had disbelieved the evidence adduced in support of the charges under ss. 344 and 370 of the Penal Code, he ought for the same reasons to have disbelieved the evidence adduced in support of the remaining charge.

Upon that application a rule was issued which came on for hearing before a Bench consisting of NORRIS and BEVERLEY, JJ., when the following judgment was delivered by

BEVERLEY, J.—I am of opinion that the rule should be made absolute and the conviction set aside, *first*, on the ground that the proceedings were irregularly conducted, and that the accused was thereby prejudiced on his trial; and *secondly*, because in my opinion the evidence is not sufficient to establish an offence under s. 374, Penal Code. I further think that even if the conviction can be sustained, the sentence is excessive. It, moreover, transgresses the provisions of s. 65 of the Penal Code.

In the first place the Magistrate, though professing to try the accused in respect of three persons only, has admitted a considerable [575] quantity of evidence in respect of other persons, and has used that evidence against the accused. He has in fact examined nine of the persons who are said to have been illegally confined, detained as slaves, and unlawfully compelled to work, and has used their statements regarding themselves as corroborating the statements of the others. Beyond the statements of these persons (mostly women), there is no independent evidence of the

1892 APRIL 20. — CRIMINAL MOTION. — 19 C. 572.

charges against the accused. The statements themselves are full of gross contradictions and exaggerations, and bear the impress of having been tutored.

But even if the evidence be believed, I do not think it is sufficient to prove the offence. What is alleged is that these people used to work for the accused; that they were fed by him, but received no money wages because advances were said to be due from them; that they were watched while at work by a chaprassi or duffadar to see that they did not idle or run away, and that they were secured at night in a mat hut, the jhamp doors of which opened inside; the accused himself keeping guard over them all night and never going to sleep. The Judge himself has disbelieved a great part of the evidence; but he has upheld the conviction under s. 374 apparently on the ground that by magnifying their debts to him and never settling their accounts the accused has unlawfully compelled these people to go on working for him against their wills. I very much doubt whether this amounts to "unlawful compulsion" such as will subject the offender to a criminal penalty under s. 374, Penal Code. As my learned colleague, however, differs from me in the view I take of the case, the matter must be referred for the decision of a third Judge.

The rule was accordingly referred to and reargued before another Bench consisting of PETHERAM, C.J., NORRIS and BEVERLEY, JJ.

Baboo *Joy Gobind Shome*, in support of the rule.

Mr. *Kilby*, for the Crown.

The following judgments were delivered :—

JUDGMENTS.

PETHERAM, C.J.—On the 24th August 1891, Mr. Brodrick, the Assistant Superintendent in charge of the Nowgong police, inspected a police outpost at Dhurrumtal in his district, and whilst [576] there received certain information from head-constable Sharafat Ali, and saw some women who made complaints to him, and some of whom showed him marks of ill-usage on their persons. He afterwards on the same day inspected the prisoner's premises which were situated from 550 to 560 paces from the outpost, and he describes what he saw in these words :—"I went through the entrance gateway, passed along the road past the office and granary into an open quadrangle or yard, the cooly-lines being to the north-west of this again. I inspected these cooly-lines. Yes, I saw the doors. They were, as far as I remember, jhamp doors. They opened inwards. Usually such doors are fastened from the inside. These, on the contrary, were made to fasten from the outside by the usual method of a bar across. They also had means of fastening from inside. I do not remember having ever noticed native houses with a similar method of fastening doors from outside. I also examined some cooly-houses on the left as I entered the gateway. Did not notice anything particular about these. Yes, there is a solid masonry wall running along the front of accused's compound. It also runs a little way up the east side. Perhaps from 30 to 60 feet in length. Yes, I believe there is a hedge running along the western side of the compound. To the rear of the cooly-lines up in the north-west corner which I inspected, are the houses in which the complainants were said to be confined at night. There is an opening in this hedge."

After this inspection Mr. Brodrick caused the prisoner to be arrested, but he was released on bail the next morning.

On the 25th of August 1891, Mr. Brodrick sent a number of persons who had complained to him to the sudder station at Nowgong, and they

1892 APRIL 20. — CRIMINAL MOTION. — 19 C. 572.

remained there in the police compound, supported by the police authorities, until the trial of the prisoner before Major Gray had been concluded.

On the 2nd of September 1891, the prisoner was brought before Major Gray, the Deputy Commissioner at Nowgong, and from that day until the 19th, various witnesses produced by the police were examined before him. On the 19th, he framed three charges against the prisoner in respect of three persons—Honto Lahang, Hoibori Lahingani, and Bagi Musalmani—as follows :– *First*, that **[577]** you, at Dhurrumtal, Nowgong district, have detained on your premises as slaves the following persons, *viz.*, Honto Lahang, Hoibori Lahingani, and Bagi Musulmani, and thereby committed an offence punishable under s. 370 of the Indian Penal Code, and within my cognizance. *Secondly*, that you at Dhurrumtal, Nowgong district, have wrongfully confined for periods considerably exceeding ten days the said Honto Lahang, Hoibori Lahingani, and Bagi Musulmani, and thereby committed an offence punishable under s. 344 of the Indian Penal Code, and within my cognizance. *Thirdly*, that you at Dhurrumtal, Nowgong district, have for a considerable period past unlawfully compelled Honto Lahang, Hoibori Lahingani, and Bagi Musulmani to labour for you against their wills, and thereby committed an offence punishable under s. 374 of the Indian Penal Code, and within my cognizance.

Between that day and the 28th the witnesses for the prosecution were cross-examined ; no evidence was given for the defence, and on the 28th Major Gray delivered judgment, convicting the prisoner on each of the three charges, and sentenced him to one year's rigorous imprisonment and a fine of Rs. 500. The prisoner appealed to the District Judge, and on the 14th of November the District Judge delivered judgment in the appeal, by which he reversed the judgment of the Deputy Commissioner on the first two charges, but upheld it on the third charge, *i.e.*, that of unlawfully compelling these three persons to labour, and confirmed the sentence which had been passed by the Deputy Commissioner.

On the 8th February 1892, a rule was obtained from this Court on behalf of the prisoner to set aside the conviction. This rule was argued before Mr. Justice Norris and Mr. Justice Beverley, and as those two learned Judges were unable to agree, it has been again argued before them and myself. The question to be considered is, whether having regard to the fact that the prisoner has been acquitted of keeping the complainants in confinement against their wills, he can, under the circumstances of the case, be convicted of having unlawfully compelled them to labour for him against their wills under s. 374 of the Penal Code. The first person for whom the prisoner has been convicted of unlawfully compelling to labour is Honto Lahang. He is a man of about 38 years of age, and he **[578]** says that prior to the month of December 1890, he was living in a house of his own, and that he owed the prisoner Rs. 7 which he had borrowed of him on the understanding that he was to work off that amount in labour at the rate of 3 annas a day ; that in December 1890 the prisoner, with his duffadar and his gomastha, went to his house ; that the prisoner stated that he owed him Rs. 200 or Rs. 300, and that they broke down his house and took away the materials with them to the prisoner's premises, taking at the same time Honto Lahang himself. his wife Mil, and their three children against their wills, and that from that time to the time when Mr. Brodrick went to the place they were kept there locked up at night in the houses in the prisoner's compound and made to work in the daytime under a duffadar, notwithstanding that the debt had been long ago worked off. He says that he has never received any pay at all, but that they have been

1892 APRIL 20. — CRIMINAL MOTION. — 19 C. 572.

fed, though insufficiently, by the prisoner. This man's wife, Mil, is called. She says that in December 1890 the prisoner came to the place where they were living, and declared that her husband owed him Rs. 400 or Rs. 500; that he caught hold of her daughter Nowa, and told her that as her parents owed him money, she must go with him; that upon this she, Mil, said that if her daughter was taken, she would go too. That upon that she, her husband, Nowa, and her infant son and daughter were all taken away, together with the materials of their dismantled house, and that they have been kept there since, in the cooly-lines in his compound, and made to work against their wills, receiving no pay but a certain amount of food, which she says was not sufficient to satisfy their stomachs. She says that they did not run away because they were afraid of being caught and beaten, and that she met the sahib by the river side, and complained to him. Nowa, the daughter of Honto Lahang and Mil, was called. She said that they had a house of their own until December 1890, when the prisoner dismantled it and took it away to his own place, taking herself, her father, mother, and two other children at the same time, under a false pretext that the father owed him money; that they have been kept and fed there since; kept at work under the supervision of the prisoner and his duffadars, and beaten when they have not performed the full amount of work.

[579] This is the only evidence on the charge under which the prisoner has been convicted, as far as Honto Lahang is concerned. It is true that his name is mentioned by some of the other witnesses, but it is principally with reference to his being one of the persons kept in confinement. The general statements made by all the witnesses that they were all made to work against their wills. do not, in my opinion, carry the case further than it is carried by the statement of the man himself.

The next person in respect of whom the prisoner is charged is Bagi Musulmani. Her story is that her husband was an unpaid servant of the accused for many years, and that she lived in his premises for seven years with her husband, during which time she had two children, one of whom is living, the other dead; that when her husband died the prisoner turned her out, and she went as a cooly to the Nelli tea-garden; that after a time the prisoner went to the garden, and compelled her to return to his premises, saying that her husband's debt was not worked off, and that he has since that time kept her locked up with others and compelled her to work for him, giving her food but no pay, and beating her when her work was not done to his satisfaction.

The third person in respect of whom the prisoner is accused is Hoibori. She describes herself as a slave in the prisoner's premises. She says that her husband died about six years ago, and that upon his death the prisoner took her and her children by force from her home to his premises, saying that her husband owed him money, and that he has since kept her there in confinement, and has compelled her to work for him; that she has been beaten and her hands have been tied. She says that the prisoner gave them food but no pay.

This is really the only evidence against the prisoner on the charge of which he has been convicted by the Judge. Other witnesses were called who said that they themselves and the three persons in respect of whom the charges are made had been kept in confinement and compelled to work, but the evidence of the compelling to work is very general, and the evidence of the other witnesses does not carry the case further than that of the three complainants themselves.

1892 APRIL 20. — CRIMINAL MOTION. — 19 C. 572.

[580] As I have before said, the Deputy Commissioner convicted the prisoner under each of the three charges, as he believed that the three persons in respect of whom the charges were made were kept in slavery by him.

The District Judge has acquitted the prisoner of keeping the complainants in confinement or in slavery. After saying that he cannot believe that the complainants could not have communicated with the police had they chosen to do so, he describes what he thinks was the actual state of things, as follows :—"There is ample evidence on record to show that Madan Mohan Biswas has been in the habit of getting people into his meshes by loans working on their ignorance and trading on the traditions of serfdom, which still exist among the lowest classes of the province, and getting them into his power '*adscripti glebae*' as it were. The process with such people as those called for the prosecution is easy enough, a magnified debt, an offer to waive this for service, the supply of the little daily wants of a lazy people in rice, oil or opium, the non-payment of wages, which works a terrible bondage ; for when a man has been serving long without wages, he is afraid to do anything which might result in forfeiture of past service and dismissal without payment of any arrears, and he hangs on such with hope deferred.

The Crown has not appealed against the acquittal of the prisoner on these charges, and it seems to me that the Judge's finding and the reasons given by the District Judge for it amount to a finding that the complainants have for some consideration or other consented to remain in the prisoner's employ, being housed and fed by him, and that as far as actual physical restraint went they might have gone away at any time, and I think I ought to add that upon the evidence, as it appears on this record, the conclusion at which the District Judge has arrived appears to me to be the correct one.

The question, then, is whether a person who has induced other persons to consent to live in his premises, and to be fed by him as his servants, commits an offence under s. 374 of the Penal Code if he insists upon their working, and punishes them by beating them if they do not do so.

[581] There is, I fear, no doubt that assaults on servants and labourers in this country are by no means uncommon, and there is equally no doubt that such assaults are offences for which the persons guilty of them are liable to punishment under the criminal law, and this cannot be too widely known ; but I do not think that a person who insists that another who has consented to serve him shall perform his work, unlawfully compels such person to labour, because it is the thing which he or she has agreed to do, and although if the employer assault the servant for not working to his satisfaction, he undoubtedly renders himself liable to rigorous imprisonment under s. 352 of the Penal Code, I do not think he thereby commits an offence under s. 374.

For these reasons I am of opinion that the rule to set aside this conviction must be made absolute. The prisoner must be released and the fine, if paid, refunded.

NORRIS, J.—This was a rule granted by Mr. Justice Beverley and Mr. Justice Hill to show cause why the conviction of one Madan Mohan Biswas under s. 374, Indian Penal Code, should not be set aside.

The accused was convicted on the 28th September 1891 by Major Gray, the Deputy Commissioner of Nowgong, upon the following charges:—

1892 APRIL 20. — CRIMINAL MOTION. — 19 C. 572.

(i) with having detained in his premises at Dhurrumtal in the district of Nowgong as slaves Honto Lahang, Hoibori Lahingani, and Bagi Musulmani, and thereby committed an offence under s. 370, Indian Penal Code; (ii) with having wrongfully confined the same three persons for a period exceeding ten days, and thereby committed an offence under s. 344, Indian Penal Code; (iii) with having unlawfully compelled the same three persons to labour for him against their wills, and thereby committed an offence under s. 374, Indian Penal Code.

The Deputy Commissioner's judgment is an eminently unjudicial production into which has been introduced a considerable quantity o utterly irrelevant matter. On appeal the District Judge quashed the conviction under ss. 344 and 370, but affirmed the conviction under s. 374, Indian Penal Code, and maintained the full sentence passed by the Deputy Commissioner, *viz.*, 12 months' rigorous imprisonment and a fine of **[582]** Rs. 500, and on default further rigorous imprisonment for six months.

I very much regret that I am unable to concur in the judgment which has just been pronounced by the Chief Justice. I have read very carefully the whole of the evidence on the record, and the evidence, if true, seems to me to warrant the conviction under s. 374. Two Courts have believed that evidence. It stands uncontradicted, and I see no reasons for discrediting it. On the evidence on the record, I have come to the conclusion that these three persons never did give their full and free consent to work and labour for the accused. In my opinion, therefore, the conviction in this case was right, and this rule ought to be discharged.

BEVERLEY, J.—I have nothing to add to my former judgment.

A. F. M. A. R. *Conviction set aside.*

---

19 C. 582.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

IN THE GOODS OF SHOSHEE BHUSAN BANNERJEE, DECEASED.*
[17th June, 1892.]

Practice—Hindu Will—Universal Legatee not entitled to probate—Letters of Administration with the will annexed, Grant of universal legatee—Probate and Administration Act (V *of* 1881), s. 19.

A universal legatee is not entitled to probate, but only to letters of administration with the will annexed.

In the goods of Radhika Mohan Sett (1) not followed.

[F., 73 P.L.R. 1908=15 P.W.R. 1907; R., 1 N.L.R. 164 (166).]

THIS was an application in Chambers for probate of the will of one Shoshee Bhusan Banerjee made on the 16th June by an attorney on behalf of Srimati Kamani Dabi, the widow of the deceased and the universal legatee under the will.

No executor was appointed by the will, the material portion of which was as follows:—

---

* Application in Chambers.

(1) 7 B.L.R. 563.

" Accordingly I make regular provision in respect of whatever properties, immoveable, moveable, and buildings, &c., I am possessed of. I give the same to my wife, Srimati Kamani Dabi, **[583]** absolutely. She will be competent, at her own free will and pleasure, to dispose of the same by gift or sale. To this none of my heirs have, and will have, any claim or demand."

1892
JUNE 17.

ORIGINAL CIVIL.

19 C. 582.

The judgment of the Court (TREVEYLAN, J.) was as follows :—

JUDGMENT.

Yesterday an application was made to me for probate of a will. The applicant was not named as executrix. It was contended before me that as universal legatee she was executrix according to the tenor of the will, and in support of that argument the decision in the case of *In the goods of Radhika Mohan Sett* (1) was cited. Although I desire to speak with every respect for the learned Judge who passed the order in that case, still I am unable to follow that decision. That decision, if it were right at the time, is inconsistent with the intention of the Legislature as shown by s. 19 of the Probate and Administration Act (2). Under this Act a universal or residuary legatee is entitled to letters of administration with the will annexed. I must take it that by that expression the Legislature intended that they are to be excluded from probate. The decision in the case of *In the goods of Radhika Mohan Sett* (1), as far as I can find, has never been followed. Mr. Belchambers, the Registrar of the Court, has referred me to other cases. I find that in 1889 (3) Mr. Justice Wilson refused probate to a universal legatee, and granted letters of administration with the will annexed. There have also been other cases (4). I must follow the practice which has been in force for the last 20 years, *i.e.*, ever since that decision was passed. I decline to grant probate, but grant letters of administration with the will annexed.

Application for Probate refused and Letters of Administration with will annexed granted.

Attorney for the applicant : Mr. *Jogen C. Dutt.*

A. A. C.

---

(1) 7 B.L.R. 563,
(2) Act V of 1881; See the Indian Succession Act (X of 1865), s. 196.
(3) *In the goods of Monmohiney Dossee* (November 30th, 1889, Wilson, J.).
(4) *In the goods of Jane Porter* (March 21st, 1883, Norris, J.) *In the goods of Kadumbiney Dabee* (May 11th, 1887, Trevelyan, J.).
Reporter's Note.—See *In the goods of Oliphant*, 1 Sw. and Tr. 525 ; Belchambers' Practice, 431.

1892
MARCH 11.

PRIVY
COUNCIL.

19 C. 584
(P.C.)=
19 I.A. 95=
6 Sar. P.C.J.
192.

19 C. 584 (P.C.)=19 I.A. 95=6 Sar. P.C.J. 192.

[584] PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Lord Hannen, Sir R. Couch and Lord Shand.

[*On appeal from the High Court at Calcutta.*]

OMRAO BEGUM AND ANOTHER (*Plaintiffs*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*).
[10th and 11th March, 1892.]

Nawab Nazim's Debts Act (XVII of 1873)—*Award of Commissioners conclusive—Construction of documents not establishing a charge on immoveable property.*

Commissioners appointed under Act XVII of 1873 by their award found that an estate was in the possession of the Government for the purpose of upholding the dignity of the Nawab Nazim for the time being, a finding within their competence to make, of which the effect was that the Government held the property freed and discharged from all claims.

In a suit against the Government, it was alleged that the estate, when in the hands of the Nawab, had been charged with payment of an annuity and arrears in favour of the plaintiff's father on his abandoning the title which he had set up to the property:

Held that the above award, under the Act, would have been a sufficient answer to the claim, even if the charge had originally attached to the estate. But in equity no charge could be created, unless there was an intent to charge. Here the documents showed that this payment had not been legally charged upon the property, neither party having contemplated this result, and there having been only a mandate by the Nawab for payment of the annuity out of his treasury.

APPEAL from a decree (10th July 1889) of the High Court, affirming a decree (24th April 1888) of the District Judge of Murshidabad.

This suit, against the Secretary of State for India in Council, was for payment of an annuity with arrears granted by the late Nawab Nazim of Bengal to the plaintiff's father, and alleged to have been charged on an estate, afterwards in the possession of the Government. Among the questions raised in this appeal was whether this suit was barred by Act XVII of 1873, the Nawab Nazim's Debts Act, an award having been made by Commissioners under that Act, to the effect that the estate, on which the annuity was said to have been charged, was property held by [585] the State to uphold the dignity of the Nawab Nazim for the time being. It was also a question whether the annuity had been charged upon the estate at all.

A similar claim against the Government made by the present plaintiffs in 1877 related to the same annuity and the same estate during the lifetime of the late Saiyed Mansur Ali, who was Nawab Nazim when the above Act was passed. It was dismissed on the ground, that under the provisions of the Act, after the making of the award it was not competent to the plaintiffs to sue as they had sued. The state of things causing that result was that the suit of 1877 could not proceed without the Nawab Nazim being a party to it; while, at the same time, the permission of the Governor-General in Council, discretionary with that authority, but necessary under the Act to allow the Nawab to be sued, had not been obtained (1).

(1) *Omrao Begum* v. *The Government of India*, 9 C. 704=10 I.A. 39.

1892 MARCH 11. — PRIVY COUNCIL. — 19 C. 584 (P.C.)= 19 I.A. 95= 6 Sar. P.C.J. 192.

On the 7th May 1887, the Nawab Nazim Saiyed Mansur Ali having died in 1885, the present suit was brought by the daughters of Mehdi Ali, who died in 1864. The latter was half-brother to Amirannissa Begum, widow of the Nawab Nazim Ali Jah, who preceded Saiyed Mansur Ali in the Nizamut. Upon her death childless in 1858, her estate, including a zemindari, Gopinathpur, purchased and held by her in the name of Medhi Ali, had been claimed by the Nawab Nazim in virtue of a family custom as that of a "gaddinashin Begum," and therefore Nizamut property. On the ground that they, as Mehdi Ali's daughters, were entitled to seven-eighths of his estate, the plaintiffs claimed their proportionate share of an annuity, Rs. 600 a month, together with arrears. This annuity the Nawab had granted on the 25th July 1858 to Mehdi Ali in perpetuity upon the execution by the latter of a ladawanama, or claim-renouncing deed, relating to Gopinathpur; and the plaint stated that the Government having taken possession of all the properties of the Nawab Nazim, the daughters were entitled to a decree.

The defence, by written statement filed by the Collector of Murshidabad, stated that Act XVII of 1873, continuing to operate after the death, as it had during the lifetime of the late Nawab [586] Nazim, and Gopinathpur having been declared by the Commissioners to be property held by the State to support the dignity of the Nawab Nazim, the suit could not proceed without the consent of the Government first had and obtained in accordance with s. 11. It alleged revision of the contract to pay the annuity on the withdrawal of Mehdi Ali from the conditions between the parties, by his claiming the estate of Amirannissa, the deceased Begum. It was also denied that the annuity had been charged upon Gopinathpur or any of the Nizamut property, or that the Government was liable in consequence of the transfer of the estate into its possession.

The facts about grant of the parawana of the 25th July 1858 and the ladawanama appear in their Lordships' judgment on this appeal; and are also stated in their judgments in *Omrao Begum* v. *The Nawab Nazim of Bengal* (1) and in *Omrao Begum* v. *The Government of India* (2).

Only Rs. 2,009 were paid in respect of the annunity. In April 1867 the Nawab Nazim sued the daughters of Mehdi Ali for the possession of Gopinathpur, for which he obtained a decree in the District Court affirmed on appeal by the High Court in April 1869. This was upheld by the Judicial Committee in 1875 in *Omrao Begum* v. *The Nawab Nazim of Bengal* (1) their Lordships holding that both parties, Mehdi Ali on the one part, and the Nawab Nazim on the other, were bound respectively by the ladawanama and the parwana, and that Mehdi Ali and his heirs were not released from the disclaimer of title by reason of the Nawab not having continued, after the first payment, to pay the monthly allowance according to the parwana.

Meanwhile, in 1870, these appellants instituted in the Court of the Subordinate Judge of Murshidabad a suit against the Nawab Nazim to recover, first their shares of estates, other than Gopinathpur, which had belonged to Amirannissa, which claim was decided against them; and, secondly, to obtain their shares of this same monthly allowance now in question. The latter was decreed in their favour in 1872 for their shares of the annuity that had fallen due within the previous three years, regard being had to limitation, the sum amounting to Rs. 18,900. An appeal from [587] this decree was dismissed by the High Court on the 1st December

(1) 24 W.R. 28. (2) 9 C. 704=10 I.A. 39.

1892 MARCH 11. — PRIVY COUNCIL. — 19 C. 584 (P.C.) = 19 I.A. 95 = 6 Sar. P.C.J. 192.

1873, and a few days before this dismissal, *viz.*, on the 24th November in the same year, Act XVII became law. The effect of the provisions of that Act appear in their Lordships' judgment on this appeal, and in their judgment in 1882 (1). The Commissioners, appointed under the Act, rejected a claim brought before them by the present appellants in respect of the annuity now claimed, and they certified by their award on the 10th May 1874, that all the properties of which the Nawab Nazim had taken possession, as heir of Amirannissa, including Gopinathpur, were held by the Government for the purpose of upholding the dignity of the Nawab Nazim for the time being. An application for the review of this decision as to Gopinathpur made after the judgment of their Lordships of the 7th May 1875, was rejected by the Commissioners. An application made to the Government on the 26th May 1876 for leave to execute the decree of 1872, and for leave to sue the Nawab Nazim for further maintenance was not granted. On the 26th May 1878 the District Judge dismissed a suit, brought by the present appellants against the Government of India and Amir Saheb (to whom the Nawab had purported to transfer Gopinathpur) for a declaration that their maintenance was a charge upon that estate. This decision was maintained by the High Court on the 26th April 1880, and by their Lordships on the 28th November 1882 in the judgment already referred to (1).

The District Judge dismissed the present suit as, in his opinion, the award of the Commissioners of the 10th May 1874 was a bar to it; and he was also of opinion that the Act operated to make the award an adjudication within the contemplation of s. 13 of the Code of Civil Procedure. Also that the Act had not been affected by the death of the Nawab Nazim Mansur Ali in 1885.

The High Court dismissed an appeal from the above, on the grounds that the plaintiffs had failed to prove that the estate of the Nawab had been so vested in the Secretary of State for India in Council that the latter had become responsible for the annuity. Also that, assuming this to have been proved, the suit was not maintainable under s. 11 of Act XVII of 1873, because [588] the consent of the Governor-General in Council to the commencement of the suit had not been obtained.

On this appeal.

Mr. *R. V. Doyne*, for the appellants, submitted that the 11th section of Act XVII of 1873 was not applicable after the death of the Nawab for whose relief the Act was passed; and the consent of the Government to the bringing the suit was unnecessary. The Act operated only during the lifetime of Mansur Ali. The plaintiffs' claim in regard to the annuity was, in effect, based on their right under the parwana given to their father in 1858, as to which the judgment of their Lordships in 1875 was that the ladawanama and his document amounted to a valid contract by which the Nawab and Mehdi Ali were respectively bound, the Nawab having executed the parwana on the faith of the disclaimer. The operation of the disclaimer had been enforced, and it remained that the corresponding liability should be established in favour of those from whom Gopinathpur had been taken.

As to the judgment of the High Court, that Court had erred in holding that the estate of the Nawab Nazim was not liable in the hands of the Government, as defendant, to satisfy the appellants' legal claims under the parwana of 1858, erring also in applying the 11th section of the Act

(1) 9 C. 704 = 10 I.A. 39.

1892 MARCH 11. — PRIVY COUNCIL. — 19 C. 584 (P.C.) = 19 I.A. 95 = 6 Sar. P.C.J. 192.

after the death of Mansur Ali. The grounds given in the judgment were no complete answer to the case made. The award of the Commissioners had not been restricted to its due effect. The question whether they had not exceeded their powers was before the Courts, and had not been correctly decided. The first Court upon this had held erroneously that the Commissioners did not act *ultra vires* in awarding that the plaintiffs had no right to the maintenance claimed. And the finding that Gopinathpur was held by the Government for the purposes of upholding the dignity of the Nawab Nazim did not govern the question whether the general liability to make good the annuity "out of the tehbil of the sirkari mehals" had not attached to the Nizamut estate in the hands of the Government. Their was error also in the Court's having maintained the proposition that the award of the Commissioners had effect, as if it had been a decree, to operate under the 13th section of the Code of [589] Civil Procedure. These views had caused the plaintiffs to lose the benefit of the decree obtained by them in 1870, and of the decision of their Lordships of the 7th May 1875, as to the reciprocal rights of the parties to the ladawanama and the parwana of 1858. The appellant's rights under the contract between the late Nawab Nazim and their father should have received effect. In reference to the operation of Act XVII in regard to process against the Nawab's person or property, reference was made to the *Nawab Nazim of Bengal* v. *Amrao Begum* (1), and to the cases mentioned above.

Mr. *W. F. Robinson*, Q.C., and Mr. *J. H. A. Branson* were called upon only in case they should desire the maintenance of the judgment of the High Court for the same reasons that had been assigned by that Court. They were not desirous of so limiting their grounds, and their argument was therefore not heard.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD MACNAGHTEN.—The appellants, who were plaintiffs in the suit, claim to be entitled to seven-eighths of a perpetual annuity of Rs. 600 a month, which was granted in 1858 to their father, Syed Mehdi Ali, by the late Nawab Nazim, Syed Mansur Ali. They now demand payment of the annuity with arrears from the Government of India on the ground that the Government hold property on which, as they allege, the annuity was and is charged.

If the claim were well founded the charge would apparently extend to all the immoveable property of the Nawab, or at least to all the immoveable property belonging to him which he had power to alienate. But for the purposes of this suit the plaintiffs limit their claim to pergunnah Gopinathpur. That purgunnah was the property of the Nawab in 1858, when the annuity was granted, and it is now held by the Government. The Government holds it "for the purpose of upholding the dignity of the Nawab Nazim for the time being" under the award of certain Commissioners appointed in pursuance of "the Nawab Nazim's Debts Act, 1873."

Although their Lordships propose to rest their judgment mainly upon another ground, it appears to them that the award under [590] which the Government holds the property would be an answer to the present demand, even if the plaintiffs' claim had been well founded originally.

(1) 21 W.R. 59.

1892 MARCH 11. — PRIVY COUNCIL. — 19 C. 584 (P.C.) = 19 I.A. 95 = 6 Sar. P.C J. 192.

It seems that the affairs of the Nawab had got into a state of hopeless confusion. He was involved in debts and liabilities which he could not meet. The Government intervened, laid hands on his property, and passed the Act of 1873 for his relief. All persons having claims against the Nawab or his property were required to notify them within a limited time to certain Commissioners appointed under the Act. Every debt or liability not so notified was to be barred. The Commissioners were empowered, "after due and full inquiry," to determine and certify "the amount which, on the consideration of all circumstances," they might "consider each claimant ought in fairness and justice to receive." On payment or tender by Government of the amount certified the debt or liability was to be extinguished. No suit was to be commenced or prosecuted, and no process was to be sued for against the person or property of the Nawab without the consent of the Government, and, lastly, the Commissioners were to ascertain what immoveable property was held by the Government for the purpose of upholding the dignity of the Nawab Nazim for the time being. They were to certify the particulars, and it was declared that "their finding thereon" should be "binding and conclusive on all persons whomsoever."

Complying with the exigency of the Act of 1873, the plaintiffs brought in their claim. The Commissioner rejected it altogether. They held that if there was a contract it was "not binding on the Nawab Nazim either for past years or for the future." They made an award finding that the acquisition by the Nawab of certain specified property including Gopinathpur was, to use their own words, "so to speak official, and that it became an appanage of the office and state of the Nawab Nazim." They held that he was incapable of alienating his interest in such property. And in the terms of the Act they declared that it was "held by the Government of India for the purpose of upholding the dignity of the Nawab Nazim for the time being."

Their Lordships understand that finding applied to Gopinathpur to be that Gopinathpur is held by the Government for the [591] purpose declared in the Act, freed and discharged from all claims and incumbrances including the alleged claim or incumbrance of the plaintiffs. Such a finding in their Lordships' opinion was within the competence of the Commissioners, and, if so, it was, in the words of the Act, "binding and conclusive on all persons whomsoever."

The learned counsel for the appellants commented severely upon the manner in which the Commissioners discharged their functions. He insisted that they had misunderstood or disregarded the opinion of this tribunal which certainly had held that the Nawab was bound by contract to pay the annuity in question to Syed Mehdi Ali. But their Lordships have no power to review the findings of the Commissioners, nor is it within their province to express any opinion upon their conduct. The Commissioners were invested with arbitrary powers. If they used those powers harshly, or otherwise than in accordance with the principles of fairness and justice, to which they were required by the Act to conform, the only remedy open to persons who might conceive themselves aggrieved was to appeal to Government. The Government had the power of removing the Commissioners or permitting recourse to be had to Courts of Justice.

The plaintiffs, it seems, did apply to the Government for leave to enforce a decree of the High Court for payment of arrears of their annuity. This application, however, was refused. Thus through the action of the Government the plaintiffs were deprived of legal rights which had been

recognized by this Board, and successfully vindicated in the highest Court in India, while at the same time the property renounced in consideration of those rights was placed for ever beyond their reach.

1892 MARCH 11.

PRIVY COUNCIL.

19 C. 584 (P.C.) = 19 I.A. 95 = 6 Sar. P.C.J. 192.

Passing from the consideration of the Act of 1873 and the findings of the Commissioners, their Lordships will now direct their attention to the terms of the contract which was made between the Nawab Nazim, and Syed Mehdi Ali, and which is the foundation of the plaintiffs' claim. In January 1858, Amirannissa, the widow of a former Nawab Nazim, died without issue. She was a lady of great wealth and the proprietor of Gopinathpur, which she had purchased in the name of Syed Mehdi Ali. On her death the Nawab claimed to succeed to all her property to the exclusion of her heirs, of whom Syed Mehdi Ali was one. Not [592] caring at the time to dispute the matter with the Nawab, Syed Mehdi Ali approached him with a petition, dated the 12th of February 1858, admitting in terms the Nawab's claims and soliciting from him an allowance for maintenance. Thereupon the Nawab passed the following order:—"Out of the properties, mehals and zemindaris of the Begum Sahiba, deceased, let a monthly allowance Rs. 600, besides the sum given in the report, be fixed for Syed Mehdi Ali, and nothing further shall be allowed to him by the Sirkar at any time or in any way."

Then after about a fortnight's interval, during which, no doubt, communications passed between the parties, Syed Mehdi Ali executed a ladawanama or agreement of disclaimer, dated the 24th of February 1858, in which in the most unqualified terms he renounced every claim and all pretension to the property of the late Begum. Thereupon the Nawab executed the following parwana:—"The late Nawab Amirannissa Begum, deceased, my grandmother, adopted you as her son, and maintained and supported you, and she died on the 21st January 1858. After the death of the deceased, you along with your children and dependents appeared before me and made application for support and maintenance from the Sirkar. Consequently, for the purpose of your support and maintenance, posterity after posterity, and generation after generation, the sum of Company's Rs. 600 per mensem, being the annual sum of Company's Rs. 7,200, will be paid to you out of the tehbil of the sirkari mehals. You and your heirs shall be supported and maintained one after another out of the said stipend. It is incumbent on you never to prove faithless to the Sirkar. And as for the expenditure of the 10 days of the Mohurrum connected with you, mehal Nimgram, lying in pargannah Bhalul, a mehal in the name of Zahura Begum, is granted by the Government." That document is dated the 25th of February 1858.

The learned counsel for the appellants contended that the four documents are parts of one transaction. That is prefectly clear. But it is equally clear that the first set, the two documents of the 12th of February, are introductory to the second set, the documents of the 24th and 25th of February which were intended to be the operative and governing instruments. Even if the matter rested on the order of the 12th February, their Lordships would [593] be prepared to hold that no charge was created on any part of the Nawab's property. It is not a legal charge. In equity no charge can be created unless there is an intent to charge. Taking all the documents together it is plain that no charge was contemplated by either party. The order of the 12th of February is, in their Lordships' opinion, nothing more than a mandate by the Nawab Nazim to his own officials for their convenience. The parwana of the 25th of February

1892 MARCH 11. — PRIVY COUNCIL. — 19 C. 584 (P.C.) = 19 I.A. 95 = 6 Sar. P.C.J. 192.

1858 does not even purport to charge any property. It simply says that the amount is to be paid out of the Nawab's State Treasury.

Upon these grounds, and especially upon the last, which goes to the very root of the matter, their Lordships hold that the appeal must fail. They express no opinion as to the particular ground on which the High Court rested their judgment. They would not have been prepared to have concurred in that view without further argument.

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed. But having regard to all the circumstances their Lordships do not think fit to make any order as to costs.

Appeal dismissed.

Solicitors for the appellants : Messrs. *Wrentmore* and *Swinhoe.*
Solicitor for the respondent : *The Solicitor, India Office.*

C. B.

---

19 C. 593.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

HALADHAR SAHA AND ANOTHER (*Defendants Nos.* 1 *and* 3) *v.* RHIDOY SUNDRI AND OTHERS (*Plaintiffs*).*
[3rd May, 1892.]

Bengal Tenancy Act (*VIII of* 1885), *s.* 188—*Joint landlords—Tenure, enhancement of rent of—Fractional co-sharers—Suit for enhancement of rent of a tenure by some only of several joint landlords.*

The provisions of s. 188 of the Bengal Tenancy Act apply to a suit by some only of several joint landlords to enhance the rent of a tenure, [594] whether such tenure was in existence at the date of the Permanent Settlement or not, and preclude such a suit being brought.

The plaintiffs, who were some only of the co-sharers in a zemindari, instituted a suit to enhance the rent of a tenure within the zemindari and to recover their share of the rent at the enhanced rate for a specified period. Of the tenure-holders, some were co-sharers of the plaintiffs in the zemindari and the remainder were not interested therein. It was admitted that the plaintiffs collected their share of the rent of the tenure separately from their co-sharers who were sharers in the tenure. The plaintiffs alleged that they had requested the latter to join them in instituting the suit, but that they had declined to do so, and they accordingly made them defendants in the suit.

Held, that the plaintiffs could not maintain the suit, having regard to the provisions of s. 188 of the Act.

The term "joint landlords" in that section must be taken as including all co-sharers under whom a tenant holds, whether such co-sharers collect their *quota* of rent from the tenants jointly or separately.

Prem Chand Nuskur v. *Mokshoda Debi* (1), *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2), *Beni Madhub Roy* v. *Jacd Ali Sircar* (3) referred to.

[R., 19 Ind. Cas. 776 (778) = 19 C.L.J. 324 ; D., 159 P.L.R. 1903.]

THIS was a suit brought by the plaintiffs, who were the owners of a 10 annas share in a zemindari, to enhance the rent payable by all the

---

* Appeal from Appellate Decree, No. 191 of 1891, against the decree of J. Douglas, Esq., District Judge of Tippera, dated the 29th December 1890, modifying the decree of Baboo Kali Prossonno Mukherjee, Subordinate Judge of that district, dated the 27th of September 1888.

(1) 14 C. 201. (2) 17 C. 695. (3) 17 C. 390.

defendants, 18 in number, who were talukdars holding a taluk within the zemindari, and to recover their share of the rent at the enhanced rate for the year 1295. The remaining 6 annas share in the zemindari belonged to the defendants Nos. 5 to 18, and the plaintiffs alleged that they had refused to join in instituting the suit, and consequently that they had made them defendants.

The suit was contested by defendants Nos. 1, 3 and 4 upon various grounds. They contended, *inter alia*, that the rent of the tenure was not liable to enhancement, and that the plaintiffs, being some only of the joint landlords, could not maintain the suit, having regard to the provisions of s. 188 of the Bengal Tenancy Act.

Seven issues were fixed for trial by the Court of first instance, but of these the only one material for the purpose of this report, having regard to the decision in this appeal, was that relating to the latter contention.

[595] It was not contested that the plaintiffs collected their share of the rent of the taluk separately from the defendants Nos. 5 to 18.

Both the lower Courts held that the rent was liable to enhancement, and gave the plaintiffs a decree. Upon the issue as to the right of the plaintiffs to maintain the suit, the material portion of the judgment of the Subordinate Judge was as follows :—

"Then the question arises whether the plaintiffs as owners of a portion of the zemindari are alone entitled to maintain this suit for enhancement of rent. With regard to this question it is necessary to be premised that the plaintiffs' co-sharers in the zemindari are the defendants Nos. 5 to 18, who are parties to this suit, and those defendants are also co-sharers in the taluk the rent of which is sought to be enhanced. The circumstances of this case are therefore peculiar, and I do not see how the plaintiffs' co-sharers could have joined as plaintiffs in this suit against themselves. It is also to be observed that the plaintiffs claim the enhancement of the rents of the whole taluk, and not merely of the portion payable for their own share, and as all the persons who are entitled to those rents are represented in this suit, I do not see why the suit should not be maintainable. Then it appears that the plaintiffs are the only persons who would be benefited by the enhancement of rent. For their co-sharers are also owners of the *taluk* in question, and so an enhancement of its rent would, instead of being profitable to them, be rather against their interests, because they would have to bear a portion of the enhanced rent, and to that extent their profits from the *taluk* would be diminished. There could, therefore, be hardly any probability of their joining the plaintiffs in this suit. The rent, if enhanced, would draw away a portion of the profits of the *taluk*; but when those profits come to the pocket of the co-sharers they would have no necessity to resort to any enhancement of the rent. The plaintiffs also state that they had invited their co-sharers to join in the suit, and in support of this allegation an affidavit has been filed by them. The co-sharers, however, have not joined in the suit. In this state of things, to hold that the plaintiffs' suit is not maintainable, would be against all justice and good sense, for in that case the plaintiffs would be for **[596]** ever deprived of their legitimate right of enhancing the rent of the *taluk* in question, though it may be liable to enhancement of rent.

"In the next place, considering the authorities bearing upon this point, I am clearly of opinion that a suit like this is not prohibited. In

1892 MAY 3. — APPELLATE CIVIL. — 19 C. 593.

the Full Bench ruling in the case of *Guni Mahomed* v. *Moran*(1) it was held that the rent law does not contemplate the enhancement of a part of an entire rent, such enhancement being inconsistent with the continuance of the lease of the entire tenure. The Chief Justice, by whom the Full Bench judgment was delivered, explains the meaning of the same in the judgment delivered by him in the case of *Chuni Singh* v. *Hera Mahto* (2), which was also decided by a Full Bench. From what we understand from the judgment in the latter case, it seems clear that when a tenure is held under several co-sharers, if some of the co-sharers refuse to join as plaintiffs in a suit for enhancement of its rent, the other co-sharers may institute such a suit for enhancing the rent of the whole tenure making the co-sharers, who do not join them, parties to the suit. That this was the meaning of the Full Bench decision in the case of *Chuni Singh* v. *Hera Mahto* (2) was held by the High Court in the case of *Bidhu Bhushun Basu* v. *Komaraddi Mundul* (3). Then we see from the ruling in *Bharrut Chunder Roy* v. *Kally Das Dey* (4) and *Jogendro Chunder Ghose* v. *Nobin Chunder Chottopadhya* (5) that the restriction placed upon a suit for enhancement of rent by some of the co-sharers is, that a suit for enhancing a share of the rent is not maintainable. The same question also came before the High Court in the case of *Kali Chandra Singh* v. *Rajkishore Bhuddro* (6), and from their Lordships' decision in it, we may draw the inference that a suit for enhancement, in which all the interested parties are joined, and in which enhancement is claimed of the rent of the entire tenure, is not unmaintainable. In this case the plaintiffs claim to enhance the rent of the entire *taluk*, and all the persons to whom the rent is payable have been parties to it, and from what we understand to be the law laid down **[597]** in the aforesaid precedents, I am clearly of opinion that such a suit is not untenable. Accordingly I hold that the present suit is maintainable.

"There is abundant evidence on the record to prove that the plaintiffs are in separate receipt of rent for their 10 annas share, and so if the rent of the *taluk* may be enhanced, they would be entitled to recover the same share of the enhanced rent.

"Section 188 of the Bengal Tenancy Act is relied upon as preventing a suit like this, but it has been already settled by authority that a suit for rent does not come within the scope of that section. *Prem Chand Nuskur* v. *Mokshoda Debi* (7).

"For all these reasons I find the second issue in favour of the plaintiffs."

The Subordinate Judge having found all the material issues in favour of the plaintiffs gave them a decree, but for an amount somewhat less than they claimed, as he held that the total rent of the taluk should be Rs. 1,083-12 and not Rs. 1,815-10-15 as claimed by them.

The defendants Nos. 1, 3 and 4 filed an appeal against this decree, and the plaintiffs lodged a cross-appeal against that portion of it which reduced the amount claimed by them. The lower appellate Court dismissed the defendants' appeal and decreed that of the plaintiffs, giving them a decree for the full amount claimed.

Upon the question of the applicability of s. 188 of the Bengal Tenancy Act to the case, the Officiating District Judge observed as follows :—

(1) 4 C. 96. (2) 7 C. 633. (3) 9 C. 864. (4) 5 C. 574.
(5) 8 C. 353. (6) 11 C. 615. (7) 14 C. 201.

"The next point urged is that all the joint-landlords should have come forward as plaintiffs to bring this suit. The defendants Nos. 5 to 18 are co-landlords as well as *talukdars*, in this land, and while defendants Nos. 5 to 16 possess, as *talukdars*, the same shares in the land as is possessed by them as co-landlords, it is different with defendants Nos. 17 and 18, whose interests as zemindars are greater than what they hold as *talukdars*. Although their interests be antagonistic to the present plaintiffs' interests as far **[598]** as an enhancement suit is concerned, yet all the *pro forma* defendants are co-landlords with the plaintiffs, and nothing can override s. 188 of the Bengal Tenancy Act whereby co-sharers cannot sue separately for enhancement of rent.—See *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (1), which settles this point. The rulings quoted in the lower Court's judgment have no application in the present case, and the existence of separate collections by various co-sharers does not mean that separate enhancement of rent suits are maintainable by such co-sharers. Therefore the present suit is not maintainable. The co-sharers should apply for a manager, if they wish to sue for enhancement of these rents.

"For the respondents, it is urged that defendants Nos. 5 to 18 are not such co-landlords as are contemplated by s. 188 of the Tenancy Act, which refers to landlords, pure and simple, so to speak, and not to those persons who hold the double character of landlord and tenant in the same land. Many rulings of the High Court have laid down that such landlords, possessing this double character must be made co-defendants along with the tenants whose rent it is sought to enhance. Accordingly it is natural to draw an inference from the procedure thus laid down that a landlord who has such double character is not a co-landlord in accordance with s. 188 of the Act. With regard to what was said for the appellants, under s. 93 of the Act, that the joint-landlords should first appoint a manager, the mere fact that the plaintiffs contemplated a suit for enhancement which was opposed by their co-sharers is not sufficient ground for holding that a dispute exists as to the management of the property.

"I do not consider that the contention as to this section being inapplicable to the present case of the plaintiffs and the *pro forma* defendants is a sound one, nor do I hold that s. 93 of the Act does not provide for a dispute between such joint-landlords with regard to the enhancement of the rent. The question, however, which is of importance in this case, is how far s. 188 and the ruling in *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (1) has any bearing on this point. This section now clearly refers to enhancement suits of a *raiyat's* rent by joint landlords; does it **[599]** also refer to enhancement suits by joint-landlords of the rents of a *taluk* or of any intermediate tenure-holding? In connection with this matter, it will be well to bear in mind the ruling of the High Court in *Prem Chand Nuskur* v. *Mokshoda Debi* (2), in which it was held that s. 188 of the Tenancy Act refers only to such matters as the landlord is under the Act authorized or required to do. Under ss. 28, 29 and 30, the landlord can sue to enhance a *raiyat's* rent only in accordance with the provisions of the Act; does the same principle apply to the rents of a *taluk* or such intermediate tenure?

"The Bengal Tenancy Act seemingly makes a great difference between the procedure to be adopted in enhancement suits of the *raiyat's* rent and the rents of *talukdars*. Besides ss. 28, 29 and 30, s. 147 of the Act is in

(1) 17 C. 695. (2) 14 C. 201.

1892 MAY 3. — APPELLATE CIVIL. — 19 C. 593.

favour of the *raiyat* only and not the *talukdar*. Then under s. 179 of the Act, a landlord may make any terms he pleases as regards enhancement with his subordinate tenure-holders; whereas under s. 29 if a landlord seeks to enhance his *raiyat's* rent under the terms of a contract, he is limited to an increase of 2 annas in the rupee. There is no such provision or section in the Act as to the enhancement of *taluka* rents like the procedure laid down in ss. 28, 29 and 30, which is the only authority now existing for the enhancement of a *raiyat's* rent; therefore landlords are not authorized by this Act to enhance the rents of their *talukdars*. This right to enhance, if it exists at all, is, by ss. 6 and 7 of the Act, allowed to exist from a time prior to the introduction of the Act, and is not created by the Act at all. It is clear, therefore, that the procedure for the enhancement of *taluka* rents is not regulated by the Act but by a variety of rulings of the Court, which up to date have not been interfered with by statutory law; while the landlord's right to enhance is regulated by the contracts and conditions under which the *taluk* is held.

"Before the passing of the Tenancy Act, the method and procedure as to the enhancement of all rents, *raiyati* and *taluka*, and the equities of the same were set forth in the Full Bench ruling in *Chuni Singh* v. *Hera Mahto* (1), under which if a co-proprietor **[600]** declined to join in bringing a suit as plaintiff, he was to be joined as a co-defendant (see paragraph 2, page 638 of that volume), and this was the law then generally applicable in all cases. The Bengal Tenancy Act has since that time made an exception in favour of the *raiyats*, and has laid down a special procedure in ss. 28, 29 and 30, while it has left untouched that part of the Full Bench ruling which applies to the enhancement of *talukdari* rents. I therefore hold that s. 188 of the Tenancy Act read with the ruling in *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2), does not apply to a suit for the enhancement of a *taluk's* rent, and therefore this suit is maintainable in its present form. I accordingly decide this point against the appellants."

Defendants Nos. 1 and 3 now appealed to the High Court.

Mr. *Jackson*, Baboo *Srinath Dass*, and Baboo *Tara Kisore Chowdhry*, for the appellants.

Mr. *Evans*, Dr. *Troylukyanath Mitter*, Baboo *Harendro Nath Mukerjee*, and Baboo *Gobindo Chunder Dass*, for the respondents.

The following authorities were cited during the course of the arguments (the nature of which is sufficiently stated in the judgment of the High Court), upon the question of the right of the plaintiffs as some only of the joint-owners of the zemindari to institute the suit:—

Prem Chand Nuskur v. *Mokshoda Debi* (3), *Moheeb Ali* v. *Ameer Rai* (4), *Beni Madhab Roy* v. *Jaod Ali Sircar* (5), *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2), *Chuni Singh* v. *Hera Mahto* (1), *Hurronath Roy* v. *Gobind Chunder Dutt* (6), *Bunchanund* v. *Hurgopal Bhadery* (7), *Bamasoondery Dassyah* v. *Radhika Chowdhrain* (8).

It was also contended at the hearing of the appeal that the tenure was not liable to enhancement at all, and that even if it were, the lower Courts had assessed the rent upon an erroneous principle, and authorities were referred to upon these points. The **[601]** judgment of the High Court, however, proceeded upon the applicability of s. 188 of the Act, and

(1) 7 C. 633. (2) 17 C. 695. (3) 14 C. 201.
(4) 17 C. 538. (5) 17 C. 390. (6) 2 I.A. 193=15 B.L.R. 120.
(7) 1 Sel. Rep., 145=6 I.D. (O.S.) 142. (8) 13 M.I.A. 248.

1892 MAY 3. — APPELLATE CIVIL. — 19 C. 593.

renders it unnecessary for the purpose of this report to refer to this branch of the case.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

The plaintiffs in this suit are the 10 annas co-sharers of a certain zemindari mehal, No. 6490 of the Mymensingh Collectorate towjee. That mehal appears to have formed a portion of a larger estate which was brought to sale for arrears of revenue and purchased by Government in the year 1833. During the time the estate was in the khas possession of Government, the mehal in question was detached from the larger estate and formed into a separate estate, and in 1863 it was sold to the present plaintiffs and others.

The mehal appears to comprise, and indeed to consist of, an under-tenure or dependent taluk which is held by the defendants, some of whom are also co-sharers in the zemindari mehal. This taluk is said to have existed before the Permanent Settlement; it was certainly in existence at the time the Government purchased the zemindari in 1833, and it was settled on several occasions at varying rents during the time the zemindari was in the khas possession of Government. After the purchase of the zemindari by the plaintiffs and others, an attempt was made to eject the talukdars, but that attempt was unsuccessful, and it seems to have been then decided [*Hurgobind Doss* v. *Kalachund Sahaye* (1)] that the tenure was a permanent one. Later on an attempt was made to enhance the rent of the tenure, but through some informality that attempt also failed. The result is that the taluk is still being held at the same rent at which it was last settled by Government in 1854, and the purchasers of the zemindari have as yet derived no benefit whatever from their purchase in 1863.

The plaintiffs accordingly brought the present suit to have an enhanced rent assessed upon the taluk, and inasmuch as the other 6 annas co-sharers refused to join them as plaintiffs, being themselves also co-sharers in the taluk, they made them party defendants in the cause. It is admitted that the plaintiffs collect their share of the rent separately.

[602] Both the lower Courts have found that whether the taluk existed before the Permanent Settlement or not, the rent is liable to be enhanced, and both Courts accordingly decreed the plaintiffs' suit—the lower appellate Court fixing the assessment at the full rate claimed in the suit. In second appeal Mr. Jackson has questioned both the correctness of the finding that the rent was liable to be enhanced and the principles upon which the assessment has been made by the lower appellate Court. We do not think the appeal ought to succeed on either of these grounds, but it is unnecessary to consider them at length, because we think there is another ground of appeal which is fatal to the present suit.

That ground is that, having regard to the provisions of s. 188 of the Bengal Tenancy Act, the plaintiffs as being some only of the joint landlords are not entitled to maintain this suit.

Both the lower Courts have decided this question in favour of the plaintiffs, the lower appellate Court being of opinion that s. 188 is not applicable to a suit for the enhancement of the rent of a tenure. The District Judge relies on the decision in *Prem Chand Nuskur* v. *Mokshoda*

(1) 2 Wyman, Part II, p. 29.

1892 MAY 3. — APPELLATE CIVIL. — 19 C. 593.

Debi (1), and attempts to distinguish the present case from that of *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2).

Mr. Jackson in this appeal relies upon the latter case and upon the Full Bench decision in *Beni Madhub Roy* v. *Jaod Ali Sircar* (3).

We are of opinion that the provisions of s. 188 must apply to the present case, unless it can be shown either (i) that the plaintiffs and their co-sharers are not "joint-landlords" within the meaning of that section, or (ii) that the bringing of a suit to enhance the rent is not a thing which the landlord is authorised to do by virtue of the Act.

The term "joint-landlords" is not defined in the Act. It was suggested by Mr. Evans upon the analogy of s. 61 of the Act that the term might be equivalent to "co-sharers to whom the rent is payable jointly," and that it does not include a co-sharer who is in separate collection of his share of the rent. Mr. Evans **[603]** argued that under the Act when rent is payable to co-sharers jointly, such co-sharers are bound to give a joint receipt, but that no co-sharer who was in separate receipt of his share of the rent would be bound to join in such joint receipt. And it was suggested that such a co-sharer is not therefore a joint landlord within the meaning of s. 188. We are unable to accept this argument. A "landlord" is defined in the Act as "a person immediately under whom a tenant holds," and if a tenant holds under two or more co-sharers, those co-sharers must be joint landlords whether the rent is payable to them jointly or separately. We see no sufficient reason to hold that the expression "joint landlord" in s. 188 is equivalent to the expression "co-sharers to whom the rent is paid jointly" in s. 61. To do so would be to hold that a co-sharer who collects his rents separately has all the powers of a sole landlord under the Act, and to defeat the very purpose for which s. 188 would seem to have been enacted. We think that the term "joint landlords" must be held to include all the co-sharers immediately under whom the tenant holds, whether such co-sharers receive their *quota* of rent from the tenant jointly or separately.

In the case of *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2) it was held, upon the construction of ss. 28 and 30 of the Act, that the bringing of a suit to enhance the rent of an occupancy raiyat was a thing which the landlord was authorised to do by virtue of the Act and by virtue of the Act alone. The learned District Judge has attempted to distinguish between a suit to enhance the rent of an occupancy raiyat and a suit to enhance the rent of a tenure-holder. Mr. Evans has endeavoured to support this distinction. It is contended that a right to enhance rents subject to certain limitations is a right conferred on the zemindar under the terms of the Permanent Settlement, and that all that the Tenancy Act does is to impose certain limitations upon that general right—*Bunchanund* v. *Hurgopal Bhadery* (4), *Hurronath Roy* v. *Gobind Chunder Dutt* (5), *Bamasoondery Dassyah* v. *Radhika Chowdhrain* (6).

[604] The sections of the Act that deal with the enhancement of the rent of tenures are ss. 6, 7, 8, and 9. Section 6 deals with tenures that have been held from the time of the Permanent Settlement, and it declares that the rent of such tenures shall not be liable to enhancement except on proof of one or other of two things—either "(*a*) that the landlord under whom it is held is entitled to enhance the rent thereof either by local custom or by the conditions under which the tenure is held, or

(1) 14 C. 201. (2) 17 C. 695. (3) 17 C. 390.
(4) 1 Sel. Rep. 145 = 6 I.D. (O.S.) 142.
(5) 2 I.A. 193 = 15 B.L.R. 120. (6) 13 M.I.A. 248.

1892 MAY 3. — APPELLATE CIVIL. — 19 C. 593.

(*b*) that the tenure-holder, by receiving reductions of his rent, otherwise than on account of a diminution of the area of the tenure, has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it."

The first Court found that the tenure in question in the present case was not in existence at the time of the Permanent Settlement. The lower appellate Court thought it unnecessary to come to a finding upon this point inasmuch as it was proved that under the conditions of the tenancy the tenure was liable to enhancement. We think that, having regard to the settlement proceeding of 1854, the previous litigation between the parties and the manner in which the tenure has been dealt with, there can really be very little doubt that the tenure was in existence at the time of the Permanent Settlement. We think it unnecessary, however, to remand the case for a finding upon this point. It is only material as regards our present argument so far that if the tenure in question is one of the character referred to in s. 6, its rent can only be enhanced upon proof of something referred to in that section; that is, as we understand it, in a suit brought under the Act.

But even supposing that the tenure does not date from the Permanent Settlement, we think that under the terms of ss. 7—9 the rent could only be enhanced either by amicable agreement or by a suit brought under the Act. Section 7 deals with the limits up to which the Court may decree enhancement of the rent, s. 8 gives the Court power to order gradual enhancement and s. 9 provides that the Court shall not again enhance the rent within fifteen years from the last enhancement. We think that, having regard to these sections, and more specially s. 7, it is only by virtue of the provisions of this Act that the land-**[605]** lord can sue for enhancement of the rent of a tenure. From the plaint we think it is quite clear that the plaintiffs themselves thought they were suing under the Tenancy Act. That being so, we think that the plaintiffs in bringing the present suit intended to take the benefit of the Act and accordingly under the Full Bench decision *Beni Madhub Roy* v. *Jaod Ali Sircar* (1) they were bound to act in concert with their co-sharers.

For these reasons we think that this appeal must be allowed and the plaintiffs' suit dismissed; but as we entertain no doubt of the correctness of the finding that the rent is liable to enhancement, and are of opinion that the conduct of the defendants is vexatious, we refuse to allow them any costs.

H. T. H. *Appeal allowed.*

(1) 17 C. 390.

1892
AUG. 16.
—
REFERENCE FROM THE SPECIAL COURT OF LOWER BURMA.
—
19 C. 605.

19 C. 605.

REFERENCE FROM THE SPECIAL COURT OF LOWER BURMA.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

YEO SWEE CHOON *alias* BAH U *v.* THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, RANGOON, AND OTHERS.* [16th August, 1892.]

Insolvent Act (XI and XII. Vic., c. 21), s. 50—Lower Burma Courts Act (XI of 1889), ss. 50 & 69, cls. (b) and (c)—Criminal case—Reference to the High Court.

A petition presented to the Special Court under s. 50, cl. (5) of the Lower Burma Courts Act, by a person considering himself aggrieved by an order of the Recorder sitting as Insolvency Commissioner made under s. 50 of the Insolvent Act, comes before the Special Court as a criminal case, and is therefore to be dealt with, in case of difference of opinion between the members of the Special Court, under s. 69, cl. (c) of the Lower Burma Courts Act.

The punishment which can be awarded under s. 50 of the Insolvent Act is a punishment for something which the person to be punished has [606] done, and is not inflicted in order to compel him to do something in the future and the case in which it is inflicted is therefore a criminal case.

Rash Behari Roy v. *Bhugwan Chunder Roy* (1) followed.

[R., L.B.R. (1893—1900) 141.]

ONE Yeo Swee Choon, otherwise called Bah U, by an order dated the 16th March 1892, of the Recorder of Rangoon sitting as Insolvency Commissioner, was sentenced to undergo rigorous imprisonment for two years for having committed offences under s. 50 of the Indian Insolvent Act (11 and 12 Vict., c. 21).

Bah U and one Lin Kin, his uncle, carried on business under the name and style of Tsang Choon & Company. On the 18th August 1891, they filed their petition under the Insolvent Act. The liabilities of the firm were large, and the assets consisted chiefly of debts. The personal discharge of the insolvents was opposed by several creditors, at whose instance they were charged with having been parties to a fraudulent mortgage made with intent to give undue preference to a creditor of the firm, and with having prepared a false special ledger purporting to contain an account of the transactions with another creditor.

From the order of the Insolvency Commissioner above mentioned, Bah U appealed to the Special Court, under s. 50, cl. (5) of the Lower Burma Courts Act (XI of 1889), upon the following, amongst other, grounds, *viz.*:—that there had been no sufficient specification of the matters charged against him; that the case of the appellant and of his partner, which were entirely different, had not been kept separate, nor any attempt made to consider what evidence there was upon which the appellant, apart from his partner Lin Kin, had been found guilty of any act punishable under s. 50 of the Insolvent Act; that the judgment and order of the Recorder were based upon a complete misconception of the meaning of s. 50; that there was no evidence to show that the appellant had taken any part in, or had any knowledge of, the partnership business; that the

*Civil Reference, No. 3 of 1892, made by W.F. Agnew, Esq., and E. M. H. Fulton, Esq., Judges of the Special Court of Lower Burma, dated the 9th of June 1892.

(1) 17 C. 209.

appellant was a small sharer, in the business and had implicitly trusted his uncle, the other insolvent, and was besides ignorant of the Chinese character in which the books were kept, and could not therefore have had any hand in preparing the balance sheet; that the appellant was not shewn to have been concerned in the alleged fraudulent [607] preference, and that the judgment was erroneous and against the weight of the evidence.

The members of the Special Court differed in opinion upon the facts, the Judicial Commissioner being of opinion that there was no evidence to show that Bah U was personally liable for any of the acts charged; the Recorder upon a review of the evidence being unable to come to a conclusion different to that come to by him when sitting as Commissioner.

The Special Court concurred in making the following reference to the High Court:—

"The facts of this case are that one Bah U, partner in the firm carrying on business under the style of Teang Choon & Company, was adjudicated an insolvent on his own petition on the 18th August 1891. On applying for his personal discharge he was opposed by various creditors, who alleged that he had been guilty of acts rendering him liable to punishment under s. 50 of the Insolvent Act. The Recorder held that some of the charges had been proved, and sentenced him to two years' imprisonment under that section. He appealed to the Special Court, and the Judicial Commissioner was of a different opinion, holding that the evidence was not sufficient. He also held that the appeal was a "criminal case" within the meaning of s. 69, cl. (*c*), of the Lower Burma Courts Act, 1889, and that the whole case could be referred to the High Court for a decision. The Recorder held that the appeal came under cl. (*b*) of s. 69 of the Act, and was not a criminal case, and that as there was no difference of opinion between him and the Judicial Commissioner on a question of law or of custom having the force of law, or as to the construction of any document, or the admissibility of any evidence, the Special Court had no power to make any reference to the the High Court.

"There being this difference of opinion between the Recorder and the Judicial Commissioner, as to whether an appeal from an order under s. 50 of the Insolvent Act, made by the Recorder sitting as Commissioner in Insolvency, is a civil appeal or is a criminal case, they refer the following questions for the decision of the High Court:—

"(i) Whether a petition presented under s. 50, cl. (5) of the Lower Burma Courts Act, to the Special Court by a person [608] considering himself aggrieved by an order of the Recorder, sitting as Insolvency Commissioner, under s. 50 of the Insolvent Act, comes before the Special Court 'by way of appeal not being a criminal case,' and is therefore to be dealt with in case of difference of opinion between the members of the Court, under cl. (*b*) of s. 69 of the Lower Burma Courts Act, or is a criminal case and to be dealt with under cl. (*c*) of the section.

"(ii) If such petition is a criminal case, whether the Recorder's order is right.

Sir *Griffith Evans*, for the insolvent, cited the following cases:—*Rash Behari Roy* v. *Bhugwan Chunder Roy* (1); *The Queen* v. *The Justices of the Central Criminal Court* (2); *Jarmain* v. *Charterton* (3); *O'Shea*

(1) 17 C. 209. (2) L. R. 18 Q. B. D. 314. (3) L. R. 20 Ch. D. 493.

1892 AUG. 16.

REFERENCE FROM THE SPECIAL COURT OF LOWER BURMA.

19 C. 605.

v. *O'Shea and Parnell* (1); *In re Ashwin* (2); *In re Freston* (3); *Marris* v. *Ingram*(4); *Ex parte Marsden*(5).

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

PETHERAM, C. J.—In this case we think that the view taken by the Judicial Commissioner in the judgment given by him in the Special Court is right on both points. The first point which has been referred to us and upon which our opinion is required is, whether this matter is a criminal case within the meaning of s. 69 of the Lower Burma Courts Act. The learned Recorder thinks it is not a criminal case, but a civil one. The Judicial Commissioner thinks it is a criminal case, and, as I said just now, we agree with the Judicial Commissioner. The punishment which can be awarded under this section is a punishment for something which the person to be punished has done, and is not in any way an imprisonment to which he is subjected in order to compel him to do something in the future; and that brings the case within the definition of a criminal case which is to be found in the various cases which have been cited before us by Sir Griffith Evans, which were *O'Shea* v. *O'Shea and Parnell* (1), *In re Ashwin*(2), *In re Freston*(3), *Marris* v. *Ingram*(4), and *Ex parte Marsden*(5). These cases show, as one would expect they would show, that where **[609]** imprisonment is inflicted as a punishment for something done, the case in which it is inflicted is a criminal case. To hold anything else would be, in our opinion, to sacrifice the substance of the matter to a mere question of words; in other words, it would be to say that where a man is punished for an offence which he has committed it is to be taken as a civil matter when the Court which is authorised to inflict the punishment happens to be a Civil Court. That, as I said just now, would be to sacrifice the real intention of the legislature to a mere form of words. We think, therefore, that the view taken by the Judicial Commissioner on the first point is correct.

That being so, the whole matter is before us, and we have to consider whether the sentence which has been awarded in this case was right. This case, to my mind, is identical in principle with the case of *Rash Behari Roy* v. *Bhugwan Chunder Roy* (6). In that case, at p. 220, I am reported to have said, "It seems to me to come to this, that this case shows as clearly as anything can show how necessary it is that a law of this kind, the intention of which is to punish people, should be administered as the criminal law is administered; that is to say, specific offences should be charged against people, not technically specific in the sense of a specific form of indictment, but that the Judge and the insolvent and everyone else should know what offence the man is being tried for, and that the evidence should be directed to the proof of that offence, so that the accused person may be in a position to produce the evidence, if he has got any, to rebut the charge of that offence, and that the Judge who has to try the case should specifically find what offence the insolvent has become guilty of, and in his judgment, and in his order, and in the warrant it should appear what the man has done." I think that these remarks are as applicable to the case which is before us now as they were applicable in that case, and I entirely adhere to-day to what I said then.

(1) L. R. 15 P. D. 59. (2) L. R. 25 Q. B. D. 271. (3) L.R. 11 Q.B.D. 545. (4) L. R. 13 Ch. D. 338. (5) L. R. 2 Ch. D. 786. (6) 17 C. 200.

1892
AUG. 16.

REFERENCE FROM THE SPECIAL COURT OF LOWER BURMA.

19 C. 605.

The case before us shows how necessary it is that in cases of this kind these precautions should be adopted. In the present case the offences recited in the warrant are not the same offences as those of which the Recorder in his judgment, when he was a member of the Special Court, came to the conclusion that this person was guilty. He finds a different state of things, and he comes to the conclusion that this person [610] was guilty of some other offence which is not any of those specifically mentioned in the warrant, as he does not now appear to think that he has been guilty of those offences. For the offence of which the learned Recorder would now convict him he has never been tried with any of the safeguards with which a criminal trial should be surrounded. There has never been anything like a charge formulated; there has never been anything like a finding of guilty of any particular offence, or of this person having been guilty of any series of acts which constiuted any particular offence. But what is said is, that his explanation of his conduct is so unsatisfactory that it is impossible to suppose that he was not aware how the business of the firm was being carried on, and upon that a sentence of two years' imprisonment has been passed, without its being found what the particular transaction of the firm is with which he is found to be so implicated as to be guilty of this offence. Under these circumstances we think that the learned Judicial Commissioner was right on both points; that a reference does lie to this Court upon the whole case; and that when the whole case comes to be looked into, it is apparent from the judgments themselves that this person has never been tried for the offence for which he has been punished in the sense in which a man has a right that his case should be tried before he is subjected to punishment. With these remarks the case will be sent back to the Special Court of Lower Burma.

Attorney for the Insolvent: Baboo *Sittanath Das.*

A. A. C.

---

19 C. 610.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

PANCHANAN BANERJI (*Plaintiff*) v. RAJ KUMAR GUHA (*Defendant*).* [11th July, 1892.]

Bengal Tenancy Act (*VIII of* 1885), *s* 188—*Joint proprietors—Arrangement with fractional co-sharer, effect of—Separate tenancy, creation of.*

Where a tenant has agreed to allow one of several co-sharer landlords to deal with him as if he were his own tenant, without any regard to the [611] interests of the other co-sharers, the effect is to create a separate tenancy under such fractional co-sharer, and s. 188 of the Bengal Tenancy Act is inapplicable to such a case.

Gopal Chunder Das v. *Umesh Narain Chowdhry* (1) distinguished.

[F., 2 C.L.J. 534 (536); 7 C.W.N. 93 (96); R., 7 C.W.N. 670 (677); 14 Ind. Cas. 738 (740) D., 25 C. 917 (920); 25 C. 917 (Note) = 1 C.W.N. 521.]

---

* Appeal from Appellate Decree No. 1241 of 1891, against the decree of A. H. Collins, Esq., District Judge of Jessore, dated the 13th of May 1891, modifying the decree of Babu Koylash Chunder Mukerjee, Subordinate Judge of Khulna, dated the 21st of January 1891.

(1) 17 C. 695.

1892
JULY 11.
APPELLATE CIVIL.
19 C. 610.

THE plaintiff, a fractional co-sharer in mehal Chuk Bansbaria, sued to recover the sum of Rs. 1,029-7-12 gundas from the defendant, an *osut talukdar*, being the arrears of rent in respect of a 14 annas 8 pie share of the *osut taluk* from 1292 to 1295 B.S. The defendant's predecessors in title, from whom the defendant purchased in 1288 executed in favour of the plaintiff a registered kabuliyat in Choitro 1286 in respect of 661 bighas $3\frac{3}{4}$ cottahs. Against them the plaintiff obtained a rent decree, in course of execution whereof a solehnama or compromise was entered into on the 17th April 1886 (5th Bysack 1292) between the plaintiff and the defendant, under which solehnama the defendant paid the existing arrears of rent and agreed to pay rent thereafter, upon measurement being made, at the rate of Re.1 per bigha, for the lands found to be comprised in his tenure. The plaintiff measured the lands in Choitro 1294, when the area of the defendant's land was found to be 711 bighas 4 cottahs. The present suit was brought to recover rent for the above area at the rate of Re. 1 per bigha.

The kabuliyat of Choitro 1286 recognised in express terms the right of the plaintiff to deal with the tenants of the *osut taluk* in respect of his 14 annas 8 pie share, or 661 bighas $3\frac{3}{4}$ cottahs, without reference to the rights of the other co-sharer landlords.

The defendant contended that the plaintiff, being a fractional co-sharer, could not measure the land or institute a suit to enhance the rent; that he was not bound by his predecessor's kabuliyat of 1286, and was entitled to repudiate the solehnama. He further denied the accuracy of the plaintiff's measurement.

Upon the issue being raised whether the plaintiff, being a fractional co-sharer, was entitled to measure the defendant's land and sue for rent upon the increased area, the Court of first instance held that the defendant was bound by his own voluntary act and solehnama, and also by his predecessor's kabuliyat, and disallowed **[612]** the objection, holding that the decision in *Gopal Chander Das* v. *Umesh Narain Chowdhry* (1) was inapplicable to the case. The Court further held that it would be inequitable to bind the defendant by an *ex-parte* measurement, and found the quantity of assessable land to be 679 bighas. Deducting certain payments admitted to have been made by the defendent, the Court decreed the plaintiff's claim to the extent of Rs. 867-$4\frac{1}{2}$ annas.

The defendant appealed. Upon the issue above mentioned, the lower appellate Court observed as follows :—

"It is urged in appeal that the plaintiff, being a fractional co-sharer, cannot maintain the suit for additional rent for excess land, and the ruling of *Gopal Chunder Das* v. *Umesh Narain Chowdry* (1) is relied upon. The lower Court has disallowed the plea on the grounds that the plaintiff collects his rent separately, and that the defendant, having agreed in the solehnama to pay the additional rent after measurement cannot be now allowed to repudiate his agreement. I am of opinion that the lower Court is wrong in the view taken by it. The defendant undoubtedly agreed to pay the additional rent, but that does not validate the suit. The ruling above quoted is based on the principle that where there are several co-sharers in an estate no one of them can effect any change in the area or rental or conditions of any tenancy held under them. If this suit is allowed, the effect will be that the original tenancy of the defendant will be altered, and the area of that tenancy will

(1) 17 C. 695.

1892 JULY 11. APPELLATE CIVIL. 19 C. 610.

be altered by the act of a fractional co-sharer behind the back of the other co-proprietors. It is distinctly laid down in the ruling above quoted that the right of the several co-sharers to realize their rent separately stands on quite a separate footing, and that such an arrangement gives rise to no change in the tenancy or in the area of the tenure, but is merely an arrangement by which rent can be conveniently paid. I am of opinion, therefore, that the suit for additional rent cannot be maintained by the plaintiff. I do not think that the agreement in the solehnama can give the plaintiff a right which the law says he has not got. If hereafter the suit is properly brought, it will be a matter for consideration whether the defendant will be bound by the solehnama. The plaintiff has **[613]** also under s. 188 of the Tenancy Act no right as co-sharer to cause the tenure to be measured. As the tenure has been measured by the Court at the instance of the plaintiff in this suit, and as the measurement before made by plaintiff himself was not acted on, it appears that the remarks of the lower Court do not apply. It is distinctly laid down in *Moheeb Ali* v. *Ameer Rai* (1) that fractional co-sharers cannot measure or proceed under s. 158 or s. 90 of the Tenancy Act. I think, therefore, that the plaintiff's suit must fail for the above reasons so far as he has claimed additional rent."

Upon the view taken by him of this issue, the learned District Judge considered it unnecessary to decide the other issues in the case, and gave the plaintiff a decree for Rs. 580-4, being the rent due upon the previous area for the year 1295.

From this decision the plaintiff appealed to the High Court.

Dr. *Troylukhyanath Mitter* and Baboo *Lal Behari Mitter*, appeared for the appellant.

Baboo *Jogesh Chunder Roy* appeared for the Respondent.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

JUDGMENT.

We think the District Judge has committed an error in holding on the strength of the decision cited by him *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2) that this suit is not maintainable. The present case is, we think, clearly distinguishable from that case. It is based on a kabuliyat executed by the defendant, and looking at that document as a whole, the effect of it clearly was to create a separate tenancy under the plaintiff. The kabuliyat sets out the total area of the land, the area which proportionately would belong to the plaintiff; and the defendant stipulates to pay the plaintiff rent for that area. It gives the plaintiff a right to measure the land, and the defendant undertakes to pay increased rent for any increase that may be found over the area for which rent is paid, and he is entitled to a deduction for any diminution in the area. It is quite obvious that in the case of *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2) there was no such agreement. In that case there was a mere undertaking **[614]** by the tenant to pay to each of the landlords their proportionate share of the rent, and it was held that the effect of that arrangement was not to split up the tenancy, or create a separate tenancy under each of the landlords. Here the tenant, by his own act, has given the plaintiff the power to deal with him as if he was his tenant alone, without any regard to the interests of the co-sharers, and should the defendant be

(1) 17 C. 538. (2) 17 C. 695.

1891
JULY 11.

APPELLATE CIVIL.

19 C. 610.

subjected to separate suits, at the instance of the co-sharers, either with reference to enhanced rent or measurement, he has no reason to complain.

The District Judge has dismissed the case, but the ground on which he has done so does not dispose of the questions which were raised. We think it is necessary here to notice one of them, and that is the solehnamah, which the defendant executed some few years after the kabuliyat, in execution of a decree on which the tenure had been attached. That solenamah states the rent to be less than that specified in the kabuliyat; but it contains an agreement by which, on the measurement of the tenure, the defendant would be liable to pay a higher rent for any increase, with effect from the year 1291, than he would be liable to under the agreement. Now, the plaintiff did not set up this solehnamah. He rested his case, as set out in the plaint, entirely on the kabuliyat. The plaint makes no reference to the solehnamah. The defendant set up the solehnamah, and contended that he was only bound to pay as rent the amount therein specified. What he wishes to do is to take advantage of the solehnamah as regards the amount of rent payable, repudiating the terms which would make him under certain circumstances liable to pay a higher rent than he would be required to pay under the kabuliyat. It is quite clear that he cannot be permitted to set up a case like that. The solehnamah must be taken as a whole or not at all. In our opinion the objection which the defendant took, that the document was inadmissible, must prevail.

The case must go back to the District Judge to be decided according to the claim as set out in the plaint, *viz.*, with reference to the rent specified in the kabuliyat, to the area as found on measurement, and to the amount of rent which may be due in accordance with its terms.

A. A. C. *Case remanded.*

---

19 C. 615.

[615] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

LALESSOR BABUI AND OTHERS (*Plaintiffs*) *v.* JANKI BIBI (*Defendant*).* [18th November, 1891.]

Claims for possession and mesne profits—Distinct claims—Separate suits—Joinder of causes of action—Civil Procedure Code (Act XIV of 1882), ss. 43, 44.

Claims for the recovery of possession of immoveable property and for mesne profits are distinct claims, and separate suits will lie in respect of each claim.

Section 44 of the Code of Civil Procedure merely *permits* the joinder in one suit of a claim for recovery of immoveable property with one for mesne profits in regard to the same property.

Kishori Lal Roy v. *Sharut Chunder Mozumdar* (1), *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (2), and *Madan Mohun Lal* v. *Lala Sheosanker Sahai* (3), referred to. *Venkoba* v. *Subbanna* (4) dissented from.

[**Diss.**, 4 L B.R. 56 (58); **N F.**, 9 O.C. 224 (226-B); **F.**, 1 L.B.R. 13 (14); 31 M. 405 = 4 M.L.T. 192; **Cited.** 30 A. 225 = 5 A.L J. 192 = A.W.N. (1908) 96; 78 P.R. 1902 = 137 P L.R 1902; **R.**, 17 A 533 (534); 32 M 330 = 2 Ind. Cas. 3 3 = 5 M. L.T. 105; 3 Bur. L.T. 56 = 8 Ind Cas. 445; 9 O C. 322 (323); U.B.R. (1904) 1st Qr. Civil Procedure, 42 (43); **D.**, 34 C. 223 = 5 C.L.J. 192.]

---

* Appeal from Appellate Decree No. 1503 of 1890, against the decree of A. C. Brett, Esq., Judge of Tirhut, dated the 24th of July 1890, modifying the decree of Baboo Matadin, Subordinate Judge of that district, dated the 31st December 1888.

(1) 8 C. 593 = 10 C.L.R. 359.
(2) 17 C. 968.
(3) 12 C. 482.
(4) 11 M. 151.

THIS was a suit for mesne profits. On the 13th September 1887 (13th Assin 1295) the plaintiffs instituted a suit for the recovery of possession of certain immoveable property, but did not join with it a claim for mesne profits, and on the 25th May 1888 obtained a decree for possession. They did not execute their decree or obtain possession, but fearing lest a portion of their claim for mesne profits would be barred by limitation, on the 26th June 1888 they instituted the present suit for mesne profits for the years 1292 to 1295 Fusli (1884—88) inclusive.

1891 NOV. 18. APPELLATE CIVIL. 19 C. 615.

The Sub-Judge decreed the suit, but on appeal the District Judge, relying upon the authority of the cases of *Venkoba* v. *Subbanna* (1) and *Lalji Mal* v. *Hulasi* (2), dismissed the claim for mesne profits for the years 1292, 1293 and 1294, the period prior to the institution of the suit for the recovery of possession, on the ground that it was barred by s. 43 of the Civil Procedure Code.

[616] The plaintiffs appealed to the High Court.

Baboo *Abinash Chunder Banerjee*, for the appellants.

Mr. *C. Gregory* and Baboo *Jogesh Chunder Dey*, for the respondent.

The judgment of the Court (PRINSEP and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

The plaintiffs obtained a decree for possession of certain immoveable property on the 25th May 1888. They have not yet executed that decree or taken possession, but fearing that a portion of their claim for mesne profits would become barred, they on the 26th June 1888 brought this suit for mesne profits for the years 1292 to 1295 Fusli.

The District Judge has dismissed the claim for mesne profits for the period antecedent to the date of the institution of the suit for recovery of possession, and has, in this respect, modified the decree of the Court of first instance in favour of the plaintiffs. He relies upon the cases of *Venkoba* v. *Subbanna* (1) and *Lalji Mal* v. *Hulasi* (2) for holding that a portion of the claim for mesne profits is barred by the operation of s. 43 of the Civil Procedure Code.

The question raised before us, therefore, is whether a person suing for recovery of immoveable property and entitled at that time, if he succeeds in that suit, to mesne profits, is bound to include that claim in his suit; or, in other words, whether, if he should fail to include such claim for mesne profits in that suit, he is barred from claiming them thereafter.

We cannot find that the rule adopted by the learned District Judge is in accordance with the practice of the Courts in Bengal, or has been adopted in any reported decision. It is unnecessary to refer to the decisions of this Court before 1882, because in that year a Full Bench of this Court in the case of *Kishori Lal Roy* v. *Sharut Chunder Mozumdar* (3) declared the law in this respect prevailing in Bengal. The learned Chief Justice expresses himself in these terms :—"Having regard both to the practice of the Courts and to the language of the Legislature, it seems to me [617] that in this country the policy of the law has always been to allow a plaintiff to enforce a claim for possession of land and for mesne profits, either in one suit or two, as he might think proper ; but at the same time to induce him, if there is no reason to the contrary, to dispose of his

(1) 11 M. 151. (2) 3 A. 660. (3) 8 C. 593=10 C.L.R. 359.

1891 Nov. 18. — APPELLATE CIVIL. — 19 C. 615.

whole claim in one suit only." The latest case on the subject is *Mon Mohun Sircar* v. *The Secretary of State for India in Council* (1), in which the same principle is adopted. In the view that we take of ss. 43 and 44 of the Code of Civil Procedure, claims to recover possession of immoveable property and for mesne profits are distinct claims, and there has been no alteration of the law in this respect between s. 10, Act VIII of 1859, and the present Code, although, no doubt, the terms of the law of 1859 were more precise. The cause of action and the nature of the suit in each case are altogether different. Section 44, as we read it, merely permits joinder in one suit of a claim for recovery of immoveable property with one for mesne profits in regard to the same property. The case of *Lalji Mal* v. *Hulasi* (2) is not in point. We are unable to accept the view laid down in the case of *Venkoba* v. *Subbanna* (3). As we understand the facts on which the judgment of their Lordships in the Privy Council in the case of *Madan Mohun Lal* v. *Lala Sheosanker Sahai* (4) is based, and, which are more fully set out in the judgment of this Court then under appeal [see *Sheo Shunkur Sahoy* v. *Hridoy Narain* (5)] they do not support the conclusion arrived at by the Madras Court. We, therefore, set aside the judgment of the District Judge modifying that of the Subordinate Judge, and restore the decree of the first Court in its entirety. The appellants will receive costs in this Court and the lower appellate Court.

C. D. A. *Appeal allowed.*

Editor's note.—The same point arose in appeal from Appellate Decree No. 319 of 1891, heard and decided by PRINSEP and HILL, JJ., on the 24th March 1892. Their Lordships followed the above ruling.

---

19 C. 618 (P.C.)=19 I. A. 75=6 Sar. P.C.J. 189.

[618] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, Hannen and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

SARODA PROSUNNO PAL AND ANOTHER (*Plaintiffs*) *v.* SHAM LAL PAL AND ANOTHER (*Defendants*).
[12h February and 5th March, 1892.]

Evidence of title– Commission of partition.

Under a Commission of partition issued by the Supreme Court, land in Calcutta was apportioned among the members of a family, and the allotments were confirmed by a final decree in 1825.

In this suit, brought in 1884, the plaintiff claimed, through one of the family, a parcel of land, by reference to one of the allotments so made. The defence, which was made by setting up a title through the widow of him who received the allotment, was not proved; but the correctness of the area allotted was also in dispute, and the Appellate Court excluded part from the decree, made by the first Court for the whole.

It appeared to the Judicial Committee that there was no ground for assuming that the members of the family, who were parties to the partition suit, were under any mistake as to the family property, or that there was any error, or

---

(1) 17 C. 968. (2) 3 A. 660. (3) 11 M. 151.
(4) 12 C. 482. (5) 9 C. 143.

want of due care, on the part of the Commissioners of partition, whose proceedings had been regular: nor had there been an adverse claim to any part of the allotted land. The first Court's decree was restored.

1892
MARCH 5.

PRIVY COUNCIL.

19 C. 618 (P.C.)= 19 I.A. 75= 6 Sar. P.C.J. 189.

APPEAL from a decree (16th August 1888), of the High Court, in part reversing a decree (26th March 1888) of the Court in its original jurisdiction.

In this suit, brought in 1884, the late plaintiff, Raichurn Pal, whose executors were the present appellants, sued for possession of four bighas thirteen cottahs of land in Calcutta, to which he was entitled through his nephew Khetter Chunder Pal, deceased in 1837. Piarimoni, widow of the latter, had been entitled to the land for her widow's estate during the years intervening from the death of her husband till she died in 1884. Through her the defendants claimed, alleging a mortgage made by her in 1867, followed by a decree, and a judicial sale to them, whereby afterwards, according to them, the land became vested in the second [619] defendant, as benamidar for his father, the first defendant, and they also alleged a purchase by her of part out of her own money.

The plot had been apportioned to Khetter Chunder, who was grandson of Raghoo Nath Pal, deceased in 1819, the estate of the latter having been allotted in shares to his descendants by a commission of partition in the Supreme Court, confirmed by a final decree in 1825, the parties taking undisturbed possession, each of his allotment. The defence was not established. The area of the plot that was, or should have been, allotted to Khetter Chunder on the partition, was, however, disputed, with the result that, in the original jurisdiction, TREVELYAN, J., decreed the whole plot claimed: but the appellate Court's judgment, delivered by WILSON, J. (PETHERAM, C.J., and TOTTENHAM, J., concurring) reduced the area decreed by 1 bigha 4 cottahs.

On this appeal Mr. *J. D. Mayne* appeared for the appellants.

The respondents did not appear. Their Lordships' judgment was delivered by:—

JUDGMENT.

SIR R. COUCH.—On the 25th September 1822 a suit was brought in the Supreme Court at Calcutta on the Equity side by Issar Chunder Pal, one of the sons of Roghoo Nath Pal, deceased, and Khetter Chunder Pal, son and heir of Tarachand Pal, deceased, another son of Roghoo Nath, against the other members of their family, which was an undivided Hindu family, to have the will of Roghoo Nath established and the provisions thereof carried into effect, and to have a partition of the immoveable estate of Roghoo Nath, subject to the provisions of his will. On the 22nd April 1823, by an order of the Supreme Court, Commissioners were appointed to make the partition, with power to examine the parties and their witnesses on oath, and to compel the production of documents. On the 28th June 1825 the Commissioners made their report, and thereby certified that they had allotted to Khetter Chunder Pal, with other property, a portion of tenanted ground in Deehee Entally, called Sontose's garden, containing by admeasurement about four bighas and thirteen cottahs, and included within the boundary line coloured green in the map of the garden annexed to the report. The map is in existence. There is no doubt that Khetter Chunder's allotment, [620] as delineated on the map, does contain four bighas and thirteen cottahs. And there is no question as to the exact position and boundary line of that allotment.

1892 MARCH 5. — PRIVY COUNCIL. — 19 C. 618 (P.C.) = 19 I.A. 75 = 6 Sar. P.C.J. 189.

Khetter Chunder died intestate, and without issue in 1837, leaving Piarimoni Dossee his sole widow and heiress. Piarimoni died in 1884, and thereupon Raichurn Pal became the heir of Khetter Chunder, and entitled to his estate. In August 1885, Raichurn Pal brought a suit in the High Court, in its ordinary original civil jurisdiction, against the respondents for possession of four bighas thirteen cottahs of Sontose's garden, as having been allotted to Khetter Chunder by the decree in the partition suit. The plaint alleged that, from the time of the decree down to the time of his death, Khetter Chunder was in possession of the piece of land so allotted to him, and that after his death Piarimoni had possession for many years, and that the defendants were then in possession. Besides relying on a Hindu widow's power of alienation in case of necessity, the written statement of Sham Lal, the real defendant, denied that Roghoo Nath died possessed of the four bighas, thirteen cottahs, and alleged that within the land the subject-matter of the suit about one bigha of land described inaccurately in the conveyance and in a subsequent pottah thereof as sixteen cottahs, had been purchased by Piarimoni with her own moneys from one Sheik Budooroodin under a bill of sale dated the 25th December 1834, and never was part of the estate of Roghoo Nath. The main defence failed. But both Courts have dealt with a minor point suggested by Sham Lal. The learned Judges of the Court of appeal, differing from the Judge of first instance, have found or placed within Khetter Chunder's allotment Budooroodin's sixteen cottahs, now developed into one bigha four cottahs. In order to arrive at this result they assume a blunder on the part of the Partition Commissioners, and an adverse title to part of the allotment extinguished in 1834 by Piarimoni's purchase.

The defendant Sham Lal derived his title to the premises under a mortgage granted by Piarimoni to one Lokenath on the 7th August 1867. The mortgage deed is in English form. It contains two important recitals. In the first place it recites that Khetter Chunder "was in his lifetime and at the time of his [621] death seized and possessed," among other property, of the four bighas and 13 cottahs, formerly called Sontose's garden. That is the piece of land allotted to Khetter Chunder on the partition. Then it recites Budooroodin's conveyance of the 16 cottahs. They are described as "adjoining to the said piece or parcel of land measuring four bighas and 13 cottahs hereinbefore mentioned, and forming together one entire piece or parcel of land measuring five bighas and nine cottahs." The deed proceeds to convey to Lokenath by way of mortgage among other property "all that piece or parcel of land . . . measuring five bighas and nine chittacks or thereabouts," describing it by its abuttals. Now the first observation which arises in reference to this deed is this:—It is directly at variance with the allegations of the principal defendant in his written statement. The defendant alleges that the 16 cottahs conveyed to Piarimoni by Budooroodin were within the ambit of the four bighas and 13 cottahs allotted to Khetter Chunder. The mortgage deed shows that they were two distinct properties, adjoining but not intermixed. In the next place it is to be observed that in 1868, when Raichurn Pal brought a suit against Piarimoni and Lokenath to impeach Piarimoni's dealings with her husband's estate, Lokenath put in a defence on oath, in which he stated that from the title-deeds in his possession he believed that the four bighas and thirteen cottahs, with certain house property, did belong to Khetter Chunder in his lifetime, but he alleged that the rest of the property in the mortgage was held under a different title. He said he was not bound to disclose his title to it, and therefore he objected to produce the mortgage deed. He

1892 MARCH 5. — PRIVY COUNCIL. — 19 C. 618 (P.C.) = 19 I.A. 75 = 6 Sar. P.C.J. 189.

added that on the occasion of the mortgage the title to the property was investigated by his attorney. Nothing could show more plainly that the theory on which the judgment under appeal proceeds had not been invented in the year 1868.

Lokenath, suing on his mortgage, obtained a decree for sale in default of payment of the amount due. The land in mortgage was sold under the decree on the 19th February 1870. It was brought by one Modoosoodun Dutt. On the 1st December 1877 Modoosoodun Dutt became insolvent. His property was put up for sale in lots by the Official Assignee. At the auction the defendant Sham Lal in the name of his son, the co-defendant, [622] bought Lot 2. Lot 2 was conveyed to him by deed dated the 4th August 1880. On examining this deed it seems clear that Lot 2 is the piece of land allotted to Khetter Chunder Pal on the partition, diminished slightly in extent by some encroachments which are noted by Mr. Cantwell, who surveyed the property on behalf of the plaintiff in 1888. Lot 2 is described as "containing by estimation four bighas and three chittacks, and thirteen square feet, more or less." The record is silent as to the other lots, among which Budooroodin's sixteen cottahs, if they exist, might not improbably be found. But it would, in their Lordships' opinion, be an unprofitable task to enquire what has become of these sixteen cottahs, and what is their precise situation. The plaintiff does not claim them. The defendant Sham Lal has not connected himself with them by any document of title or anything that can be described as evidence.

Under these circumstances, Mr. Justice Trevelyan, who heard the case in the first instance, was "satisfied that the land in dispute belonged—the whole of it—to Khetter Chunder Pal," and he made a decree to the effect that possession of the premises should be delivered to the plaintiff.

The defendant Sham Lal appealed to the High Court in its appellate jurisdiction. The learned Judges who heard the appeal have modified the decree of the lower Court by excluding from it one bigha and four cottahs, as representing Budooroodin's sixteen cottahs, measured off in a position determined apparently by mere guesswork.

Their Lordships are of opinion that there is no ground for assuming that the members of Roghoo Nath's family, who were parties to the suit for partition, were under any mistake as to the property which belonged to their father, or that there was any error or want of due care on the part of the Commissioners (whose proceedings appear to their Lordships to have been perfectly regular), or that there was ever any adverse claim to any part of the land allotted to Khetter Chunder Pal.

Their Lordships think the title of the plaintiff to the land claimed in the plaint was proved, and they will humbly advise Her Majesty to affirm the decree of Mr. Justice Trevelyan, to [623] reverse the decree of the appellate Court, and to order the appeal to it to be dismissed with costs. The respondent, Sham Lal Pal, will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Wrentmore & Swinhoe.*

C. B.

1892
AUG. 1.

FULL
BENCH.

19 C. 623
(F.B.).

19 C. 623 (F.B.)

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Trevelyan, Mr. Justice Ghose, and Mr. Justice Ameer Ali.

MAKHAN LAL PAL (*Plaintiff*) *v.* BUNKU BEHARI GHOSE AND ANOTHER (*Defendants*).* [1st August, 1892.]

Transfer of Property Act (*IV of* 1882), *s.* 54, *para.* 3—*Transfer of Property Act Amendment Act* (*III of* 1885), *s.* 3—*Immoveable property of value less than one hundred rupees, transfer of—Suit by purchaser for possession when vendor is out of possession.*

The transfer by sale of tangible immoveable property of a value less than one hundred rupees can be effected only by one of the two modes mentioned in s. 54, paragraph 3 of the Transfer of Property Act, *viz.*, by a registered instrument or by delivery of possession.

Khatu Bibi v. *Madhuram Barsick* (1) overruled.

[**Appr.**, 4 N.L.R. 90 (93); **R.**, 22 C. 179 (182); U.B.R. (1897–1901), Vol. II, 573 (574); **D.**, 32 M. 532 = 4 Ind. Cas. 1039 = 6 M.L.T. 175.]

THIS case was referred to a Full Bench by PRINSEP and BANERJEE, JJ. The facts sufficiently appear from the following order of reference:—

"The plaintiff sues to recover certain land in the possession of defendant No. 1. It has been found that defendant No. 1 conveyed to defendant No. 2 by an unregistered instrument; that defendant No. 2 conveyed to the plaintiff by a registered instrument, and that defendant No. 1 has, notwithstanding this transaction, remained in possession.

[624] "The District Judge has dismissed the suit, holding that the conveyance to the defendant No. 2, notwithstanding that it was for immoveable property of less than Rs. 100 in value, being unregistered and not accompanied by delivery of possession, is invalid.

"This is opposed to the case of *Khatu Bibi* v. *Madhuram Barsick* (1), and as we have doubt as to the correctness of the law there laid down, we refer to a Full Bench the following question:—

"(i) Can the transfer by sale of tangible immoveable property of a value less than one hundred rupees be effected only by one of the two modes mentioned in s. 54, paragraph 3 of the Transfer of Property Act, *viz.*, by a registered instrument or by delivery of possession? and

(ii) Does a conveyance of such property, not by registered document or by delivery of possession, confer any title on the vendee so as to entitle him to transfer it to a third person?"

Baboo *Karuna Sindhu Mukerji*, appeared for the appellant.

Baboo *Saroda Churn Mitter*, appeared for the respondents.

Baboo *Karuna Sindhu Mukerji.*—Section 54, paragraph 3, of the Transfer of Property Act, is not exhaustive or imperative [*Khatu Bibi* v. *Madhuram Barsick* (1)]; and the omission of the word 'only' which occurs in the preceding paragraph is significant. The remarks of GARTH, C.J., in *Narain Chunder Chuckerbutty* v. *Dataram Roy* (2) are *obiter*. The amending Act (III of 1885) provided that this section should be read

---

* Appeal from Appellate Decree No. 842 of 1891, against the decree of F. W. Badcock, Esq., District Judge of Burdwan, dated the 17th March 1891, affirming the decree of Babu Monmoth Nath Chatterji, First Munsif of Katwa, dated the 6th February 1890.

(1) 16 C. 622.

(2) 8 C. 597 (612).

as supplemental to the Indian Registration Act (III of 1877). [Sections 59, 107, and 123 of the Transfer of Property Act, and ss. 48, 49, and 50 of the Registration Act, were also referred to.] The plaintiff can enforce the contract of sale, using the unregistered deed as evidence, *Monomothonath Dey* v. *Sree Nath Ghose* (1); *Luchmeeput Singh Doogur* v. *Mirza Khyrat Ali* (2). A reasonable construction should be placed on the Act, and the defendant should not be allowed to avail himself of the non-registration of the document.

[625] Babu *Saroda Churn Mitter.*—I submit the view of the sections taken by GARTH, C. J., in *Narain Chunder Chuckerbutty* v. *Dataram Roy* (3) is the correct one, and the case of *Khatu Bibi* v. *Madhuram Barsick* (4) should be overruled.

OPINION.

The opinion of the Full Bench (PETHERAM, C.J., PRINSEP, TREVELYAN, GHOSE, AND AMEER ALI, JJ.) was delivered by

PRINSEP, J.—This reference to a Full Bench has been made by me, sitting with Mr. Justice Banerjee, because we had reason to doubt the correctness of the opinion expressed in *Khatu Bibi* v. *Madhuram Barsick* (4), decided by Mr. Justice Trevelyan and myself. The first question referred, and this is the only question which it is necessary for us to answer, having regard to the opinion at which we have arrived, is:—Can the transfer by sale of tangible immoveable property of a value less than Rs. 100 be effected only by one of the two modes mentioned in s. 54, paragraph 3, of the Transfer of Property Act, *i.e.*, either by a registered instrument or by delivery of possession, and in no other way?

In the case of *Khatu Bibi* v. *Madhuram Barsick* (4) it was held that a transfer by sale of tangible immoveable property of a value less than Rs. 100 could be effected by an unregistered instrument not accompanied by delivery of possession. The judgment proceeded on the terms of paragraph 3, s. 54, of the Transfer of Property Act, which, it was held, was not exhaustive, and did not alter the previously existing law expressed in ss. 17 and 49 of the Registration Act, under which transfers of property of such value could be effected by unregistered instruments, registration not being compulsory. Some weight was also given to what has now turned out to be a misapprehension of the law in consequence of the enactment of Act III of 1885. That Act consists of only a few sections, s. 3 of which is alone applicable to the matter now before us, and that section, read by itself, conveys no definite meaning, and, even when applied to the Transfer of Property Act, is expressed in terms which are not easily intelligible. That **[626]** provision of the law, it may be observed, was not cited to the referring Bench in the course of the argument by the pleaders in the case, and was overlooked by Mr. Justice Banerjee and myself. We endeavoured to reconcile the terms of the Transfer of Property Act and the Registration Act, and were of opinion that the mode suggested by us afforded the only possible means of reconciliation.

Having had the question re-argued and having regard to the terms of the Act of 1885, we do not think there is any conflict between the two Acts. The intention of the Act of 1885, no doubt, was to clear away a difficulty which had arisen and which was referred to in the course of the

(1) 20 W. R. 107.
(2) 12 W. R. (F.B.), 11.
(3) 8 C. 597 (612).
(4) 16 C. 622.

1892 AUG. 1. — FULL BENCH. — 19 C. 623 (F B.).

decision of the Full Bench in *Narain Chunder Chuckerbutty* v. *Dataram Roy* (1).

It declares that s. 54 of the Transfer of Property Act shall be read as supplemental to the Registration Act (III of 1877). Its effect therefore is to make s. 54, paragraph 3, absolute, in so far as it prescribes that a transfer of ownership by sale of tangible immoveable properties of a value less than Rs. 100 can be made only by a registered instrument or by delivery of the property, and that, if made otherwise, as in the case now before us, by an unregistered instrument unaccompanied by possession, the transfer or sale is inoperative and so it confers no title on the vendee.

The plaintiff, in the case before us, states that defendant No. 1, as the proprietor of some land of a value less than Rs. 100, sold it by an unregistered instrument to defendant No. 2 without delivery of possession, and that he purchased from defendant No. 2 by a registered instrument. He now sues to recover possession from defendant No. 1, the vendor of his vendor, who, notwithstanding that he has sold by an unregistered instrument and obtained the purchase-money, still holds possession. The plaintiff's title to sue, therefore, depends upon that of his vendor; and his vendor having, under the law as above expressed, an invalid title, would be unable to enforce that title in a suit of ejectment. The case is, no doubt, one of some hardship, because defendant No. 1, who has obtained the value of the land sold, is thus able to obstruct **[627]** the possession of his vendee. We think, however, that the plaintiff has placed himself in such a position that the Court can afford him no relief in this suit, as it is now before us in second appeal. In his petition of appeal he merely contends that his conveyance is a valid instrument, and that on it he is entitled to be put in possession. The case, moreover, was tried in both the lower Courts on issues directed solely to this purpose. It is impossible at this stage of the case to change the nature of the suit. The answer to the first question put must, therefore, be in the affirmative. It is unnecessary to answer the second question. The appeal must be dismissed with costs.

A. A. C.

---

19 C. 627.

APPELLATE CRIMINAL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

JUKNI *alias* PARBATI *v.* QUEEN-EMPRESS. *
[7th June, 1892.]

Bigamy—Sagai or nikka marriage—Relinquishment of wife—Penal Code, s. 494.

A conviction under s. 494 of the Indian Penal Code cannot be supported where there is evidence to show that, by the custom of the caste, *sagai* or *nikka* marriage was admissible and that the husband had relinquished his wife.

In re Mussamut Chamia (2) followed.

IN this case the appellant, Jukni *alias* Parbati, was charged with the offence of having married again during the lifetime of her husband, under s. 494 of the Penal Code.

* Criminal Appeal No. 457 of 1892, against the order passed by H. Beveridge, Esq., Sessions Judge of Murshidabad, dated the 10th of May 1892.

(1) 8 C. 597. (2) 7 C.L.R. 354.

1892 JUNE 7. — APPELLATE CRIMINAL. — 19 C. 627.

The case for the prosecution was that Jukni was the duly married wife of one Matilal Saha, that she lived with him for several years, and that in February 1892 she went through a form of marriage with one Dukhu Sal a while her marriage with Matilal was subsisting.

[628] The defence was that although Jukni was married to Matilal Saha, yet he (Matilal) having relinquished her, she was entitled to marry another person in accordance with the custom of the caste to which they both belonged.

Both the assessors, who aided the Judge in trying the case, found Jukni not guilty of the offence, one of them being of opinion that Matilal Saha had relinquished her and the other that the custom of *sagai* or *nikka* marriage prevailed in the caste.

The Judge held that Matilal Saha had not relinquished Jukni, and convicted her of an offence under s. 494 of the Penal Code, and sentenced her to three months' rigorous imprisonment. Jukni appealed to the High Court.

Baboo *Joges Chunder Dey*, for the appellant.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown.

During the argument Mr. *Kilby* cited and relied on the case of *Reg v. Sambhu Raghu* (1) and referred to *In re Mussamut Chamia* (2).

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

This is an appeal from the decision of the Additional Sessions Judge of Murshidabad, convicting Jukni of an offence under s. 494 of the Indian Penal Code, and sentencing her to three months' rigorous imprisonment.

The case is hardly distinguishable in any point from the case of *In re Mussamut Chamia* (2). The defence in that case, as in this case, was, that by the custom of the caste *sagai* marriage or *nikka*, which generally means a second marriage, was admissible, and that the husband had relinquished the wife.

In this case the Judge was of opinion that the husband had not relinquished the wife. One assessor was of a different opinion, and the second assessor, without referring to the question of relinquishment at all, was of opinion that the custom of *nikka* marriages prevailed in the caste.

[629] We think there is a large mass of evidence, some of it unrebutted in any way, to show that such a custom does exist. We agree with the assessor who came to the conclusion that Matilal Saha had relinquished his wife. No doubt it has been pointed out to us by Mr. Kilby on behalf of the Crown that, according to a decision of the Bombay High Court, such a marriage would not be binding; but a second marriage has been for a long time recognized by this Court among certain classes of people in this country.

We think, therefore, that the decision of the Judge must be set aside, and, acquitting the accused, we direct her discharge.

A. F. M. A. R. *Conviction set aside.*

---

(1) 1 B. 347. (2) 7 C.L.R. 354.

1892
JUNE 2.

APPELLATE CIVIL.

19 C. 629.

19 C. 629.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

MAHABIR PERSHAD SINGH AND OTHERS (*Plaintiffs*) *v.* HURRIHUR PERSHAD NARAIN SINGH AND OTHERS (*Defendants*).* [2nd June, 1892.]

Limitation—Instrument, suit to set aside or declare the forgery of—Immoveable property, suit for possession of—Limitation Act (XV *of* 1877), *Sch.* 2, *arts.* 91, 92, 93, 144.

One *D* died in 1849, leaving an ikrarnamah or will. His widows entered into possession of his property, and the survivor died on the 23rd April 1886. The predecessors in estate of the plaintiffs brought a suit to set aside the ikrarnamah, which suit was dismissed in 1864, on the ground that they had no cause of action during the lifetime of the surviving widow. On the 29th June 1889 the plaintiffs, as the heirs of *D* after the death of the surviving widow, instituted a suit to recover possession of the property of *D* from the defendants' who claimed to have come into possession thereof under the ikrarnamah upon the death of the widow.

Held, that the suit was governed by the limitation of three years for a suit to set aside an instrument, and not by the general limitation prescribed for suits to recover immoveable property, as after the widow's death the [630] parties in possession were those claiming under the ikrarnamah, who could not be displaced except by setting it aside.

Raghubur Dyal Sahu v. *Bhikya Lal Misser* (1) approved. *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaoddhri* (2) and *Janki Kunwar* v. *Ajit Singh* (3) referred to.

[**Cited**, 56 P.R. 1894; **R.**, 24 B. 260 (284); 30 C. 990=7 C.W.N. 864; 31 C. 111 (119) =7 C.W.N. 688; 33 C. 257=1 C.L.J. 403=9 C.W.N. 636; 1 Bom. L R. 799; 11 C.P.L.R. 49 (51); 1 O.C. 178; **D.**, 23 C. 460 (469).]

THIS suit was brought by the plaintiffs as the descendants of one Durbijoy Singh by his first wife, Mussamut Sulagan Koer claiming to be the heirs of Durbijoy Singh, and as such entitled to recover possession of his properties with mesne profits. The principal defendants claimed to have been in possession of the properties as the agnates of Durbijoy Singh since the death of Mussamut Maheshwar Koer, his second wife, by virtue of an ikrarnamah or will executed by Durbijoy Singh on the 7th October 1847. The second party defendants claimed as purchasers from the principal defendants.

Durbijoy Singh was a member of a joint Hindu family, governed by the Mitakshara law, together with the predecessors of the principal defendants, but separated himself from them during his lifetime. At the date of his death in January 1849 Durbijoy left two widows, the elder of whom, Mussamut Sulagan, died in 1850, leaving three daughters, through whom the plaintiff claimed to inherit; the other widow, Mussamut Maheshwar, died childless on the 23rd April 1886.

The ikrarnamah executed by Durbijoy Singh was in the following terms:—" Whereas I have not got any sons from my first wife, Mussamut Sulagan Koer, therefore, with the advice of all I negotiated to marry Mussamut Maheshwar Koer, daughter of Baboo Lal Narain Singh, on condition that I should give mauza Roop Narainpur to Mussamut Sulagan Koer, my first wife, for her maintenance, to be held by her until her death, and also give her one separate house for her living and all other properties,

* Appeal from Original Decree No. 264 of 1890, against the decree of A. C. Brett, Esq, District Judge of Tirhoot, dated the 2nd of August 1890.

(1) 12 C. 69. (2) 13 C. 308=13 I.A. 84. (3) 15 C. 58=14 I.A. 148.

together with tents and goods to Mussamut Maheswar Koer. This negotiation was made with Baboo Tirloke Nath Singh, uncle of Mussamut Maheshwar Koer, and upon my agreeing to carry out the above contract, Mussamut Maheshwar was married to me. In accordance with the said agreement I gave mauza Roop Narainpur [631] and the western house to my first wife, Mussamut Sulagan Koer, and I kept my second wife, Mussamut Maheshwar Koer, with me in the eastern house. My second wife, Mussamut Maheshwar Koer, told me to execute a document according to the contract entered into by me. Therefore I execute this document to the effect that if God be pleased to favour me with a son, then he shall get all the properties, tents, camps, &c. If no son is born to me, then after my death Mussamut Sulagan Koer shall hold possession over Roop Narainpur during her lifetime, without having any power to alienate the same, and all my remaining shares and properties shall be taken possession of by my second wife, Mussamut Maheshwar Koer, but no one shall be competent to alienate the said properties; that if necessary she may give lease upon zurpeshgi; that after the death of my first and second wives these shares shall devolve upon my uncles, Baboo Juggernath Singh and Baboo Birj Behari Singh, and my cousins, Baboo Tirbeni Singh and Baboo Roghubuns Narain Singh; that I have already married my daughters and given *dan-dahez* (dowry), so that they have no right to my milkiut. He who does contrary to this deed will be considered a liar in Court. Therefore I write this Ikrar, so that it may be of use when required. Dated 13th Assin 1255 Fusli."

Upon the death of Durbijoy his widows came into possession of the property. Litigation was at that time pending between one Rungi Roy and Durbijoy, and in a proceeding to determine the right of representing Durbijoy, Mussamut Maheshwar propounded the ikrarnamah, but no decision was come to upon its validity. The descendants of Mussamut Sulagan then brought a suit to have the ikrarnamah set aside, making Mussamut Maheswar and the agnates defendants. That suit was dismissed on appeal by the High Court on the 17th December 1864, on the ground that the reversioners were not entitled to recover the property during the lifetime of the widow, that no waste was proved, and that the suit was not framed to obtain a declaration as to the validity of the ikrarnamah after the widow's death.

The present suit was instituted on the 29th June 1889, more than three years after the death of Mussamut Maheshwar. The lower Court held that there was only one issue upon the merits—the validity of the ikrarnamah; that arts. 91, 92, and 93 of the [632] Limitation Act applied; and upon the authority of *Raj Bahadoor Singh* v. *Achumbit Lal* (1), *Uma Sanker* v. *Kata Prasad* (2), and *Jagadamba Chaodrani* v. *Dakhina Mohan Roy Chaodhri* (3), dismissed the suit upon the ground of limitation, finding also upon the merits that the ikrarnamah was a genuine document, the effect of which was to vest the estates of Durbijoy in the defendant.

The plaintiffs appealed to the High Court.

Mr. *Woodroffe*, Baboo *Srinath Doss*, and Baboo *Saligram Singh*, appeared for the appellants.

The Advocate-General (Sir *Charles Paul*), Baboo *Prannath Pandit*, and Baboo *Jogender Chunder Ghose*, appeared for the respondents.

The arguments sufficiently appear from the judgment of the Court (PRINSEP and AMEER ALI, JJ.) which was as follows :—

(1) 6 I.A. 110=6 C.L.R. 12. (2) 6 A. 75. (3) 13 C. 308=13 I.A. 84.

1892
JUNE 2.
APPELLATE CIVIL.
19 C. 629.

JUDGMENT.

Durbijoy Singh was a member of a joint Hindu family under Mitakshara law with the predecessors of the first party defendants, but it was held by a competent Court that he had separated from them. He died in January 1849, leaving two widows, Sulagan and Maheshwar. Sulagan died in 1850 leaving daughters, and Maheshwar died childless in 1886. The plaintiffs are the natural heirs to Durbijoy, plaintiffs 1 and 2 being sons of daughters of Sulagan, and plaintiffs 3 and 4, sons of a son of a third daughter. As heirs to Durbijoy after the death of his last surviving widow, they sue to recover his estate, some of which has been alienated to the second party defendants.

The defendants rely on an ikrarnamah or will, alleged to have been executed by Durbijoy on the 13th Assin 1255 (7th October 1847), under which, in the event of his leaving no son, he gave Sulagan a life estate in a certain property, Roop Narainpur, and gave his other wife, Maheshwar, his remaining estate; all of which however, at her death was to go to his uncles and cousins and they also plead limitation as a bar to this suit.

The District Judge has dismissed the suit as barred by limitation, because it is a suit to set aside the ikrarnamah and [633] was not brought within three years from Maheshwar's death, and he has also found that the ikrarnamah is a genuine instrument. The plaintiffs have accordingly appealed.

The District Judge has relied on the judgment of their Lordships of the Privy Council in *Raj Bahadoor Singh* v. *Achumbit Lal* (1) and in *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (2) as explaining that case, and he has also quoted *Uma Shankar* v. *Kalka Prasad* (3).

It is contended for the appellants that the suit is to recover immoveable property by right of inheritance, and that to set aside the ikrarnamah is not the object of the suit, but one of the probable consequences. The matter is not free from considerable difficulty. The predecessors in estate of the plaintiffs sued to get this ikrarnamah set aside as not a genuine instrument, and that suit was dismissed in three Courts, not on the merits, but because it was premature. The High Court, on 17th December 1864, held that "the plaintiffs had no cause of action during the lifetime of the widow." The suit before us has been brought more than three years from the widow's death, and the question is whether it is governed by the limitation of three years for a suit to set aside an instrument, or by the general limitation prescribed for suits to recover immoveable property, that is, twelve years after the right accrued by the widow's death. There is no doubt that the widow Maheshwar set up the ikrarnamah. It was set up in Court in March or April 1849, and although the question of its genuineness was raised and evidence was taken, there was no finding delivered. The reason for this was that Maheshwar had an indisputable title to retain possession as the widow of Durbijoy, and therefore no immediate benefit would be derived by any one seeking to impugn the ikrarnamah; although it was set up, it was never acted upon by the widow in such a manner as to prejudice the rights of any reversionary heir until after her death; any alienation by her would necessarily be valid until that time, and this was declared by the order of the High Court of December 1864 in a suit brought for that purpose. Moreover, it was impossible to predict whether any person then claiming to be a reversionary heir would

(1) 6 I.A. 110=6 C.L.R. 12. (2) 13 C. 308=13 I.A. 84. (3) 6 A. 75.

[634] occupy that position at the widow's death. But after the widow's death, although the right of inheritance has become perfected, so that it can be practically enforced, the parties in possession are those who claim under the ikrarnamah, and these cannot be displaced except by setting it aside. We are inclined to take the view expressed by Field, J., in *Rughubar Dyal Sahu* v. *Bhikya Lal Misser* (1), which is practically that of their Lordships of the Privy Council in the latter case of *Jagadamba Chaodrhani* v. *Dakhina Mohun Roy Chaodhri* (2). The case of *Janki Kunwur* v. *Ajit Singh* (3) has been cited in this case by the learned counsel for both sides. It seems to us to be in favour of the defendant and to be in no way in conflict with the case last cited.

The plaintiffs were bound to challenge the ikrarnamah on the widow's death, when it was put into effect as against them in continuance of the title asserted by the widow. No doubt as Maheshwar had another and a complete and independent title as a Hindu widow as has already been intimated, the plaintiffs might not be prejudiced by the setting up of the ikrarnamah during her lifetime. But the ikrarnamah was set up by the defendants at her death, and unless plaintiffs can get rid of the title so derived, they cannot succeed. It therefore seems to us that this is the real object of the suit, and that the limitation applicable is three years from the widow's death. We arrive at this conclusion with some regret. The appeal must therefore be dismissed with costs.

A. A. C. *Appeal dismissed.*

---

19 C. 634.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

ABHAI CHURN JANA (*Plaintiff*) *v.* MANGAL JANA AND OTHERS (*Defendants*).*
[18th May, 1892.]

Hindu Law—Reunion—Succession.

Where there has been a reunion between persons expressly enumerated in the text of Brihashpati, *viz.*, father, brother, and paternal uncle, and [635] where their descendants continue to be members of the reunited Hindu family the law of inheritance applicable to the latter is the same as in the case of the death of any of those between whom the reunion took place.

Tara Chand Ghose v. *Pudum Lochun Ghose* (4), *Gopal Chunder Daghoria* v. *Kenaram Daghoria* (5) and *Ramhari Sarma* v. *Tirihuram Sarma* (6) referred to.

[R., 4 Ind. Cas. 1077=19 M.L.J. 723 (725); D., 33 C. 371=3 C.L.J. 98 (102)=10 C.W.N. 236.]

THE facts out of which this appeal arose were shortly these. Sutraghana Jana, Shiva Jana, Nakoari Jana, and Haru Jana, were four brothers; they were members of a joint Hindu family. Nakoari left a widow, Saki Dassi, and a son, Punchu Jana. Haru Jana died leaving a son, Mangal

---

* Appeal from Appellate Decree No. 87 of 1891, against the decree of Baboo Dwarka Nath Buttacharjee, Subordinate Judge of Midnapore, dated the 11th of September 1890, affirming the decree of Baboo Lali Koomar Bose, Munsif of Contai, dated the 15th of March 1890.

(1) 12 C. 69. (2) 13 C. 308=13 I.A. 84. (3) 15 C. 58=14. I.A. 148.
(4) 5 W. R. 249. (5) 7 W.R. 35. (6) 7 B.L.R. 336.

1892 MAY 16. — APPELLATE CIVIL. — 19 C. 634.

Jana, the defendant No. 1; and Sutraghana left a son, Abhai Churn, the plaintiff in this case. The present case had no concern with Shiva Jana's branch of the family. During the lifetime of the four brothers a separation took place between them, and this was followed by a reunion between Nakoari and Haru Jana. Upon Nakoari's death, his share of the family property devolved upon his son Panchu, and on the latter's death upon his mother, Saki Dassi. Haru was suceeded by his son, the defendant No.1, and he continued to be a member of the reunited family. This state of things lasted until Saki Dassi died, which event took place in the year 1295 B. S., and it was upon her (Saki Dassi's) death that the question arose who should succeed to the estate of Panchu Jana. The plaintiff as the cousin of Panchu Jana and standing in the same degree with Mangal Jana, the defendant No. 1, claimed a moiety of the estate; whereas Mangal Jana claimed the whole, upon the ground that,as a member of the reunited family, he was entitled to take precedence over the plaintiff, he being an unassociated member of the family.

The Munsif held that the defendant No. 1 was the preferential heir, and that the plaintiff was not entitled to succeed; and on the authority of *Kesabram Mahapattar* v. *Nandkishor Mahapattar* (1), and *Tara Chand Ghose* v. *Pudum Lochun Ghose* (2) dismissed the suit. The Subordinate Judge agreed in that decision, holding that he was bound to follow the principle enunciated in those cases. The plaintiff now appealed to the High Court.

[636] Baboo *Golap Chunder Sircar* appeared for the appellant.

Baboo *Debendronath Ghose* appeared for the respondent.

Baboo *Golap Chunder Sircar.*—In order that two persons may be called reunited, it is necessary that they should have been members of a joint family, that they should have received shares of the joint estate on a partition, and that they should have again through mutual affection united after having annulled the previous partition (Dayabhaga ch. XIII s. 1, paragraph 30). The reunion in this case took place between the father of the defendant and the deceased proprietor; therefore the defendant cannot claim preference on the ground of being reunited with the deceased proprietor: the preference can be claimed only by the actual party to the reunion, which the defendant was not; the privilege being personal and not heritable. Besides, even if the three brothers had continued joint and partition had taken place after their death between the three cousins, namely, the plaintiff, the defendant, and the deceased proprietor, and the latter two had lived together by forming a reunion between themselves, yet the defendant would not have been entitled to preference. For reunion, technically so called may be formed only between three sets of relations, namely, between father and son, between brothers, and between paternal uncle and paternal nephew, but between no other relations (Dayabhaga, ch. XI, s. 1, paragraph 30; ch. XI, s. 5, paragraphs 38-39; ch. XII, paragraphs 3-5: Mitakshara ch. II, s. 9, 1-3; Dayatattwa, p. 68; Dayakrama Sangraha pp. 80, 81). There could be no reunion between two first cousins, so as to entitle either of them to claim preference to a separated cousin. And what could not directly be done by them, cannot be done indirectly through a reunion between their fathers. There are several cases which seem to be against my contention, but the present question was not raised nor decided. The Bengal commentaries are clear on the point, and as cases of reunion are rare, it would not disturb many titles if

(1) 3 B. L. R. (A. C. J.) 7. (2) 5. W. R. 249.

the law as enunciated in the leading commentaries be followed, though a different view has been taken in some cases.

Baboo *Debendronath Ghose.*—In the Dayabhaga, the enumeration of persons who could re-unite is only illustrative and not [637] exhaustive. The text of Jimutavahana, "Father, son, brothers, paternal uncles and the rest, when re-united, are called re-united parceners," supports this view. Supposing that re-union could take place only among those enumerated, the heirs of those who were originally re-united are still to be regarded as re-united parceners, and when there is competition for the succession to the estate of a deceased relative among those who stand in an equal degree of relationship to him, those descended from a re-united parcener are to be preferred to those who are descended from an unassociated parcener. See *Jaudub Chunder Ghose* v. *Benodbehary Ghose* (1), *Kesabram Mahapattar* v. *Nandkishor Mahapattar* (2).

JUDGMENT.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was delivered by

GHOSE, J. (who, after setting out the facts as stated above, continued)—Both the Courts below have held, following certain decisions of this Court, that the defendant is entitled to the property in preference to the plaintiff, and they have accordingly dismissed the suit. The present appeal is by the plaintiff; and it has been contended by the learned vakeel for the appellant that upon a correct reading of the Hindu law as it obtains in Bengal, the plaintiff is entitled to share equally with the defendant the property left by Panchu Jana.

The argument on behalf of the plaintiff, if we have understood it correctly, is that, according to the Bengal school of law, as expounded by Jimutavahana, re-union can take place only between a person and his father, brother, or paternal uncle, and, therefore, although there was a re-union between Haru Jana and Nakoari Jana, still Mangal Jana and Panchu Jana could not be regarded as re-united parceners within the meaning of the Hindu law, so as to entitle Mangal Jana, upon Saki Dassi's death, to the estate of Panchu Jana, to the exclusion of the plaintiff.

What is re-union according to Hindu law is to be gathered from a text of Brihaspati, and it is this: "He who once separated dwells again through affection with his father, brother, or paternal uncle, is termed re-united." (See Colebrooke's Dayabhaga, ch. XI, s. I, verse 30.) The Dayabhaga in ch. XI, s. I, verse 30, after referring to the text of Brihashpati, [638] says as follows: "He thus shows that persons who by birth have common rights in the wealth acquired by the father and grandfather, as fathers (and sons), brothers, uncle (and nephew), are reunited when, after having made a partition, they live together, through mutual affection, as inhabitants of the same house, annulling the previous partition and stipulating that 'the property which is mine is thine, and that which is thine is mine'," and so on.

If reunion could take place between persons who by birth have common rights to the wealth acquired by the father and grandfather, it would seem that the mention of father, brothers, and uncles is but illustrative, and not exhaustive, and that seems to have been the view taken by the Mithila school, and by the Viramitrodaya, a book of authority in the Benares school; but, so far as the Dayabhaga is concerned, a book which

(1) 1 Hyde, 214. (2) 3 B. L. R. (A.C.J.) 7.

1892 MAY 18. — APPELLATE CIVIL. — 19 C. 634.

is of paramount authority in the Bengal school, it is laid down in ch. XII, verse 4, that "a special association among persons other than the relations here enumerated is not to be acknowledged as a reunion of parceners: for the enumeration would be unmeaning."

The enumeration is in the preceding verse 3, which gives the text of Brihashpati already referred to.

If we had to decide whether there could be a reunion between Panchu Jana and Mangal Jana, we should perhaps have to hold that there could be no such reunion according to the Bengal school of law; but that is not the question we have to consider in this case; for the reunion had taken place between persons who are expressly enumerated in the text of Brihashpati. The question we have to determine really is whether Mangal Jana and Panchu Jana having, since the death of their respective fathers, continued to live as members of the reunited family, the same rule of succession which applies in the case of persons expressly enumerated in the text of Brihashpati also applies to their descendants, supposing they continue to live as members of the reunited family.

In the Dayabhaga, ch. XI, s. I, verse 4, the author says: "In like manner, Yajnyawalcya says—'The wife and the daughters also with both parents, brothers likewise and their sons, gentiles, cognates, a pupil and a fellow-student: on failure of the first among these, the next in order is indeed heir to the [639] estate of one who departed for heaven, leaving no male issue. This rule extends to all persons and classes.' Thus affirming the right of the last mentioned on failure of the preceding, the sage propounds the succession of the widow in preference to all the other heirs."

The author, then, in ch. XI, s. V, verse 9, says that the brother of the whole blood has "the first title according to a text of Yajnyawalcya." That text (see verse 10, s. V, ch. XI, Colebrooke's Dayabhaga) is as follows:—"A reunited (brother) shall keep the share of his reunited (co-heir) who is deceased: or shall deliver it to a son (subsequently) born. But an uterine brother (shall thus retain or deliver the allotment) of his uterine relation." Verse 37 of the same chapter runs as follows:—"Accordingly, the plural number is employed in the term 'brothers, (s. I, verse 4) for the purpose of indicating the succession of all descriptions of them in the order here stated; else it would be unmeaning." Then comes verse 38. "The text 'a reunited (brother) shall keep the share of his reunited co-heir' (s. 10) is intended to provide a special rule governed by the circumstance of reunion after separation and applicable to the case where a number of claimants in an equal degree of affinity occurs." And in verse 39, the author says as follows:— "Hence, if there be competition between claimants of equal degree, whether brothers of the whole blood or brothers of the half blood, or sons of such brothers, or uncles or the like, the reunited parcener shall take the heritage: for the text does not specify the particular relation; and all (these relations) were premised in the preceding text (s. I, verse 4), and a question arises in regard to all of them. Therefore, the text must be considered as not relating exclusively to brothers."

The author in verse 37 evidently refers to s. I, verse 4; and in verses 38 and 39, when speaking of "the text," he means to refer to the text of Yajnyawalcya, which is that "a reunited (brother) shall keep the share of his reunited (co heir)." And when the author alludes to the "preceding text," he apparently means the text of Yajnyawalcya, as

recited in s. I, verse 4. It is to be observed that verse 39 speaks of competition between "brothers" "or sons of such brothers, or the uncles, or the like," and in each one of these cases the reunited parcener takes the [640] heritage. It seems to us upon a consideration of all these passages that, supposing that a reunion cannot take place between persons other than those expressly enumerated in the text of Brihashpati, if there has been a reunion between individuals so enumerated and their descendants continue to be members of the reunited family, the law of inheritance applicable to them is the same as in the case of the death of any of those between whom the reunion took place. And this was the view that was taken in the case of *Tara Chand Ghose* v. *Pudum Lochun Ghose* (1), where the law on the subject seems to have been fully considered. This case was apparently followed in *Gopal Chunder Daghoria* v. *Kenaram Daghoria* (2), and the same view seems to have been acted upon in the case of *Ramhiri Sarma* v. *Tritham Sarma* (3). There is also a case to the same effect to be found in Macnaghten's Hindoo Law, Vol. 2, decided by the Zillah Court of Hooghly in the year 1820.

We might here observe that there is a slight inaccuracy in the translation given by Colebrooke of the text of Yajnyawalcya as given in verse 10, s. V, ch. X1, of the Dayabhaga. The correct rendering is, we think, as follows:—"But one reunited shall keep the share of his reunited (co-heir)," and so on. With reference to this text the author of the Viramitrodaya at page 205 (Babu Golap Chunder Sarkar's translation), after alluding to the said text, observes as follows:—"The term 'but' shows that it forms an exception to what proceeds (*i. e.*, the text of Yajnyawalcya quoted in ch. XI, s. I, verse 4, laying down the order of succession to the estate of a sonless deceased person). Thus the meaning is that the estate of a reunited co-heir dying without a male issue shall be taken by a reunited co-heir alone, and not by the wife, and the like." If this opinion (as regards the law in the Benares school) be correct, there can be, we think, no doubt as to the meaning of the verses 38 and 39 of s. V, ch. XI, of the Dayabhaga, *viz.*, as we understand it, that the competition need not be a competition between those who are expressly mentiond in the text of Brihashpati, but that it extends to the case of their descendants, provided they continue to live together as members of the reunited family.

[641] We might add that it would be anomalous if the law of succession as between the descendants of reunited members be different from the law as between the reunited members themselves. If certain persons who are entitled to reunite come to a reunion, they form one joint Hindu family, and it would be only reasonable to suppose that the same law which regulates succession as between them, in the event of any one of them dying without issue, is also applicable to their descendants, if they continue to be members of the same joint Hindu family.

We might here observe that Sree Krishna Tarkalankar in his commentary on the Dayabhaga, ch. XI, s. VI, styled by Mr. Colebrooke as "recapitulation," recognizes the distinction between a reunited and disjoined coparcener as forming a ground of distinction in the heritable rights of brother's grandsons.

Upon these considerations we think that the Courts below have come to a right conclusion, the result being that this appeal will be dismissed with costs.

A. F. M. A. R. *Appeal dismissed.*

---

(1) 5 W. R. 249. (2) 7 W. R. 35. (3) 7 B.L.R. 336.

1891
APRIL 17.

APPELLATE CIVIL.

19 C. 641.

19 C. 641.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Beverley.

NORENDRO NATH ROY CHOWDHRY, MINOR, BY HIS GUARDIAN AND MOTHER HARI MONI DABI CHOWDHRANI (*Defendant No.* 1) *v.* SRINATH SANDEL, LUNATIC, BY HIS MANAGER UNDER THE COURT OF WARDS, SARAT CHUNDER ROY, AND ANOTHER (*Plaintiffs*), AND RAM GOPAL ROY CHOWDHRY AND OTHERS (*Defendants*).* [17th April, 1891.]

Bengal Tenancy Act (*VII of* 1885), *ss.* 102, 103, 106, 108—*Powers of Settlement Officers —Record of rights—Disputed lands —Appeal —Powers of supervision of High Court.*

A Settlement Officer has no power, under the provisions of the Bengal Tenancy Act, to entertain any dispute between the persons interested in neighbouring estates as to the title of any land.

[F., 19 C. 643 (645); R., 21 C. 378 (383).]

IN this case the plaintiffs objected to the entry in the survey papers of the Settlement Officer of Sankerpore estate of a certain piece of land under taraf No. 42, in mauza Fazelpore, on the ground that it was in their taraf No. 35 in the said mauza. The dispute was decided, under s. 106 of the Bengal Tenancy Act, by the [642] Settlement Officer, the result being that he found it to be *ijmali* or joint land appertaining to the above two tarafs, and to two others in the same mauza.

Against this decision both the defendant No. 1, the owner of taraf No. 42, and the plaintiffs appealed, and put forward their respective claims to the land.

The District Judge, being of opinion that the appellants had not made out a sufficient case for his interference, dismissed the appeal.

The defendant No. 1 appealed to the High Court.

Mr. *Evans* and Baboo *Surendro Nath Mutty Lal*, for the appellant.

Baboo *Hem Chunder Banerjee* and Baboo *Jasada Nundun Varamanick*, for the respondents.

The judgment of the Court (PIGOT and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

We think that the appeal must be allowed; that the proceedings are bad from the beginning; and in dealing with the matter we must make an order in the alternative, that is to say, that the powers which we exercise in respect of those proceedings must be exercised in the alternative. We first declare that, assuming the proceedings to be such as to give us under the law a jurisdiction in second appeal, we must declare that the appeal must succeed; and secondly, under the assumption that the proceedings were absolutely bad and void *ab initio*, we must set them aside under our powers of supervision, as made in error by an officer who had no power to entertain them or to do any judicial act in regard to them. The Settlement Officer, we are of opinion, had no power under

* Appeal from Appellate Decree No. 1050 of 1890, against the decree of J. B. Worgan, Esq., District Judge of Dinajpur, dated 23rd of May 1890, affirming the decree of Baboo Romesh Chunder Dass, Settlement Officer of Sankerpore Estate, dated the 6th of September 1889.

the Bengal Tenancy Act, to entertain at least any dispute between the persons interested in the zemindari of the so-called plaintiff, the estate under the Court of Wards, and the persons interested in the neighbouring estate as to the title to any land; and the dispute in this matter is distinctly put as one arising out of the improper inclusion within the land of the neighbouring zemindar represented by Hari Moni, of land which the plaintiff, the disqualified person whose estate is under the Court of Wards, alleges to be part of his estate. Now we express no opinion in this case as to whether, for the sake of convenience, a Settlement Officer may or may not record in his record of rights [643] his belief, whether expressed by a map or otherwise, as to the boundary of the estate upon which he was engaged under the order. In the present case, indeed, the officer may perhaps have been empowered under the rules issued under s. 189 to make a map of the district or estate *as a Settlement Officer*. Of that we know nothing; but we are clear that no challenge of the correctness of the expression of his opinion as to the boundary, supposing that he was entitled to make it, as to which we say nothing, could be used to found proceedings under ss. 106 and 108, as the matter of a dispute which could be judicially enquired into and determined under these sections of the Act. Were that so, it would lead to the formidable result that officers of the position who must needs be employed in the preparation of these records of right might perhaps find cast upon them the duty of inquiring into and deciding matters of disputed titles to land, of indefinite importance. Looking at the terms of ss. 102, 103 and 106, we think that there is no reason whatever for supposing that any such thing was contemplated by the legislature.

The whole of the proceedings therefore which now are before us on appeal or quasi-appeal from the date of the so-called plaint to the proceedings before the District Judge, initiated by the lunatic's next friend, are bad and must be all quashed as nought.

We think ourselves at liberty to add that we should regret greatly that any defective proceedings such as these should at all hamper or cast discredit on what, sitting here, we allow ourselves to say is greatly to be desired, *viz.*, the encouragement of a record of rights in all estates to which the Court of Wards' powers extend.

A. F. M. A. R. *Appeal allowed,*

---

19 C. 643.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

BIDHU MUKHI DABI AND ANOTHER (*Objectors*) *v.* BHUGWAN CHUNDER ROY CHOWDHRY AND OTHERS (*Plaintiffs*).*
[14th July, 1891.]

Bengal Tenancy Act (*VIII of* 1885), s. 103—*Record of rights—Dispute as to boundaries—Powers of an executive officer.*

An executive officer, acting under the provisions of s. 103 of the Bengal Tenancy Act, has no power to determine the boundaries between [644] conterminous

---

* Appeal from Appellate Decree, No. 681 of 1890, against the decree of T.D. Beighton Esq., District Judge of Dacca, dated the 29th of February 1890, reversing the decree of L. Hare, Esq. Collector of Dacca, dated the 15th of December 1888.

1891 JULY 14. APPELLATE CIVIL. 19 C. 643.

estates as to which a *bona fide* controversy exists between the owners of such estates.

Norendro Nath Roy Chowdhry v. Srinath Sandel (1) relied on.

[R., 21 C. 378 (383).]

THE plaintiffs, Bhagwan Chunder Roy Chowdhry and others, applied to the Collector of Dacca, under s. 103 of the Bengal Tenancy Act for the measurement and preparation of a record of rights in respect of certain lands. The application was granted, and amins were deputed to measure the lands in question, and to prepare the record of rights. When the measurement papers and plans were submitted to the Court by the amins, one Bidhu Mukhi Dabi and another filed a petition of objection to the proceedings. The chief grounds were that the applicants were not entitled under the provisions of the Bengal Tenancy Act, to have a measurement made and record of rights prepared of any lands in respect of which there were *bona fide* disputes between the owners and that no lands belonging to the objectors were liable to be measured under the aforesaid Act. The objectors further prayed that the disputed lands might be marked out and excluded from the measurement.

The Collector was of opinion that, *prima facie*, the controversy being *bona fide*, the disputed lands should be excluded from the proceedings, which, however, he held might be continued as to the remaining lands.

On appeal by the plaintiffs, the District Judge held that the Collector was empowered, under the provisions of the Bengal Tenancy Act, to determine the question of boundaries between conterminous estates as to which a *bona fide* controversy existed.

The objectors appealed to the High Court.

The Advocate-General (Sir *Charles Paul*) and Dr. *Rashbehari Ghose*, for the appellants.

Baboo *Saroda Churn Mitter*, for the respondents,

The judgment of the Court (PIGOT and BANERJEE, JJ.) was as follows:—

JUDGMENT.

We think in this case the view taken by the learned District Judge cannot be supported. It has already been held in this **[645]** Court in *Norendro Nath Roy Chowdry* v. *Srinath Sandel* (1), that the powers under the record of rights section do not include the case of a controversy and dispute as to the boundaries of the owners of conterminous estates. Here the record of rights must necessarily involve a determination as to which estate the lands, in respect of which this controversy has arisen, belong to. This is a matter which is not within the scope of the section. No doubt the Act has not provided as to what should be done when such a controversy as this arises in express terms. But we take it what was before the District Judge sitting, as he was sitting in this case, in appeal from a decision of the Collector in a matter of *quasi*-executive character, though, no doubt, conducted in a judicial form, and in a judicial character, involved the question whether the executive authorities conducting the record of rights were, or were not, under this section empowered to determine the question of boundaries between conterminous estates as to which a *bona fide* controversy existed. We have already held here that they have not that power, and we think that the Collector was right in the view he expressed, namely, that *prima facie* the controversy being

(1) 19 C. 641.

bona fide, the disputed lands should be excluded from the proceedings, which, however, may continue as to the remaining lands. It is not for us to say whether or no steps should be taken to prevent the final winding up of the proceedings of the record of rights enquiry pending a suit in the Civil Court, if the parties whose estate is under the proceeding should bring one; that is not a matter for us to express any opinion upon. However that may be, the order of the Collector was right, and should have been confirmed by the District Judge, whose decision, under the authority cited above, is set aside, and the appeal decreed with costs.

1891 JULY 14. — APPELLATE CIVIL. — 19 C. 643.

A. F. M. A. R. *Appeal allowed.*

---

19 C. 646.

[646] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banarjee.

BOLAI CHAND GHOSAL AND OTHERS (*Plaintiffs*) *v.* SAMIRUDDIN MANDAL AND OTHERS (*Defendants Nos.* 1 *and* 2).*
[22nd July, 1891.]

Limitation—Ejectment, right to sue in—Order made in proceeding where a dispute exists concerning the possession of land—Limitation Act (*XV of* 1887), *sch.* II, *arts.* 47, 144—*Criminal Procedure Code* (*Act X of* 1872), *s.* 530—*Criminal Procedure Code* (*Act X of* 1882), *s.* 145.

A zemindar on the 23rd May 1876 agreed to let lands on lease to *A* and his co-sharers, who, on the zemindar's failure to carry out the terms of the agreement, brought a suit for specific performance and obtained a decree against him in 1879. The zemindar having neglected to perform the agreement, the Court in December 1881 made an order for the execution of a pottah, and directed that the pottah should take effect from the date of the original agreement. The pottah was executed on the 19th December 1881. In 1880 *A* instituted a proceeding under s. 530 of the Criminal Procedure Code (X of 1872), which corresponds with s. 145 of Act X of 1882, but the application was dismissed in December 1880, *A* having failed to establish possession. *B*, having purchased the interests of two of the co-sharers, instituted a suit on the 11th May 1888 against certain persons who had been let into possession by the zemindar, the other co-sharers being added as plaintiffs.

Held, that art. 47, sch. II of the Limitation Act, did not apply, no right to sue in ejectment being in existence in December 1880, the right with which *A* was clothed under the decree not having been perfected till December 1881 when the pottah was executed.

Held further, that the suit was not barred under art. 144, as limitation did not commence to run until the pottah had actually been executed.

Article 47 of the Limitation Act contemplates a right to sue in ejectment being in existence at the time of the passing of an order under s. 145 of the Code of Criminal Procedure.

[R., 14 M.L.T. 392 (395) = (1913) M.W.N. 871 (873) = 21 Ind. Cas. 564 (565).]

THIS suit was brought for declaration of title and for possession by the plaintiff, Bolai Chand Ghosal, as purchaser of the interests of Gobind Chunder Chuckerbutty and Ram Kamal Chuckerbutty, the other plaintiffs, Hari Nath Chuckerbutty and Shama Sundari Debi, being subsequently added as parties.

---

* Appeal from Appellate Decree, No. 813 of 1890, against the decree of C. B. Garrett, Esq., District Judge of 24 Pargannas, dated the 9th of April 1890, reversing the decree of Baboo Ashinee Kumar Gosha, Munsif of Barripur, dated the 11th of May 1889.

(1) 19 C. 641.

1891 JULY 22. — APPELLATE CIVIL. — 19 C. 646.

[647] Gobind Chunder Chuckerbutty, Ram Kamal Chuckerbutty, Hari Nath Chuckerbutty, and Shama Sundari Debi in Bysack 1283 (May 1876), partly by letter and partly by oral agreement, obtained a promise from their zemindars, Hem Nath Dutt and Surendro Nath Dutt, to grant them a maurasi mokarari kaemi lease of the lands in suit. Hem Nath and Surendro Nath failed to carry out this agreement, and let out the lands in dispute to the principal defendants, Samiruddin Mandal and Gopi Mandal.

In 1877 Gobind Chunder, Ram Kamal, Hari Nath and Shama Sundari instituted a suit against Hem Nath and Surendro Nath to obtain specific performance of the agreement for the lease and to compel the zemindars to execute a pottah. In 1879 a decree was made in that suit directing the zemindars to execute a pottah in favour of the plaintiffs. The zemindars failed to comply with this direction, and on the 19th December 1881 the Court made a further order for the execution of the pottah, and directed that it should take effect from the 3rd May 1876, the date on which, according to the original agreement, the pottah was to have been executed.

Previous to the above order, in 1830, Gobind Chunder instituted a proceeding against Samiruddin and Gopi Mandal under s. 530 of the Criminal Procedure Code, 1872 (corresponding with s. 145 of Act X of 1882) to recover possession of the lands in dispute. That proceeding was dismissed on the 3rd December 1880, Gobind Chunder having failed to establish possession under the terms of that section of the one-fourth share of the lands which he claimed.

The pottah having been executed by the zemindars on the 19th December 1881 in favour of Gobind Chunder, Ram Kamal, Hari Nath, and Shama Sunduri, the interests of Gobind Chunder and Ram Kamal were on the 14th December 1887 purchased by the plaintiff Bolai Chand, who on the 11th May 1888 instituted the present suit against Samiruddin Mandal and Gopi Mandal, Hem Nath Dutt and Surendro Nath Dutt (the zemindars), Shama Sundari, Gobindo Chunder and Ram Kamal to have the planintiff's right by purchase to an undivided eight annas share of the land declared, and for possession. Subsequently, by an [648] order of Court, the defendants Hari Nath and Shama Sundari were on the 18th July 1888 made co-plaintiffs.

The defendants Samirduddin and Gopi Mandal (amongst other defences) pleaded limitation, alleging that in 1870 they had taken the land in jote from the zemindars, subsequently obtaining a pottah on the 7th October 1876, and had cleared the land at great expense, and had been in possession ever since without notice of the agreement set up by Gobind Chunder and his co-sharers.

The Court of first instance held that the principal defendants had notice of the agreement of Bysack 1283; that they had not acquired an adverse title by possession for 12 years, the suit having been instituted within twelve years from the date of their pottah; but that the suit was barred under art. 47 of the Limitation Act, so far as it related to the share which Bolai Chand purchased from Gobind Chunder, more than three years having elapsed from the 3rd December 1880, the date when the proceeding under s. 530 of the Criminal Procedure Code was dismissed. A decree was therefore made with respect to the remaining twelve annas of the disputed lands.

The principal defendants appealed, but Bolai Chand did not prefer a cross-appeal in respect of the four annas share purchased by him, as to which the suit stood dismissed.

The lower appellate Court held that Gobind Chunder was the agent of all the co-parceners in the proceeding under s. 530; that the suit was therefore barred under art. 47 of the Limitation Act, none of the co-parceners having within three years taken any steps to contest the order made under that section. The Court also held that the plaintiffs had failed to prove possession in any form within twelve years before the institution of the suit, and that art. 142 therefore applied to the case.

The plaintiffs appealed to the High Court.

Baboo *Ashutosh Mookerjee*, for the appellants.

Baboo *Taruck Nath Palit* and Baboo *Saroda Churn Mitter*, for the respondents.

Baboo *Ashutosh Mookerjee.*—The plaintiff's claim is not barred by limitation. When in 1880 proceedings were taken under **[649]** s. 530 of the Code of Criminal Procedure of 1872, the plaintiffs had only an inchoate right to obtain a lease which was perfected on the 19th December 1881. The right of the plaintiffs to possession of the disputed land accrued only from the date of the execution of the lease, and not from the time when the pottah took effect. Article 47 of the Limitation Act cannot bar the right of a person who had no right to immediate possession at the time the order under s. 530 was passed, but only a prospective right to obtain a lease. Again, art. 144, and not Art. 142, applies to this case, and the time from which the period of limitation begins to run must be counted from the date of the execution of the lease. The plaintiffs were therefore within time.

Baboo *Taruck Nath Palit.*—Though the lease was not executed till the 19th December 1881, still, as it took effect from the 5th May 1876, this latter date ought to be taken as the starting point of the period of limitation. Article 47 of the Limitation Act is in general terms, and its application ought not to be restricted in the way suggested by the appellants.

JUDGMENT.

The judgment of the Court (PIGOT and BANERJEE, JJ.) was delivered by

PIGOT, J.—We have only to deal here with the interest of a three-fourths share of the property, that is to say, with the dismissal by the District Judge of the claim in respect of the share conferred by the pottah of the 19th December 1881; and as to that, because the plaintiff, who represented the remaining one-fourth of that interest, did not appeal to the District Judge against the decision of the Munsif, which rejected his claim as representing Gobind. In the view we take of the case, that party would, had he appealed, come within the scope of the principle to be applied.

It has been held by the District Judge that the bar created by art. 47 of the Limitation Act operates as a bar to the entire claim. Proceedings under s. 530 of the old Criminal Procedure Code were, in December 1880, instituted by Gobind and some of his tenants against the second defendant and some of his tenants. At that time Gobind's position was this:—He had partly by a letter, and partly by an oral agreement, obtained a **[650]** promise for a lease. That agreement he had sued on, and obtained in 1879 a decree from the Court affirming his right to the

1891 JULY 22. — APPELLATE CIVIL. — 19 C. 646.

lease upon his deposit of the residue of the money agreed to be paid as *salami*, the residue being Rs. 50. The zemindar did not carry out the decree of the Court, and seems to have been persistent in his refusal to carry it out. Ultimately the Court was obliged to make an order for the execution of the pottah, by reason, as we may assume, of the zemindar's persistent neglect to execute it. That was done in December 1881. It was provided that the lease should take effect as from the 5th May 1876, the date at which, according to the agreement, the lease was to have been executed. In the proceedings under s. 530, instituted when Gobind was clothed with these rights under the decree, which was not perfected until 1881, Gobind entirely failed to establish possession under the terms of that section. Quite properly, therefore, the Magistrate held that he had not possession; and the District Judge in the present case has held that inasmuch as the suit was not brought within three years from the date of the order in the 530 case, to establish the claim under the lease, the right to which Gobind then had, and the grant of which to him was made in 1881, all those persons were barred by reason of their omission to bring a suit to recover the property comprised in the said order, within three years after the date of that order. We disagree with the learned District Judge in that view. We think that the provision cannot apply, particularly having regard to the terms of s. 145, as it now stands, which contemplates an action in ejectment: art. 47 must refer to such a right of suit, and a judgment under s. 530 of the Criminal Procedure Code, existing at the time of the passing of the order. We do not think a right to sue in ejectment existed at the time: no such suit could be brought until the lease was granted, and, as we have said, it is obvious that, so far from that right being possessed by Gobind at the time of the passing of the order under s. 530, the pottah which it was his legal right to get was not obtained, not until some time after, as the zemindar had presistently refused to grant it. We think it would not be within what we regard as the reasonable scope of art. 47 of the Limitation Act to apply it to this case. And as regards [651] three-fourths of the property, we hold that no bar, such as can be created by the Limitation Act, does exist.

As to the remaining one-fourth, we cannot express any direct opinion, as the parties interested are unfortunately not before us.

As to the second point, that the statute of limitation, which is of a much wider and more searching scope, bars the case, we are unable to agree with the District Judge. He considers that limitation began to run from the date at which, for some reason, the District Judge thought that the right should be considered dead.

Whether he did this for the purpose of enabling plaintiff to get mesne profits or not we need not speculate upon; but limitation did not run under art. 144 until the pottah was actually executed.

We therefore set aside the decree of the District Judge and send the case back to him for decision on the other points arising in the case.

The costs of this appeal will abide the result.

A. A. C. *Case remanded.*

19 C. 651.

1891
SEP. 1.

APPELLATE CIVIL.

19 C. 651.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

DWARKA NATH DASS (*Defendant*) v. BANKU BEHARI BOSE AND ANOTHER (*Plaintiffs*).* [1st September, 1891.]

Execution of dceree—Attachment of immoveable property in execution of decrees of two Courts of same grade—Sale by one Court pending prior attachment by other Court —Validity of sale—Title of purchaser—Civil Procedure Code (Act XIV of 1882), s. 285.

X on the 3rd November 1884 obtained a decree in the Court of the second Munsif of Bagirhat against *A*, and on the 6th August 1887 sold such decree to the plaintiff, who on the 8th August 1887 applied in that Court for execution, and on the 5th September 1887 attached the share of *A* in a certain jama. The share was subsequently sold in execution of the [652] plaintiff's decree on the 20th October 1887, and purchased by the plaintiff himself. *Y* having obtained another decree against *A* in the Court of the first Munsif of Bagirhat on the 6th May 1875, sold his decree in the month of January or February 1887 to the defendant, who on the 10th February 1887 commenced execution proceedings in the first Munsif's Court against *A*, and on the 16th July applied for attachment of *A*'s share in the jama. *A* filed an objection which was disallowed, and the share was attached at the defendant's instance on the 28th July 1887, and the attachment was confirmed on appeal on the 26th November 1887. The plaintiff, on the strength of his purchase of the 20th October 1887, put in a claim in the month of April 1888 in the defendant's execution proceedings in the Court of the first Munsif, which was, however, disallowed. He then filed a suit to set aside the order disallowing his claim, and for a declaration that the right, title and interest of *A* passed to him under the sale of the 20th October 1887.

Held, that though the property had been first attached in the Court of the first Munsif, that Court was not a Court of a higher grade than that of the second Munsif within the meaning of s. 285 of the Code of Civil Procedure, and that the sale to the plaintiff was valid, and that he was entitled to the decree he prayed for.

Bykant Nath Saha v. *Rajendro Narain Rai* (1) followed.

Badri Prasad v. *Saran Lal* (2), *Aghore Nath* v. *Shama Sundari* (3) dissented from, and *Muttukaruppan Chetti* v. *Mutturamalinga Chetti* (4) referred to.

[R., 18 B. 458 (462); 22 B. 88 (92); 25 C. 46 (47); 34 C. 836 (839)=6 C.L.J. 130; Cons., 13 C.P.L.R. 145 (150).]

THE facts of this case were as follows:—

The defendant No. 2, Jadunath Dey, had a sixth share in a *jama*, comprising 9 bighas and 9 cottahs of land, under the defendant No. 4, Chunder Kumar Nag, and his co-sharers.

It appeared that the defendant No. 4, Chunder Kumar Nag, had, on the 3rd November 1884, obtained a decree in the Court of the second Munsif of Bagirhat on a bond against the defendant No. 2, Jadunath Dey, and his brother Priyanath Dey, for a sum of Rs. 268-12.

On the 6th August 1887 the plaintiff, Banku Behari Bose, purchased the above decree by a *kobala* for Rs. 200; on the 8th August 1887 he applied for execution of the same, and on the 5th September 1887 caused the interest of the defendant No. 2, Jadunath, and his brother Priyanath in the aforesaid *jama* to be attached. On the 20th October 1887 the

* Appeal from Appellate Decree, No. 878 of 1890, against the decree of Baboo Krishna Mohun Mookerjee, Subordinate Judge of Zillah Khulna, dated the 15th of May 1890, reversing the decree of Baboo Gopi Krishna Banerjee, Munsif of Bagirhat, dated the 13th of December 1889.

(1) 12 C. 333. (2) 4 A. 359. (3) 5 A. 615. (4) 7 M. 47.

1891 SEP. 1. — APPELLATE CIVIL. — 19 C. 651.

attached property was [653] sold by auction and purchased by the plaintiff himself for Rs. 70.

It further appeared that the defendant No. 3, Soshi Bhusan Nag, had, so far back as the 6th May 1875, obtained a money decree in the Court of the first Munsif of Bagirhat against the defendant No. 2, Jadunath, and a widow of his brother Modhu Sudan Dey. In Magh 1293 (January—February 1887) this decree was purchased by the defendant No. 1, Dwarka Nath Dass, who on the 10th February 1887 commenced execution proceedings. On the 16th July 1887 an order for attachment was made in these proceedings, and on the 28th July 1887 the share of the defendant No. 2, Jadunath, in the *jama* was attached, an objection put in by him having been disallowed. On appeal, on the 26th November 1887, the order for attachment was confirmed.

On the 30th April 1888 the plaintiff, Banku Behari, preferred a claim, based on his purchase of the 20th October 1887, which was disallowed. He then brought this suit to set aside the order rejecting his claim, and for a declaration that the right, title and interest of the defendant No. 2, Jadunath, passed to him under the sale of the 20th October 1887, and that they were no longer saleable at the instance of the defendant No. 1, Dwarka Nath Dass, in his execution proceedings.

The defendants Nos. 2 and 4, Jadunath and Chunder Kumar, did not appear.

The defendant No. 1, Dwarka Nath Dass, among other things, contended that the plaintiff, Banku Behari Bose, was the *benamidar* of the defendant No. 4, Chunder Kumar, and that the decree obtained by Chunder Kumar against Jadunath was a collusive one.

The defendant No. 3, Soshi Bhusan, stated that the sale of his decree to the defendant No. 1, Dwarka Nath, was for valuable consideration.

The Court of first instance found that the plaintiff Banku Behari Bose was the *benamidar* of the defendant No. 4, Chunder Kumar, from whom he had purchased the decree of the 3rd November 1884; and on that ground alone, relying on the decision in *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (1), dismissed the plaintiff's suit.

[654] The lower appellate Court reversed this finding, and held that the claim preferred by the plaintiff in the execution proceedings of the defendant No. 1 should not have been disallowed, and on the authority of *Kashy Nath Roy Chowdhry* v. *Sunbanand Shaha* (2), held that the previous attachment at the instance of the defendant No. 1 fell to the ground on the sale taking place at which the plaintiff purchased. The Subordinate Judge considered that it was the duty of the defendant No. 1, who had attached the property in the first Munsif's Court, to represent the fact of such attachment when the property was attached in the second Munsif's Court, and to apply under s. 285 of the Code of Civil Procedure to stay further proceedings in that Court and that he had stood by and allowed the sale to take place. He further held that there was no reliable evidence on the record to show that the sale was conducted in a clandestine manner, or that the attachment in the first Munsif's Court was subsisting at the time of sale, and he accordingly decreed the appeal.

The defendant No. 1, Dwarka Nath, appealed to the High Court.

Baboo *Jogesh Chunder Roy*, for the appellant.

Dr. *Rashbehari Ghose*, for the respondent.

---

(1) 16 C. 364. (2) 12 C. 317.

1891 SEP. 1. — APPELLATE CIVIL. — 19 C. 651.

JUDGMENT.

The judgment of the Court (PIGOT and BANERJEE, JJ.) was delivered by

PIGOT, J.—Defendant No. 2 had a sixth share in a *jama* comprising 9 bighas and 9 cottahs of land.

Defendant No. 4 obtained a decree against defendant No. 2 and another person in the Court of the second Munsif of Bagirhat on the 3rd November 1884 for Rs. 268-12, and on 6th August 1887 sold that decree to the plaintiff.

On 8th August 1887 the plaintiff applied in that Court for execution of his decree. The property in question in this suit was attached on 5th September 1887, was sold in execution on 20th October 1887, and was bought at the sale by the plaintiff.

Defendant No. 3 obtained a decree against defendant No. 2 and another person in the Court of the first Munsif of Bagirhat on 6th May 1875. That decree was purchased by defendant [655] No. 1 in January or February 1887. In execution of this decree the property in question in this suit was attached. The order for attachment was made on 16th July 1887, and the property was actually attached on the 28th July 1887, an objection put in by the judgment-debtor being disallowed. The order for attachment was affirmed on appeal on the 26th November 1887.

In April 1888 the plaintiff, on the strength of his auction purchase of the 20th October 1887, put in a claim in the execution proceedings in the Court of the first Munsif, and the claim was disallowed.

The plaintiff now brings this suit to set aside the order disallowing his claim, and for a declaration that the right, title and interest of defendant No. 2 passed to him under the sale of the 20th October 1887.

The principal contest in the Courts below was whether or not the plaintiff was really a *benamidar* of defendant No. 4, from whom he had purchased the decree of the 3rd November 1884. The first Court held that he was, and dismissed the suit. The lower appellate Court held that he was not, reversed the decision of the first Court, and made a decree in favour of the plaintiff.

In appeal this question is not discussed before us, but it is contended that, under the provisions of s. 285, the sale of October 1887 in the Court of the second Munsif was absolutely void, inasmuch as the property had been first attached in the Court of the first Munsif.

The Court of the first Munsif was not a Court of higher grade than that of the second Munsif within the meaning of the section, but the property was first attached under the decree passed by it. We think we are concluded by authority in this Court from holding that the sale was void. *Bykant Nath Shaha* v. *Rajendro Narain Rai* (1) is a direct authority upon the point, and we must follow it.

The question was discussed and was decided the other way in the case of *Badri Prasad* v. *Saran Lal* (2), which was followed in *Aghore Nath* v. *Shama Sundari* (3), and in *Muttukaruppan* [656] *Chetti* v. *Mutturamalinga Chetti* (4), it seems to have been assumed that if the section applied to immoveable property, as it was held to do, this construction of the section must be adopted and applied.

(1) 12 C. 333. (2) 4 A. 359. (3) 5 A. 615. (4) 7 M. 47.

1891 SEP. 1. — APPELLATE CIVIL. — 19 C. 651.

The case of *Bykant Nath Shaha* v. *Rajendra Narain Rai* (1) is, however, binding upon us; it has been followed in this Court; we agree with it; and we do not think it necessary to discuss in this case the reasons on which it is founded.

The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

---

19 C. 656.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Gordon.

HURRY BEHARI BHAGAT AND OTHERS (*Plaintiffs*) *v.* PARGUN AHIR (*Defendant*).* [5th August, 1890.]

Res judicata—*Rent suit—Decree as to rent payable for former years—Rate of rent payable—Decree on admission of defendant.*

The plaintiff in a suit for rent which was contested, having failed to prove that the rent was payable at the rate claimed by him, the Court, in trying the issue "what is the amount of the jama," after considering the whole of the evidence and the circumstances of the case, held that the plaintiff had entirely failed to prove his allegation of the jama," and gave him a decree for the amount admitted by the defendant, which was less than claimed by the plaintiff.

In a later suit the plaintiff sued the defendant, in respect of the same holding, for rent for a subsequent year, and he claimed at the same rate as he had claimed in his previous suit. It was contended on behalf of the defendant that the question as to the rate at which the rent was payable was *res judicata* it not being alleged that there had been any agreement subsequent to the first suit by which the rate was altered.

Held, that the question as to the rent payable for the period covered by the first suit was *res judicata*; but that it did not follow that the decree in that suit operated as *res judicata*, and conclusively determined the rate of the rent payable for the year in respect of which the subsequent suit was brought. That depended on whether the previous decision was that the plaintiff should recover from the defendant the sum admitted by him to be due, or that the sum so admitted to be due was the proper amount of rent payable for the period in question.

[657] *Held*, that in this case the previous decision was to the latter effect, and that the question of the rate at which the rent was payable by the defendant was *res judicata*.

Punnoo Singh v. *Nirghin Singh* (2) and *Jeo Lal Singh* v. *Surfun* (3) referred to.

[F., 20 C. 505 (507); 4 C.W.N. 43 (44) 4 C.W.N. 161 (162); Rel., 16 C.L J. 124=17 Ind. Cas. 111 (112); 17 C.L.J. 71=17 C.W.N. 76=16 Ind. Cas. 22; Appr., 6 C. W.N. 589; R., 1 C.L.J. 248 (250); 13 C L.J. 38=6 Ind. Cas. 860; 16 Ind. Cas. 590.]

THIS was an appeal heard under the provisions of s. 551 of the Code of Civil Procedure, and the only question raised was whether or not the finding and decree in a former suit between the same parties operated as *res judicata.*

The suit was brought for recovery of rent for the year 1296 F., and the parties were at issue as to the rate at which the rent was payable. The plaintiffs came into Court alleging that the rent had not been altered

---

* Appeal from Appellate Decree, No. 895 of 1890, against the decree of J.G. Charles, Esq., District Judge of Shababad, dated the 11th June 1890, affirming the decree of M. Amir Ali Khan, Munsif of Arrah, dated the 15th January 1890.

(1) 12 C. 333. (2) 7 C. 298. (3) 11 C.L.R. 483.

since the year 1293 F. It appeared that in a former suit for rent for the first instalment of 1294 F., and an 8-anna instalment of the year 1295 F., it was held by the Subordinate Judge, to whom the case went on appeal, that the plaintiffs had entirely failed to prove their allegation of the jama, and that they were therefore entitled only to a decree for the rent at the rate admitted by the defendant. In this suit the defendant admitted the rent to be due at the rate covered by that decree, and pleaded that the question as to the rate was *res judicata.* The Munsif having held that this contention was correct, the plaintiffs appealed, contending that the question was not *res judicata*, and that they had proved the rate at which they claimed the rent.

1890 AUG. 5. — APPELLATE CIVIL. — 19 C. 656.

Upon the first question, after referring to the nature of the previous suit, and stating that the first issue fixed by the Subordinate Judge in appeal was "what is the amount of the jama," the lower appellate Court observed as follows:—"After discussing this issue in an elaborate judgment and reviewing the evidence on both sides, the Subordinate Judge came to the following finding on this issue:—'Considering the whole evidence and the circumstances of the case, I hold that the plaintiffs have entirely failed to prove their allegation of the jama. They are therefore entitled to the jama admitted by the defendant.'

"This finding on the question of jama is a most clear one, and having been upheld on special appeal to the High Court is [658] *res judicata.* [Compare *Jeo Lal Singh* v. *Surfun* (1) and *Monmohinee Debee* v. *Binode Beharee Shaha* (2).] The appellants' pleader has relied upon the decision in *Punnoo Singh* v. *Nirghin Singh* (3), but in my opinion that case is clearly distinguishable from the present, as in that case the ruling of Garth, C.J., proceeded upon the fact that 'the District Judge professedly did not determine what was the proper rent due by the defendants,' while in the case now under consideration the Subordinate Judge most certainly did so. This most important distinction is pointed out by Garth, C.J., in *Jeo Lal Singh* v. *Surfun* (1). The learned Chief Justice adds that the Judge has as much right to act upon the admission of the defendant as upon the plaintiff's evidence, and as he found for the defendant, acting upon that admission, his finding was decisive and unobjectionable on the issue of rental. The learned Chief Justice has explained his views very clearly on this point, and I am not aware of any distinction whatever between findings on evidence and findings on the admission of one of the parties. The presumption is that the rental found in 1294 and 1295 continued in 1296, and in fact, far from alleging any alteration, the plaintiffs' own case is that the rental has continued since 1293 unchanged. Under all these circumstances, the question of rental seems to me to be *res judicata* between the parties, and, moreover, I think it would be grossly unjust to allow the plaintiffs to re-open in 1296 an issue authoritatively settled for 1295, and if such latitude were allowed to the plaintiffs in this suit, the defendant might fairly claim the same privilege to re-open the question of rental for subsequent years, if the decision in this case on the fresh evidence adduced were in favour of the plaintiffs."

The appeal having been accordingly dismissed, the plaintiffs now preferred this second appeal to the High Court, contending that the lower Courts were wrong in holding the question to be *res judicata*, and that the lower appellate Court had misapprehended the effect of the rulings

(1) 11 C.L.R. 483. (2) 25 W. R. 10. (3) 7 C. 298.

1890 AUG. 5. — APPELLATE CIVIL. — 19 C. 656.

referred to by it and misconstrued the decision of the Subordinate Judge in the previous suit.

[659] Baboo *Saligram Singh* appeared on behalf of the appellants.

The judgment of the High Court (PIGOT and GORDON, JJ.) was as follows :—

JUDGMENT.

In this appeal the appellants challenge the decision of the lower appellate Court, treating as binding upon the plaintiffs the finding in a former suit as to the amount of rent payable for the properties in respect of the rent of which the suit is brought. The present suit is brought for the rent of the year 1296 and a rent decree for the year 1295, and the proceedings in the suit in which that is the decree have been put in, and the lower appellate Court has held that the plaintiff is bound by that decree and is not entitled to recover more than the amount recovered under that decree. It is contended in appeal that the plaintiff is not bound by that decree under the principle of *res judicata*. We think he is to this extent: we think that he is bound by the rule of *res judicata* upon the question of what was the rent for the year 1295, and we think so after having had read to us the portion of the judgment in the former suit relating to the question then decided. We have been referred to the cases *Punnoo Singh* v. *Nirghin Singh* (1) and *Jeo Lal Singh* v. *Surfun* (2), and it is urged upon us that where a plaintiff claims as rent a particular sum, and it is held by the Court that he has failed to establish that to be due, and the Court upon an admission by the defendant gives a decree for a lesser sum, that cannot operate under the rule of *res judicata* as determining conclusively the due amount payable for the year, the rent of which is sued for. That proposition is too large. It may or may not be *res judicata* according to what the Court actually finds. It may be discovered from an examination of the proceedings in the suit that all that was determined in it was that the plaintiff should recover from the defendants, as rent for the period in question, the sum admitted by them to be due, or it may be that what was decided was that the sum admitted by the defendants was the proper amount of rent payable for the land in suit, for the year or years in question.

That may be ascertained from a common sense view of the judgment by seeing what was the issue decided; perhaps it would [660] not be too much to hazard the opinion that, as a general rule in these cases, the amount found due, upon the failure of the plaintiff to prove his alleged jama, upon the admission of the defendants, was probably found due as the proper amount of jama payable. In the present case we so construe the decision in the former case, and we think that the decision of the lower appellate Court was right, and that the plaintiff was bound by the former decision as to what was the rent for 1295. That being so, and it being admitted, as we understand the learned pleader, that no attempt was made to establish a subsequent agreement for a different rent, s. 51 of the Bengal Tenancy Act applies, and the present rent for 1296 must be presumed to be the same as that for 1295. We therefore reject the appeals in this case.

H. T. H. *Appeal rejected.*

(1) 7 C. 298.

(2) 11 C.L.R. 483.

19 C. 660 (P.C.) = 19 I.A. 140 = 6 Sar. P.C.J. 140.

1892 MARCH 19.

PRIVY COUNCIL.

19 C. 660 (P.C.) = 19 I.A. 140 = 6 Sar. P.C.J. 140.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Morris and Hannen, Sir R. Couch and Lord Shand.

[*On appeal from the High Court at Calcutta.*]

RAJKUMAR ROY AND OTHERS (*some of the Defendants*) *v.* GOBIND CHUNDER ROY (*Plaintiff*) AND THE REMAINING DEFENDANTS. [4th, 10th, 11th, 14th, 17th and 18th December, 1891, and 19th March, 1892.]

Limitation—Act XV of 1877, *sch.* II, *arts.* 142, 144—*Boundaries, dispute as to—Ownership of land reclaimed from a bhil contested between proprietors of contiguous estates —Prior possession of land by one of two claimants—Presumption as to continuance of possession of land by original owner, limitation being pleaded by party in possession—Appellant, duty of—Burden of proof.*

In suits relating to disputed boundaries where the decision of the lower Court as to the ownership involves questions of the correctness of surveys, maps, recorded description, and other such evidence, the appellant should do more than show points requiring explanation. He should be prepared to show in what respect the decision has been wrong in regard to the evidence, and what other course would be right.

The question was as to the ownership of land reclaimed from a bhil within the confines of one or other of two adjoining revenue mehals, the one belonging to the plaintiff, the other to the defendants, and involved the identification of the land in suit with some that had been covered with [661] water, but of which the plaintiff's possession, with title, had been affirmed in proceedings of the Revenue Survey in 1857. In consequence of the nature and condition of the land there was no evidence of any act of possession done by either party during the first two years of the twelve immediately preceding the date of the institution of the suit, and during the last ten years the defendants had been in possession. The latter having tried and failed to establish adverse possession in themselves, contended that even if the plaintiff's possession had been shown to have existed in 1857, he could not succeed without showing that his possession remained till later than the 9th April 1869, the suit having been filed on 9th April 1881, or unless he proved some act of dispossession by the defendants within that period.

Held, that the presumption was in favour of the plaintiff's possession, which had been with apparent title, having in fact continued over the two years in question, as to which continuance there was no evidence to the contrary.

If the burden was on the plaintiff to show possession down to within twelve years of suit, it had been dischaeged.

[**F.**, 29 C. 187 (199); 8 C.W.N. 876; **R.**, 24 A. 291 = 22 A.W.N. 45; 24 C. 256 (258); 7 C.L.J. 414 = 12 C.W.N. 273 = 3 M.L.T. 212; 5 C.L.J. 71 (79); **D.**, 13 C.L.J. 625 (633) = 6 Ind. Cas. 392.]

APPEAL from a decree (24th March 1888) of the High Court reversing a decree (18th September 1884) of the Subordinate Judge of Jessore.

The plaintiff, Gobind Chunder Roy, the first of the respondents, was zemindar of mouzah Babupore in taraf Kalia, in the zemindari pergana Naldi, numbered as a revenue mehal in the Collectorate towzi of zilla Jessore; and the thirteen defendants, of whom seven were now appellants, six being joined as respondents with the plaintiff-respondent, were putnidars, or were otherwise interested in the neighbouring mouzah Baraset in taraf Rasulpore. The land of both parties bordered on a bhil or shallow water called Barronal, of which the south-east part was called Betaga; and out of this two plots, together measuring about 633 bigahs, having been gradually silted up, were occupied by the defendants. The possession of these in zemindari right, and mesne profits, were claimed by

1892
MARCH 19.
——
PRIVY COUNCIL.
——
19 C. 660 (P.C.)= 19 I.A. 140= 6 Sar. P.C.J. 140.

the plaintiff as belonging to his settled mouzah Babupore. His plaint, filed on the 9th April 1881, alleged that the bigahs, having become dry in Betaga after the year 1276 (12th April 1869), were occupied by the defendants from Srabun 1278 (July and August 1871), and referred to Revenue Survey Proceedings of 1857-58 called "the mutnaza case," instituted by Gurudas Roy, the plaintiff's father, in 1857, when the thakbust **[662]** survey was being carried out in the district. The order then made by the Survey Deputy Collector on the 22nd May 1857, upheld by the Survey Superintendent on the 1st January 1858, was to the effect that the proprietors of Baraset were not then, and had not been, in possession of bhil Betaga, but that the zemindar of Babupore was in possession of it.

The defence to this suit was that neither the plaintiff nor his predecessors in title had been in possession of the land, which had in fact belonged to the defendants' estate Baraset; also, that the suit was barred by limitation, under Act XV of 1877. Issues were framed as to limitation; as to the effect of the decisions of the Revenue authorities in 1857-58; as to whether the land belonged to mouzah Babupore or to mouzah Baraset; as to whether it formed part of that to which the Revenue proceedings of 1857-58 related; and as to which party had been in possession, and in what manner.

Every fact material to a report of this case appears in their Lordships' judgment.

This suit was dismissed by the Subordinate Judge. He was of opinion that the plaintiff had failed to show possession within twelve years of suit. He found that the lands in dispute in the mutnaza case of 1857 were different from those now in suit, and that the boundary was not correctly laid down by the survey map made at that time. The plaintiff failed, according to the Subordinate Judge, to show that the lands in suit were part of Babupore, but the defendants, in his opinion, proved them to be part of Baraset and to have been in their possession for more than twelve years before suit.

This judgment was reversed on the plaintiff's appeal to the High Court. A Divisional Bench (PRINSEP and TREVELYAN, JJ.), on the 9th April 1886, directed a local inquiry by a Commissioner appointed under s. 392 of the Code of Civil Procedure, who was ordered to ascertain the true boundary line between Babupore and Baraset, which the thakbust map had attempted to lay down in 1856, leading, by its failure to define the limits of the rival estates, to the proceedings in the so-called mutnaza case. The Judges ordered that if difficulty should arise in ascertaining that boundary, a tri-junctional point should be determined. In the **[663]** next place, the Commissioner was to map the land dealt with in the mutnaza case and the land now sued for.

The result of a survey by this Commissioner and of inquiries made by him, was that a tri-junctional point was determined, and the thakbust line, doubts as to which had brought on the mutnaza case, was indicated on maps. The whole of the lands, "mutnaza" or "disputed" in 1856 and 1857, and the position of the Betaga bhil or khal, which, as the Commissioner employed in this duty observed, almost bisected the mutnaza lands in its south-western course, were denoted.

According to his report and his maps, the lands now claimed were part of those to which the decision in the mutnaza case related.

The High Court in its final judgment awarded to the plaintiff the whole of his claim. As to that part of the case which related to the time of bringing the suit, the Judges said :—

1892 MARCH 19. — PRIVY COUNCIL. — 19 C. 660 (P.C.) = 19 I.A. 140 = 6 Sar. P.C.J. 140.

"In regard to the matter of limitation, we have no doubt that neither party was in exclusive possession of the lands in suit until they became fit for cultivation by the drying up of the water. The water formed only a portion of a larger tract without any very clearly defined boundaries, including what were admittedly parts of the estates of the contending parties. We find ourselves unable, in the conflict of evidence and with its extremely vague and uncertain character, to find that either party was in possession of any particular portion of this sheet of water, so as to define any boundary line between their respective estates. Under these circumstances, we are unable to agree with the finding of the Subordinate Judge, that the defendants have been in possession of the lands now claimed for more than twelve years before the institution of this suit. The evidence, in our opinion, does not establish the fact alleged by the defendants, that the lands gradually dried up and have been held by them for more than twelve years. It therefore becomes necessary to ascertain the position of the lands which formed the subject-matter of the mutnaza case. So far as the lands now claimed are identical with those lands, we must hold, until the contrary be shown, that the possession then found continued, and that the boundary line then laid down must define the properties of the parties now before us. **[664]** From the natural features of the lands and the absence of any substantial permanent land-mark on them, there are unusual difficulties in the fixing of the land of the mutnaza case.

"We observe, too, that Mr. Madge, the Commissioner appointed by us, reports that some places were almost impenetrable, and therefore the general state of the country in 1856, when the survey was made, can readily be understood. The water-courses which intersect the lands have not altogether remained in their original position: some have silted up, and others have slightly deviated. Nevertheless, we are satisfied as to the correctness of the maps and measurements prepared by Mr. Madge, and that he has accurately depicted the lines of the original thak survey as well as of the lands relating to the mutnaza case. Salient points in the amin Ruttunmoni's map seem to have been properly ascertained both from the natural features of the lands as well as from tri-junctional points in other directions. We are satisfied that Mr. Madge's proceedings form a reliable basis for determining this suit by the result of the mutnaza case. We agree with the Subordinate Judge that the thak map itself does not accurately show the lands of the mutnaza case or the boundary line there laid down, and that, so far as can be learnt, the alteration in the thak map was made without authority and without notice to the parties. We accordingly hold that plaintiff is entitled to a decree for possession of the lands with mesne profits and interest to be determined at the time of execution of the decree, as well as costs in this and the lower Courts."

Seven of the defendants now appealed, joining as co-respondents with the respondent, Gobind Chunder Roy, six others of the defendants.

On this appeal—

Mr. *T. H. Cowie*, Q.C., and *J. H. A. Branson*, for the appellants, argued that the evidence did not show the lands in suit to form part of the tract declared by the revenue authorities in 1857-58 to belong to mouzah Babupore, and to be in the possession of the plaintiff's father. The High Court had erred in placing too great reliance on the report and map of the Commissioner appointed to make a local inquiry in 1886, which were no **[665]** sufficient basis for that Court's reversal of

1892 MARCH 19. — PRIVY COUNCIL. — 19 C. 660 (P.C.) = 19 I.A. 140 = 6 Sar. P.C.J. 140.

the first Court's decree. The lands now sued for were not, in fact, identical with those disposed of in what was called the mutnaza suit. This was the main case for the appellants; but it was also argued that, by the law of limitation, the assertion of the plaintiff's title, if it had existed, was barred either upon the ground that the defendants had been in adverse possession for twelve years before suit brought, or, if the evidence as to this fact should not be considered sufficient, on the ground that at least the plaintiff had failed to show that he had, on his part, had any possession whatever for upwards of twelve years before the 9th April 1881, when he filed his plaint. To show the latter was essential for the success of his case, but he had not satisfied the burden of proof upon him in this respect. He could only recover by the strength of a title shown to constitute a cause of action or suit permitted by the Code of Civil Procedure, and shown not to be barred by any law in force. But even if the plaintiff had a title, and had the outward marks of possession, as shown by the order of a Revenue Court in 1857, the law of limitation (Act XV of 1877, sch. II, art. 142) had deprived him of the right to sue. It was not disputed that ten years before this suit the defendants caused the land to be cultivated, and for the previous two years there had been, on the plaintiff's part, no occupation or possession.

They referred to arts. 142, 144, and 147 of sch. II of Act XV of 1877, and to Reg. III of 1793, and Acts XIV of 1859 and IX of 1871; to ss. 11 and 50 of the Code of Civil Procedure; and to *Maharaja Koowur Baboo Nitrasur Singh* v. *Baboo Nund Loll Singh* (1); *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (2); *Kally Churn Sahoo* v. *The Secretary of State for India in Council* (3); and *Radha Gobind Roy Saheb* v. *Inglis* (4).

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the respondent, Gobind Chunder Roy, were heard upon the question of limitation, in connection with the identity of the lands claimed and those affected by the decision in the mutnaza case of 1857. They contended that the lands in suit had been proved to form part of the plaintiff's settled estate and zemindari, and to have been in the **[666]** possession of his father within the twelve years preceding the institution of this suit.

The following cases were referred to on both sides:—*Karan Singh* v. *Bakar Ali Khan* (5); *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (6); *Mahammud Amanulla Khan* v. *Badan Singh* (7); *Faki Abdulla* v. *Babaji Gungaji* (8).

Afterwards, on the 19th March, their Lordships' judgment was delivered by—

JUDGMENT.

LORD HOBHOUSE.—This is one of the disputes which give rise to so much litigation, more apparently than is accounted for by the value of the property, about the boundaries of contiguous estates when the land is uncultivated and the action of water is always tending to remove land-marks. The respondent, Gobind Chunder Roy, is the zemindar of the mouzah Babupore, and is plaintiff in the suit. The appellants are talookdars or putnidars of the adjoining mouzah Baraset, and are defendants in the suit. The controversy is whether two plots of land, stated in the plaint to measure 633 bigahs, belong to Baraset or to Babupore.

(1) 8 M. I. A. 199. (2) 9 C. 744. (3) 6 C. 72.
(4) 7 C. L. R. 364. (5) 5 A. 1=9 I. A. 99. (6) 16 C. 473=16 I. A. 23.
(7) 17 C. 137=19 I. A. 148. (8) 14 B. 458.

The plaint was filed on the 9th April 1881. It states that the disputed land remained under water for a long time, and that the plaintiff's predecessors were in possession by receipt of the fishery rent; that a dispute arose between the predecessors of the plaintiff and those of the defendants with regard to the thakbust of the lands, and that a mutnaza case, No. 401 of 1857, was instituted before the Survey Deputy Collector, was decided in favour of the plaintiff's father on the 22nd May 1857, and the decision confirmed in appeal.

1892 MARCH 19.

PRIVY COUNCIL.

19 C. 660 (P.C.) = 19 I.A. 140 = 6 Sar. P.C.J. 140.

The sixth and eighth paragraphs of the plaint are as follows:—

"6. From 1276 the south-eastern portion of the aforesaid bhil began gradually to silt-up. The silted-up land used to remain waste and covered with dense jungle in the dry season, and in the rainy season overt acts of possession were exercised on the part of the plaintiff's father by receipt of the fishery rents of that place. **[667]** The Roy defendants, with a view to dispossess the plaintiff's father from the said lands, and having recourse to divers acts of fraud and injustice, exceeded the boundaries of their estate of mouzah Baraset, as fixed by the thakbust authorities, and after gradually bringing the said silted-up bhil land under cultivation and making settlements thereof, they have continued without any right to possess and enjoy the same from the month of Srabun 1278.

"8. As the act of dispossession commenced in Srabun 1278, and as the plaintiff is not in a position to ascertain the exact time when each plot of land became cultivable, he takes the cause of action in this case against the Roy defendants to have arisen from the said month of Srabun 1278."

The plaintiff adds statements to account for the delay in suing, but it is not material to consider them. He prays to recover possession on the plaintiff's zemindari right, and for mesne profits. A description of the property is added in a schedule, of which the only thing now needful to say is that the larger of the two plots is described as lying south of Betaga shore.

The defendants put in a written statement, claiming the disputed land as belonging to Baraset, denying in effect that the land sued for is the same as the land awarded to Babupore in May 1857, and contending that inasmuch as they do not admit that the plaintiff or his predecessor was ever in possession of the disputed land, the suit is barred by limitation.

The questions raised by the pleadings are two: First, do the lands now in suit form part of the mutnaza lands, *i.e.*, those comprised in the proceedings of 1857, called the mutnaza suit? If they do not, the whole foundation of the plaintiff's case fails. If they do, the second question arises: How far is the plaintiff's title barred by the possession of the defendants, or by his own non-possession?

The order made in the mutnaza suit, with preliminary statement, is set out in the record. The then zemindar of Babupore, the present plaintiff's father, complained that the talookdar of Baraset had caused 400 or 500 bigahs of land belonging to Babupore to be measured with Baraset in the thakbust proceedings. The Court caused a plan to be made, and the Survey Deputy Collector, Taruck Nath Ghose, went in person to view the spot **[668]** and to investigate the matter in dispute. He found that on the northern boundary of Baraset was a khal named Nowdara, and that the mutnaza lands lay north of that khal, and west of the bhil Betaga, and that the plaintiff received the julkur rents of bhil Betaga, &c. He ordered that the map should be corrected, by enclosing the said land within the boundaries of mauzah Babupore.

1892 MARCH 19. — PRIVY COUNCIL. — 19 C. 660 (P.C.) = 19 I.A. 140 = 6 Sar. P.C.J. 140.

The defendants appealed to Mr. Watson, the Survey Superintendent, who, on the 1st of January 1858, made an order confirming the Deputy Collector's order, on the same grounds. The thak map was then altered and is numbered 742 in this record. The mutnaza map is also in the record numbered 751.

When this suit came before the Subordinate Judge of Jessore, he sent an ameen to survey the ground and make a plan of it, but his work was not satisfactory and was set aside. Another ameen was sent, whose map, numbered 326, is in the record. The Subordinate Judge states, and it so appears from the map No. 326, that according to this ameen's survey, nearly the whole of the land now in suit lies within the circuit of mouzah Babupore.

The Subordinate Judge subjected the various maps and also the oral and other documentary evidence to a very long and minute examination, and he came to the conclusion that the ameen's map was wrong, that the thak map also was wrong, and that the lands in suit formed no part of the mutnaza lands. His main reason appears to be that the lands in suit are described in the plaint as being to the south of the Betaga shore and khal, and were so pointed out to the ameen by the plaintiff's men; whereas, he says, according to the mutnaza map the shore is to the south of the mutnaza lands. He also decided that there was no evidence to prove the plaintiff's possession of the disputed lands within 12 years of the suit, and that the defendants have proved their possession for more than 12 years.

Their Lordships may say at once, that though there are difficulties in the question of identity, they cannot understand that particular difficulty which has impressed the mind of the Subordinate Judge. Seeing that the land has till within a few years been all covered with water; that it is now mostly covered with thick jungle so as to throw serious obstacles in the way of a survey; that there are formations of water on its northern, southern, and **[669]** eastern extremities, of irregular shape, much hidden in parts by vegetation, and with names not well defined but differently given by different informants, there is plenty of ground for dispute. But their Lordships are unable to see any inconsistency between the mutnaza map and the description in the plaint. They find that the names Betaga bhil, Betaga khal, and Betaga shore, are used interchangeably to designate a water-course which in the mutnaza map is shown on the north, the east, and the south of the mutnaza lands. At the south-west end of it the Nowdara khal is marked, which appears to be in some seasons one with the Betaga, and in others separated from it. In point of fact, the Betaga khal, according to the mutnaza map, lies to the north of a large portion of the mutnaza lands, and of nearly, if not quite, the whole of that portion of the mutnaza lands which is now in suit. The Subordinate Judge seems to have been misled by looking at a marginal note on the map without the explanation afforded by the map itself. The note, apparently referring to the lands generally, says, "north of the Betaga khal of Nij mouzah;" and the map shows that the writer must refer to the southern branch of the khal. The plaintiff then is justified in stating that he sues for lands south of the Betaga shore, and though his people may easily have made mistakes in pointing out the land under circumstances calculated to baffle a skilled surveyor, no proof that they did so can be drawn from the fact that they pointed out land to the north of which lay water which they called, and which probably was, the Betaga shore or khal. These observations will

1892 MARCH 19. — PRIVY COUNCIL. — 19 C. 660 (P.C.) = 19 I.A. 140 = 6 Sar. P.C.J. 140.

dispose of a great deal of the argument pressed upon the Board by the counsel for the appellants.

As regards the Subordinate Judge's finding on the question of possession, it is very much, and quite properly, mixed up with his finding on the question of identity. The evidence has a different bearing according as it is supposed to apply to land which is, or to land which is not, portion of the mutnaza lands.

The Subordinate Judge dismissed the suit, and the plaintiff appealed to the High Court. That Court considered it necessary that a fresh local inquiry should be held and a map prepared by a competent officer; and they appointed Mr. Madge to be a Commissioner for that purpose. Briefly stated, his instructions were **[670]** to show the boundary fixed by the thakbust map prior to the mutnaza case, and to ascertain the mutnaza lands and the lands described in the plaint. The result of this commission was the preparation of two maps by Mr. Madge, of which No. 2 is now the important one, and a report by him. The defendants took objections to the report, and the case came again before the High Court.

The High Court held that, notwithstanding the great difficulties in the way of a proper survey, Mr. Madge had accurately depicted the lines of the original thak survey as well as of the lands relating to the mutnaza case, and that his proceedings formed a reliable basis for determining this suit by the result of the mutnaza case. And as his map No. 2 showed two plots of land, amounting to about 862 bigahs, as forming part of the mutnaza land, the Court gave the plaintiff a decree for those plots with mesne profits.

As regards the question of possession, the view of the Court was that, until the land became fit for cultivation by the drying up of the water, they could not find that either party was in possession of any particular portion so as to define a boundary line between their estates; that the possession found in the mutnaza case must be held to have continued; and that the plaintiff's title was not barred.

The defendants now appeal from this decree, contending that upon both the points in controversy the Subordinate Judge is right and the High Court wrong. They complain that the High Court has trusted too implicitly to Mr. Madge's survey, and has not examined the other voluminous evidence to which the Subordinate Judge addressed himself. Their Lordships will first deal with the question of identity.

On this point, with reference both to this case and to several others of a like kind which have come before them, their Lordships think it right to express an opinion that in order to set aside the decision of the Court below, the appellants should come prepared to show clearly where it is wrong, and what other course is right. In boundary cases of this kind nothing is easier than to propound riddles which cannot be answered by merely looking at the maps, or reading the statements which appear in the record. If it were enough to show to this tribunal difficulties which the respondent's **[671]** counsel cannot explain, and then to contend that his case is not proved, he would labour under an unfair amount of burden. In such cases the local Courts have advantages over the remote ones. To a certain extent the same remark is true as between the Subordinate Judge and the High Court, but the High Court possessed a resource which this Board would be very reluctant to use again in this suit. They felt the local difficulties, and they met them by ordering a local survey of their own. On the results of that survey they saw their way to affirm the plaintiff's title. To induce this Board to disaffirm it, the defendants

1892 MARCH 19. — PRIVY COUNCIL. — 19 C. 660 (P.C.) = 19 I.A. 140 = 6 Sar. P.C.J. 140.

ought to do something more than to show that the plaintiff's title is not free from doubts; they should at least give some acceptable explanation of the circumstances which have led the Court below to its conclusion.

Now that is exactly what the appellants have failed to do. They can show many difficulties of a kind which probably no amount of mapping or verbal description would avoid. Mr. Madge's map does not, so far as their Lordships can see, show in terms, and on its face, the thakbust line which was complained of and corrected in the mutnaza suit, nor the lands described in the plaint. But those objections were before the High Court, who were satisfied that Mr. Madge had shown the things required; and, though it does not appear that Mr. Madge was present to explain his map, the Court could certainly have required his presence if any real difficulties had been felt on those points.

But the difficulty of the defendants is this: It is certain that the plaintiff recovered land from the defendants in the mutnaza suit. Where are the mutnaza lands? According to the thak map, the mutnaza map, the ameen's map, and Mr. Madge's map, they are so placed as to correspond more or less closely with the land now in suit. Observations have already been made on the arguments used to show that there is error in the thak map and the ameen's, and discrepancy between them and the mutnaza map. If the maps are all wrong, where shall we place the mutnaza lands? The defendants say that they should be placed somewhere to the north of the northern branch of the Betaga khal, in a region which no one of the maps enables us to ascertain. To that theory there seem to be two strong objections.

[672] The first is, that though Mr. Madge was occupied in surveying the ground from the 18th May to the 18th June, and though from the 19th May he was attended by the ameen of the defendants, and from the 26th by their surveyor, no one objected that his operations were being conducted in a wholly wrong place, so that the work would all be thrown away.

The second is, that we cannot have any evidence of the position of the mutnaza lands so good as the mutnaza map, and where it speaks intelligibly we ought to follow it. Now, the mutnaza map gives as a land-mark a mound called Gozmara Tek, not on the face of the map, but in the marginal note before referred to, which says that the land lies to the south of it and to the north of Betaga khal. The Gozmara Tek does not appear in the thak map or in the ameen's. But Mr. Madge discovered it, and clearly identified it as one of the stations used in the mutnaza survey; and he has placed it at the northernmost point of the mutnaza lands. According to the mutnaza map the lands cannot be between the Gozmara Tek and the north branch of the Betaga khal; there is no space for them there; and the map-maker places them between the site of the Tek and the south branch of the khal. If a line be drawn on the mutnaza map from west to east through the Gozmara Tek placed at the point now ascertained by Mr. Madge, and if a parallel line be drawn at a tangent to the southernmost portion of the Betaga khal, the whole of the mutnaza lands will be found between these two lines. Another important land-mark on the mutnaza map is the Nowdhara khal at the extreme south-west. It is not marked on the thak map, or on the ameen's, but it was ascertained by Mr. Madge, and treated by him, in the presence of the agents, as the south-western boundary of the lands; for from that point he began to work due north; and it is so set down in his map. It appears therefore that Mr. Madge found these

two cardinal points on the north-east and the south-west, just where they ought to be if the plaintiff's theory of the lands is correct, and where they could not be if the defendant's theory is correct.

1892 MARCH 19.

PRIVY COUNCIL.

19 C. 660 (P.C.) = 19 I.A. 140 = 6 Sar. P.C.J. 140.

The defendants have insisted very earnestly that Mr. Madge has passively followed the thak map to produce his own. But his report has not been impugned and must be taken to speak the [673] truth. It shows a laborious survey, lasting for a month and carried into minute detail. Moreover, the points just now insisted on, to say nothing of some small variations having the effect of throwing some 5 bigahs out of the thakbust boundary, show that the survey is to be taken as an independent and original work, though of course Mr. Madge availed himself of the mutnaza map and field-book, as indeed the High Court directed him to do.

Much reliance was placed at the bar on the expression by the High Court of their agreement with the Subordinate Judge that the thak map does not accurately show the lands of the mutnaza case. In the absence of explanation their Lordships do not know what inaccuracy is referred to, unless it be the small variations just noticed. It is certainly not the inaccuracy, or rather the glaring error, supposed by the Subordinate Judge; and it is something which is consistent with the accuracy of Mr. Madge's map. It appears to their Lordships that in deputing Mr. Madge, the High Court took the best course open to them; that in the absence of proof that there are specific and material errors in his map, they were right to rely on it; and that their conclusion on this part of the case ought to be maintained.

The next question is whether the title of the plaintiff, which, accompanied by possession, was affirmed in 1857, has been lost by subsequent non-possession on his part, or adverse possession on the part of the defendants. In this controversy the defendants start with the advantage that the plaintiff admits their possession from a time nearly ten years before the suit. Still there remain two years during which possession must be proved, or inferred on legal grounds, on one side or the other. The plaintiff claims, and the High Court has held, that presumption must be in favour of the title and former possession. The defendants claim that it should be in favour of the state of things existing for ten years. Each party has tendered positive evidence on the point.

The condition of the land is such as to offer great difficulty in the proof of possession. At the date of the thakbust the whole was under water, together with a contiguous larger tract. The only use or enjoyment consisted in fishing. There has been a gradual, slow, and still incomplete, conversion of this lake into [674] swamp, and of swamp into habitable land; and it is obvious that during such a process there may be parts of the land which for many years are not used at all for any purpose of enjoyment. Mr. Madge's map shows two plots divided by a channel called the Bhaisa or the Arpangasia. Plot 1 consists of 829 bigahs lying to the west of the Arpangasia; and this plot is still for the greater part in a state of swamp and jungle, though portions of it were used for growing paddy as early as the autumn of 1871, whether earlier or not is matter of dispute. Plot 2 consists of 32 bigahs lying to the east of the Arpangasia; and there is evidence that land in this quarter, whether actually land of plot 2 or not is again matter of dispute, was dried by the cutting of a channel about the years 1868 or 1869.

The defendants contend that though the plaintiff shows title and possession in 1857, he still must fail unless he can show acts of possession and enjoyment later than the 9th April 1869, or that he must prove the

1892 MARCH 19. — PRIVY COUNCIL. — 19 C. 660 (P.C.) = 19 I.A. 140 = 6 Sar. P.C.J. 140.

act of dispossession by the defendants later than that date. Their counsel went so far as to argue that if the land, being in a state of swamp and jungle, had been left wholly unused for 12 years, and then a stranger were to settle upon it, the plaintiff could not assert any title against him.

The High Court do not enter upon any discussion of this question. In their view of the evidence it does not enable them to find that either party was in possession of the sheet of water so as to define any boundary line between their respective estates. Therefore they conclude that, so far as the lands now claimed are identical with the mutnaza lands, the possession found in 1857 must be taken to have continued, and to show the boundary line of the two estates.

After hearing a great deal of argument to impugn the view of the High Court, their Lordships are not disposed to differ from it. It is in accordance with the decision in the case of *Runjeet Ram Panday* v. *Goburdhun Ram Panday* (1), a case which fell under the Limitation Act passed in 1859, when the plaintiff [as pointed out in *Karan Singh* v. *Bakar Ali Khan* (2)] was subject to a burden of proof heavier than that established by **[675]** the Limitation Acts of 1871 and 1877. But their Lordships say no more upon this point; nor do they feel called upon to examine the subsequent cases, because they think that, even assuming the burden of proof upon the plaintiff to be such as the defendants contend for, he has sufficiently discharged it.

Their Lordships will first consider the evidence adduced by the defendants. Seven of their witnesses have been selected by their counsel, doubtless those who are the most effective. Five of them speak to plot 1 and two to plot 2. Six of them are tenants of the defendants, and one (witness No. 10) was present at the Court ameen's survey. They were examined in May 1884. Let us first take the five who speak to plot 1. As regards time, one witness, No. 14, specifies no time of occupation; one, No. 7, proves too little, only nine or ten years. The other three prove too much; No. 10 has seen tenants there 27 or 28 years previously, *i.e.*, before the thak survey, when it is agreed on both sides, that all was under water; No. 18 carries the settlement by habitation back to 1859 at latest, No. 16 to 1861 at latest; but, as has been stated, paddy planting was carried on in 1871, so that down to that time the land must have been under water and uninhabitable. As regards the situation of plot 1, No. 7 and No. 10 do not fix any. The other three fix it in village Bhawanipore, which is in mouzah Baraset; and one of them, No. 16, adds that Nowdhara is to the north of the plot. Now Bhawanipore does not appear on the earlier maps; but it is marked on Mr. Madge's map, outside the mutnaza lands. And Nowdhara is one of the cardinal points ascertained by him as the south-west extremity of those lands. There is no reason to suppose that these witnesses were consciously telling any untruth. But there is very strong reason to conclude that they were speaking of other land; an error not difficult to fall into, perhaps not easy to avoid, in such a country. There is, then, in their Lordships' judgment, no evidence at all given by the defendants which touches plot 1.

Of the two witnesses who speak of plot 2, No. 8 holds 27 bighas of the defendants, 17 of which are again held of him by No. 4. No. 8 says that he got his grant 21 or 22 years ago, *i.e.*, in 1862-63; that his land was then covered with water; **[676]** that within two years it became fit for cultivation; and that it became dry after a khal, which he calls the Kata

(1) 20 W.R. 25 (pp. 29, 30).

(2) 5 A. 1=9 I.A. 99.

1892 MARCH 19. PRIVY COUNCIL. 19 C. 660 (P.C.)= 19 I.A. 140= 6 Sar. P.C.J. 140.

khal, was cut 15 or 16 years ago, *i.e.*, in 1868-69. The cultivation he speaks of as possible in 1864-65 must have been for paddy, though he does not say so; neither does he say that it actually was cultivated; he does not cultivate personally, he says. No. 4 (who is 45 years old) says that his father took 13 bigahs 18 or 19 years ago, *i.e.*, in 1865-66, and built a house on it a year after. He took the other 4 bighas two or three years later. "When I first saw my land it was in a cultivated state. That was some 18 or 19 years ago." He does not speak of any alteration of the surface, but speaks of his cultivation as if it were the same thing as that of 19 years back.

It is impossible not to feel serious doubt of the value of this evidence. The lessee tells us that the land was cultivated at a time not later than 1866 and was built on at a time not later than 1867, while the lessor says that either a year or two years after the latest of those dates it was covered with water. And such events as the taking of a farm, the building of a house, and the drainage of a lake, are not likely to be forgotten in the life of a countryman.

As regards the situation of their land, both witnesses say that it is east of Arpangasia. No. 8 tells us nothing more. No. 4 says that it lies within the little disputed plot, but how he makes that out does not appear. There is no further identification. It was pointed out by Mr. Arathoon that the ameen's measurement of the land in suit was 1,215 bigahs, and of plot 2, 71 bigahs, the bulk of which he made out to be mutnaza lands; whereas Mr. Madge's survey only gives 829 bigahs for the mutnaza lands now in suit, and for plot 2, 32 bigahs. It is therefore quite possible that when witnesses speak of the "land in dispute" they may be speaking of some of that excess portion which was in dispute before the ameen and before the Subordinate Judge, but which is not in Mr. Madge's map or in the decree. This is conjectural, but it introduces an additional element of uncertainty into the defendant's case.

It can hardly be said of plot 2, as of plot 1, that there is absolutely no evidence which can be applied to it; but it is so **[677]** extremely weak that, even if uncontradicted, it would hardly advance their case.

The plaintiff's evidence, on the other hand, is of a character which, having regard to the nature of the land, is as substantial as can be expected. It is proved clearly that fishery leases were granted from 1861 onwards by the plaintiff or his predecessors at substantial rents. There can be little doubt that these leases covered plot 1, because the plaintiff's witness No. 6 shows that he was lessee in 1871 when the defendant's tenants planted paddy, apparently for the first time; and that, on account of this encroachment, he obtained an abatement of rent from the plaintiff. The place of encroachment he describes as being the south-east corner of Betaga bil.

That the leases covered plot 2 is not made clear by any positive evidence. But seeing that the whole of the mutnaza lands were covered with water in 1857 and afterwards, apparently down to 1868-69, the proper inference is that they did include plot 2. And as the plaintiff's evidence is in accordance with, and is aided by, his title and previous possession, which is now made clear, and is not countervailed by anything of the slightest weight on the defendant's part, their Lordships hold that the evidence clearly applying to plot 1 must be taken to apply to the whole of the mutnaza lands now in suit.

1892 MARCH 19.

PRIVY COUNCIL.

19 C. 660 (P.C.) = 19 I.A. 140 = 6 Sar. P.C.J. 140.

They will humbly advise Her Majesty to dismiss the appeal, and the appellants must pay the costs.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Sanderson, Holland,* and *Adkin.*

Solicitors for the respondent, Gobind Chunder Roy: Messrs. *T. L. Wilson & Co.*

---

19 C. 678 (P.C.) = 19 I.A. 135 = 6 Sar. P.C.J. 202.

[678] PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Lord Hannen, Sir R. Couch and Lord Shand.

[*On appeal from the High Court at Calcutta.*]

NAM NARAIN SINGH (*Plaintiff*) *v.* RAGHU NAUTH SAHAI (*Defendant*). [15th March and 2nd April, 1892.]

Agent's authority to sue on behalf of his principal—Dismissal of suit brought by agent, in his principal's name—Amendment.

A Court in which a suit is brought on behalf of one person,—through the agency of another, is entitled to inquire as to the agent's authority.

A suit for arrears of rent was brought by an agent, professing to act under authority from his principal. The plaintiff, after instituting the suit in his own name as agent, obtained an order from the Court granting him leave to amend the plaint by substituting the name of his principal as plaintiff, suing through him, an amendment which the defendant resisted, disputing the authority of the agent—*Held*, that the Court in allowing it did not decide that the agent had authority; that remained to be proved; and, as it was not proved, the suit failed.

[R., 109 P.R. 1907.]

APPEAL from a decree (1st February 1888) of the High Court, affirming a decree (30th June 1886) of the Deputy Collector, Hazaribagh.

The appellant was the zemirdar of Ramgurh, in the Hazaribagh district. The respondent, a minor, represented in this suit by his mother and guardian, Mussamut Bhikhan Koeri, held a village Atka in that zemindari, under a mokurari pottah. The suit was for Rs. 13, 574 for rent for seven years, from Sumbut 1934 to 1941 (1877 to 1884), and was instituted on the 17th March 1885, under the provisions of Bengal Act I of 1879, by Sheo Narain Sett, as the tehsildar and am-mukhtar of the zemindar, the appellant.

The question now raised related to the authority of Sheo Narain Sett, to sue, he having amended his plaint, with the leave of the Court, the Deputy Collector, by substituting the name of his principal, the zemindar, for his own, as plaintiff.

The suit having been heard, both the Courts below, original and appellate, held that the objection taken by the defendant to the suit based on the ground that Sheo Narain Sett had no authority to sue in the name of Nam Narain Singh was a good defence. The Deputy Collector stated in his judgment that the plaintiff was [679] repeatedly called upon to produce the zemindar's deed appointing him, but he had failed to do so from the beginning to the end. An appeal having been preferred in the name of Nam Narain Singh to the High Court, a Divisional Bench (NORRIS

and BEVERLEY, JJ.) was of opinion :—*First*, as regarded the arrears for the period prior to Sumbut 1941, that the defendant's objection was sufficient to require the filing of the authority under which the tehsildar was acting, and as to so much the lower Court had rightly dismissed the claim on the ground that no such authority had been filed; *secondly*, that, as regarded the rent due since that date, Sheo Narain Sett required special permission, which was not forthcoming, to sue the respondent, who was the heir of Birt Lall, the late mokurraridar. This special permission was required because Sheo Narain Sett was prohibited, as had been shown, from recognizing any one as the heir of a deceased ilakadar without the zemindar's permission. This he had alleged himself to have received under the seal and signature of the zemindar, but the document had not been produced. The dismissal of the suit was accordingly affirmed.

1892 APRIL 2. — PRIVY COUNCIL. — 19 C. 678 (P.C.) = 19 I.A. 135 = 6 Sar. P.C.J. 202.

On this appeal—

Mr. *Graham*, Q.C., and Mr. *J. H. A. Branson*, for the appellant, argued that Sheo Narain Sett, having been admitted to be the appellant's tehsildar, would have been entitled, under the provisions of Bengal Act I of 1879, to maintain the suit, even if no amendment as to the name of the plaintiff had been made. After, however, the amendment had been made, no question could arise as to his right to sue. It had become the suit of the zemindar, who was now the appellant, and was not open to any objection founded on the terms of the sunnud, which, in prohibiting the agent from recognizing an heir of a deceased ilakadar without the zemindar's permission, did not apply to a suit of this kind. At all events, with regard to the Court's order of amendment, from which no appeal had been preferred, that was in itself conclusive, in effect, to maintain the right of the agent to use his principal's name in the suit. They referred to *Madho Prakash Singh* v. *Murli Manohar* (1), and *Huro Prosad Roy* v. *Kali Prosad* **[680]** *Roy* (2), as to the application of the Code of Civil Procedure in revenue suits.

The respondent did not appear.

JUDGMENT.

Their Lordships' judgment was afterwards (2nd April) delivered by

LORD HANNEN.—This suit was originally brought in the Court of the Deputy Collector of Hazaribagh by Sheo Narain Sett in his own name, but professing to act as the tehsildar and general agent of Babu Nam Narain Singh, in respect of a property called Raj Ramgurh, to recover arrears of rent alleged to be due from the defendant as occupier of a portion of that property.

Amongst other defences the defendant alleged that the suit was not brought in the name of Babu Nam Narain Singh and on his behalf, and that the then plaintiff, Sheo Narain Sett, had no authority in his sunnud to sue for arrears.

The plaintiff, Sheo Narain Sett, for some reason, applied to amend his plaint by substituting therein for his own name the name of his alleged principal, Nam Narain Singh, as plaintiff who would presumably be entitled to sue for arrears of rent not barred by limitation. This application to amend was resisted by the defendant, but on the 16th April 1886 the Deputy Collector of Hazaribagh, before whom the case was pending, allowed the proposed amendment thinking that the 27th section of the

(1) 5 A. 406. (2) 9 C. 290.

1892 APRIL 2. — PRIVY COUNCIL. — 19 C. 678 (P.C.) = 19 I.A. 135 = 6 Sar. P.C.J. 202.

Civil Procedure Code, which authorizes such an amendment, was applicable to suits under the Rent Act.

There was no appeal from this order. What was done under it does not clearly appear, but in the final decree pronounced by the Deputy Collector the suit is described as one in which Nam Narain Singh is the plaintiff. It must therefore be assumed that the substitution of the name of Nam Narain Singh for that of Sheo Narain Sett was properly effected.

When the case came on for hearing before the Deputy Collector, a preliminary objection was taken by the defendant that Sheo Narain Sett, who had instituted the suit and obtained the amendment, had not shown that he was the tehsildar or agent of [681] Nam Narain Singh, and authorized to use his name as plaintiff. The Deputy Collector considered this objection valid, and dismissed the suit. His decree has been affirmed by the judgment of the High Court, and from this judgment the present appeal is brought in the name of Nam Narain Singh. The respondent has not appeared on this appeal.

The main argument on which the appellant's case is based is that the order amending the plaint was conclusive between the parties as to the right to maintain the suit in the name of Nam Narain Singh.

Their Lordships cannot adopt this view. The position of the parties is not different after the order for the amendment of the plaint from what it would have been if the suit had been originally commenced by Sheo Narain Sett in the name of Nam Narain Singh. All that the Court did by allowing the amendment was to correct a supposed mistake made by Sheo Narain Sett in the institution of the suit. After that correction the suit would proceed as though it had been originally brought as corrected. The Deputy Collector did not, by allowing the amendment, decide that Sheo Narain Sett had authority to institute a suit in Nam Narain Singh's name. That, if questioned, would remain to be proved.

As reconstituted, the suit purported to be brought by Nam Narain Singh *through* Sheo Narain Sett, his tehsildar and general agent. In all other respects the pleadings and issues raised remained unaltered, and the parties proceeded to offer proof of their respective cases. Upon the hearing defendant took the preliminary objection already mentioned, that it was not proved that the suit was brought under any authority given by Nam Narain Singh.

It appears to their Lordships clear that a Court whose aid is invoked on behalf of one person through the agency of another is entitled in some form or other to inquire whether the alleged agent really had authority to bring the suit. It may be necessary to do so for the protection of the person sued. He would at least be exposed to the danger of being sued again by the principal if the agency did not exist.

[682] In the present case Sheo Narain Sett, in his original plaint, alleged that he had authority in writing to bring suits in respect of arrears. If this was the fact, it was remarkable that he thought it necessary to amend the plaint; and further, though there was evidence that Nam Narain Singh knew that some legal proceedings were pending for recovery of rent, it was admitted by Sheo Narain Sett that he did not inform Nam Narain Singh that his name had been used as plaintiff. But if, as there seemed reason to surmise, Sheo Narain Sett had not a general authority to sue for arrears of rent, but only some limited authority, if any, it was within the defendant's right to require the production of the alleged authority. But this production, though called for, and, as stated in the minutes of the Court, promised on the part of the plaintiff, was never made. The

alleged plaintiff (Nam Narain Singh), though summoned as a witness on behalf of the defendant, never attended to give evidence. Sheo Narain Sett was also subpœned by the defendant, and he stated that he had been appointed Nam Narain Singh's tehsildar by deed; that he has been authorized to sue for arrears accruing before his appointment as tehsildar; that his authority to sue for arrears in this respect was recorded in his deed of appointment, and that that deed of appointment was filed in the Court of the Judicial Commissioner at Ranchi. No reason was, or has been now, assigned why this deed of appointment, or a copy of it, has not been produced, and, as the Deputy Collector pointed out, it was indispensably necessary that the authority should be submitted to the inspection of the Court, in order to see whether it was an authority to sue or only to collect rents, and to decide whether Sheo Narain Sett had *any* authority to bring the suit in the name of his alleged principal. It is clear from Sheo Narain Sett's evidence that he never informed Nam Narain Singh that an action had been brought in his name, and though Sheo Narain Sett stated that he had special permission, under Nam Narain Singh's seal and signature, to bring the original suit, this document was not produced, and no legal evidence of its contents or excusing its non-production was given. Their Lordships therefore agree with the Judges of the High Court that the lower Court was justified in dismissing the suit.

1892 APRIL 2.

PRIVY COUNCIL.

19 C. 678 (P.C.) = 19 I.A. 135 = 6 Sar. P.C.J. 202.

[683] It was argued that the judgment appealed from is inconsistent, inasmuch as it condemns the plaintiff, Nam Narain Singh, in costs, while holding that the suit was rightly dismissed on the ground of want of proof of Sheo Narain Sett's authority to bring it. This objection, if valid, applied to the judgment of the lower Court, but it was not taken as one of the grounds of appeal from the lower Court, and it does not appear that the attention of the High Court was called to this point. But the appeal being brought by Nam Narain Singh, he was properly condemned in costs for appealing against a judgment which, upon the materials before the Court, was rightly pronounced. His proper course would have been to prove that he had, in fact, given authority to Sheo Narain Sett to bring the suit in his name, but he made no application to be allowed to supply this proof, but simply appealed. By so doing he subjected himself to the jurisdiction of the Court to condemn him in costs.

Their Lordships will humbly advise Her Majesty to dismiss the present appeal.

Appeal dismissed.

Solicitors for the appellant: *Messrs. A. H. Arnould & Son.*

1892
MAY 14.

PRIVY COUNCIL.

19 C. 683 (P.C.) = 19 I.A. 166 = 6 Sar. P.C.J. 209.

19 C. 683 (P.C.)=19 I.A. 166=6 Sar. P.C.J. 209.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, Hannen and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

PROSUNNO KUMAR SANYAL AND ANOTHER (*Plaintiffs*) *v.* KALI DAS SANYAL AND OTHERS (*Defendants*).
[14th May, 1892.]

Execution of decree—Suit to have an execution sale of land set aside—Civil Procedure Code (Act XIV of 1882), *s.* 244—*Parties to the suit—Fraud, allegation of.*

Where questions are raised between the parties to a decree relating to its execution, discharge, or satisfaction, the fact that the purchaser at a judicial sale, who is no party to the decree of which the execution is in question, is interested and concerned in the result has never been held to prevent the application of s. 244 of the Civil Procedure Code, limiting the disposal of these matters to the Court executing the decree.

The plaintiffs in a suit to have the judicial sale of a zemindari set aside alleged that the decree-holder, in part satisfaction of his decree, had received, [684] from them and other co-sharers in the zemindari, their proportionate amounts of the debt decreed, and had agreed that their shares should be exempt from the execution sale about to take place: that the sale took place, subject to that exemption: that the decree-holder, however, with whom some of the co-sharers and the purchasers colluded, fraudulently had the sale set aside, revived the attachment, and caused a second sale, at which all the shares in the zemindari were sold.

Held, that the question, besides that the charge of fraud was not sufficiently specific, was determinable, in virtue of the s. 244 of the Code of Civil Procedure, only by order of the Court executing the decree.

[**F.**, 24 A. 209=22 A.W.N. 18; 26 A. 447=1 A.L.J. 65=24 A.W.N. 61; 25 B. 418 (421); 31 C. 480=8 C.W.N. 395; 23 M. 55 (59); 13 C.L.J. 257=7 Ind. Cas. 769; 11 Bom. L.R. 699=3 Ind. Cas. 763; 1 C.W.N. 656 (657); 6 C.W.N. 283 (285); 9 C.W.N. 134 (139); 12 C.W.N. 485; **Rel.**, 3 C.W.N. 6; 7 C.W.N. 591 (593); **Cited**, 34 B. 546 (552)=12 Bom. L.R. 539=7 Ind. Cas. 457; **R.**, 18 A. 163=16 A.W.N. 18; 20 A. 254=18 A.W.N. 37; 22 A. 86=19 A.W.N. 184; 22 A. 108 =19 A.W.N. 205; 23 A. 478; 24 A. 239 (240)=22 A. W.N. 49; 27 A. 702= 2 A.L.J. 469=A.W.N. (1905) 162; 30 A. 72=5 A.L.J. 20=A.W.N. (1908) 12; 22 B. 463 (**F.B.**); 23 B. 237; 25 B. 631 (634); 31 B. 207=9 Bom. L.R. 15 (24); 21 C. 437; 21 C. 940 (952) (**F.B.**); 24 C. 62 (74) (**F.B.**); 24 C. 473 (492); 24 C. 707 (710); 25 C. 175 (178); 26 C. 324; 26 C. 539 (544); 31 C. 737 (742); 34 C. 642=5 C.L.J. 491=11 C.W.N. 593=2 M.L.T. 207 (**F.B.**); 35 C. 298 (303)=14 C.L.J. 425=16 C.W.N. 26=12 Ind. Cas. 163; 18 M. 439; 20 M. 487=8 M.L.J. 7; 25 M. 529; 30 M. 507=17 M.L.J. 291=2 M.L.T. 347; 32 M. 429=2 Ind. Cas. 18=19 M.L.J. 401 (417); 34 M. 417=8 Ind. Cas. 429=21 M.L.J. 928=9 M.L.T. 152=(1910) M.W.N. 662; 1 Bom. L.R. 74; 6 Bom. L.R. 697 (698); 9 Bom. L.R. 462 (465); 4 Bur. L.T. 28=9 Ind. Cas. 472; 16 C.L.J. 542 (544)=15 Ind. Cas. 436=17 C.W.N. 84 (86); 5 C.L.J. 34 (n); 5 C.L.J. 328 (331); 4 C.W.N. 538 (539); 6 C.W.N. 279 (281); 15 C.W.N. 512; 12 C.P.L.R. 73 (77); 12 C.P.L.R. 82 (84); 13 C.P.L.R. 177 (179); 17 C.P.L.R. 60 (62); 12 Ind. Cas. 360=7 N.L.R. 134=12 Ind. Cas. 360; 5 L.B.R. 85=3 Ind. Cas. 713; 7 O.C. 199 (200); 8 O.C. 370 (376); 12 O.C. 175=3 Ind. Cas. 586; U.B.R. (1905) 4th Qr. Civ. Pro. 36 (38); **Not Appl.**, 36 C. 130=1 Ind. Cas. 783; **D.**, 22 A. 450; 31 A. 82 (**F.B.**)=5 M.L.T. 185=1 Ind. Cas. 416=6 A.L.J. 71; 22 Ind. Cas. 963=U.B.R. (1913) 191.]

APPEAL from a decree (9th August 1888) of the High Court, affirming a decree (10th August 1886) of the Subordinate Judge of Pubna.

This suit, dismissed in both the Courts below, was brought on the 6th March 1886, to have set aside, as fraudulently brought about, a judicial sale, which, under a decree of 1880, took place in the Munsifi of

Serajganj on the 10th July 1883, and was confirmed on the 30th June 1884. A petition of the 4th August 1883 against this sale was rejected on that date, the purchasers at the auction, Ishwar Chunder Roy and Akhoyakant Sanyal, having been served with notice of the petition. An appeal from this order of rejection was preferred to, and on the 10th September 1883 rejected by, the District Judge of Pubna.

The two present appellants, Prosunno Kumar Sanyal and Drobomoyi Debi, were plaintiffs with two others in this suit. The respondents, of whom the eighth, Protab Chunder Banerji, was the decree-holder and attaching creditor, were eight out of the twenty defendants, the remaining twelve having been only formal parties. The purchasers were among the eight.

The ground of dismissal was that this suit was barred; *Firstly*, by limitation, under the 12th art. of sch. II of Act XV of 1877, as being a suit to set aside a sale in execution of a decree, and not brought within one year from the confirmation of that sale; *Secondly*, by the 244th section of the Code of Civil Procedure, sub-s. (*c*) as involving questions between the parties to the suit in which the decree was passed, and relating to its execution, discharge, or satisfaction, and therefore determinable only, as it had been determined, by the order of the Court executing the decree.

[685] The appellants, with the two other plaintiffs who did not join in this appeal, and also five of the respondents, were co-sharers together with the formal defendants, as proprietors holding, in distinct shares, a zemindari in the Pubna district called Futtehpore, paying a revenue of Rs. 2,720. The share of Prosunno Kumar was 1½ annas; that of the second appellant, Drobomoye Debi, was 17½ gandas; and that of the second plaintiff, Dibendranath Sanyal, who did not join in this appeal, was 3 annas.

Against all the co-sharers in Futtehpore a decree for land had been obtained by the 8th respondent, Protab Chunder Banerji, who obtained a decree, dated the 2nd October 1880, for Rs. 660, mesne profits and costs. In execution of that decree he attached the whole zemindari of Futtehpore, and took the proceedings which were the subject of the present suit. The first, second, and third plaintiffs, paid, as they alleged, their quota, *pro rata*, of the money decreed; and, according to them, the decree-holder undertook not to proceed against their shares of the property, Futtehpore, which was sold on the 10th February 1882, as against, and so as to include, the shares only of the other judgment-debtors who had not paid. More than sufficient to pay the sum due was realized, *viz.*, Rs. 2,030, the defendants 1 to 5 purchasing in the names of their servants, defendants 6 and 7, Akhoyakant Sanyal and Ishwar Chundra Roy. Subsequently, all the parties concerned in that sale, *viz.*, the decree-holder, the co-sharer debtors, and the auction-purchasers agreed to have that sale set aside. It was set aside on the 1st September 1882, and the attachment on Futtehpore was revived. New proceedings in execution of Protab Chunder's decree of 1880 were then taken, and the whole zemindari, including the shares of the plaintiffs, was put up to sale and sold. It was purchased by the defendants 6 and 7, whom the plaintiffs now alleged to be mere benamidars for the debtors, their co-sharers, defendants 1 to 5. The case for the plaintiffs, in short, was that Protab Chunder, the co-sharer debtors, and the ostensible auction-purchasers colluded together and caused the whole zemindari to be sold in breach of the agreement. They, therefore, claimed to have the second sale set aside as illegal, and that they might be declared entitled to their respective shares in Futtehpore.

1892
MAY 14.
——
PRIVY
COUNCIL.
——
19 C. 683
(P.C.) =
19 I.A. 166 =
6 Sar. P.C.J.
209.

and that the defendants might be restrained by injunction from taking possession.

[686] The issues raised questions of (*i*) limitation; (*ii*) the agreement as to exemption of the plaintiffs' shares and subsequent fraud; and (*iii*) the application of s. 244 of the Code of Civil Procedure.

The Subordinate Judge dismissed the suit on the ground above stated, holding that the year prescribed began to run from the date of the confirmation of the sale by the first Court and not from the date of the dismissal of the appeal from that order of confirmation. He did not take any evidence on, or decide, the issues as to fraud and collusion. But he held the plaintiffs precluded by ss. 13 and 244 of the Code of Civil Procedure from raising the question in this suit as to the defendants having acted fraudulently in bringing about the second sale in execution.

The High Court (TOTTENHAM and CHUNDER MADHUB GHOSE, JJ.) were also of opinion that the year ran from the confirmation by the first Court, citing *Mahomed Hossein* v. *Purundur Mahto* (1). On the other point they said:—"The fraud alleged is alleged really against the decree-holder as having, in breach of the agreement made by him after receiving the plaintiffs' quota of the debt decreed, brought their share of the property to sale. That matter was adjudicated upon in the execution department and was decided against the plaintiffs. It was clearly a matter arising under s. 244 of the Code, and therefore no separate suit on the part of the case can lie." They concluded thus:—

"Then as regards the other defendants, namely, the plaintiffs' co-sharers, and the purchasers at auction, there is really no case made out at all: there is no case even alleged in the plaint. There was nothing more than a general allegation of fraud and collusion between them and the decree-holder. But it is not enough to make a general allegation of that sort: the allegation must be specific and must be proved. In the present case it is impossible that the plaintiffs could prove the allegation, because it was not a definite allegation. But, apart from that, the allegation in the plaint does not disclose any such fraud as to raise a case that could be tried. Authority for this is to be found in a recent decision of the Privy Council, in *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (2). Their Lordships, referring to a case in the appellate Court, [687] quoted the following from Lord Selborne's judgment: 'With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficeint even to amount to an averment of fraud of which any Court ought to take notice.'

"In this case there is nothing more than a strong averment of collusive conduct against all the defendants. It seems to us therefore that, while against the decree-holder there is one specific allegation of fraud that was disposed of in the previous proceedings, as regards the other defendants there is no such specific allegation of fraud as the Court may enquire into. So that, on both grounds, the suit must fail. We accordingly dismiss the appeal with costs."

Mr. *R. V. Doyne*, appeared for the appellants.

The respondents did not appear.

The principal argument for the appellant was that the purchasers, against whom collusion was now alleged, were not parties to the decree of the 2nd October 1880, and, therefore, not among "the parties" to

(1) 11 C. 287.

(2) 15 C. 533.

1892 MAY 14. — PRIVY COUNCIL. — 19 C. 683 (P.C.) = 19 I.A. 166 = 6 Sar. P.C.J. 209.

whom s. 244 of the Code of of Civil Procedure referred. This section was, therefore, no bar to this suit. Again, the claim having been founded on fraud alleged to have been effected by the defendants, the three years' period of limitation under the 95th article of sch. II should have been allowed. The establishing fraud was mixed up with the question of the period to be allowed from its discovery to the date of the suit. The plaintiffs' allegations were sufficiently explicit to entitle them to have the issues relating to the merits tried in this suit, the three years' period being allowed.

JUDGMENT.

Their Lordships' judgment was delivered by.

LORD MACNAGHTEN.—The suit in this case was brought for the purpose of setting aside the sale of a zemindari in the district of Pubna called Futtehpore, which was sold in execution of a civil decree on the 10th of July 1883. The Subordinate Judge dismissed the suit on preliminary grounds, without going into the merits. The High Court at Calcutta affirmed his decree.

It appears that some time before 1880 the respondent, Protab Chunder Banerji, recovered against the appellants, and certain persons who were co-sharers with them in Futtehpore, a decree for **[688]** possession of some lands in dispute, and also a money decree for mesne porfits and costs. In execution of that decree Futtehpore was attached. Thereupon, as the appellants allege, they and two other persons, who were co-plaintiffs in the suit before the Subordinate Judge, paid their quota of the judgment-debt, and came to an arrangement with the judgment-creditor that their shares should be exempted from sale. The shares of the other co-sharers were alone put for sale, and they were sold on the 10th of February 1882. Afterwards this sale was set aside, the attachment was revived, a fresh sale took place, and on the 10th of July 1883 the whole of Futtehpore was sold. The allegation in the plaint is that the setting aside of the first sale, the revival of the attachment, and the second sale, in which the shares of the plaintiffs were sold with the rest, were brought about by fraud and collusion, on the part of the other co-sharers, the judgment-creditor, and the auction-purchasers, who were all made defendants. No particulars of the alleged fraud and collusion are given. The charge is general and perfectly vague. If it means anything, it can only mean that the judgment-creditor broke his alleged agreement with the plaintiffs, and that the other persons alleged to have been implicated, being aware of the circumstances, took some part in the transaction.

Both Courts have held that the question which the plaint seeks to raise could only have been determined by the order of the Court which executed the decree, and that in such a case as the present a separate suit for the purpose of setting aside an execution sale is expressly forbidden by s. 244 of the Civil Procedure Code.

Mr. *Doyne*, who appeared for the appellants, admitted that the question at issue was one "relating to the execution, discharge, or satisfaction of the decree." But he argued with much ingenuity that the suit was not barred by the provisions of s. 244, because the question concerned the auction-purchasers as much as anybody, and therefore, as he contended, it could not properly be described as a question "arising between the parties to the suit in which the decree was passed." At the same time he admitted that he was unable to produce any authority for his

1892 May 14. — Privy Council. — 19 C. 683 (P.C.) = 19 I.A. 166 = 6 Sar. P.C.J. 209.

contention, and he also admitted that it was the common practice to make the auction-purchaser a party to an application for setting aside an execution-sale.

[689] As the point appeared to be one of some importance, and the respondents were not represented at the Bar, their Lordships thought it desirable, before giving judgment, to examine the reported cases which have arisen under s. 244 of the Civil Procedure Code. An examination of those cases, of which it is only necessary to mention *Sakharam Govind Kale* v. *Damodar Akharam Gujar* (1) and *Kuriyali* v. *Mayan* (2) has satisfied their Lordships that the decision appealed from is in accordance with the construction which the Courts in India have uniformly placed on the section in question.

It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of s. 244, and that, when a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Wrentmore* and *Swinhoe.*

---

19 C. 689 (P.C.) = 19 I.A. 157 = 6 Sar. P.C.J. 213.

PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Lord Hannen, Sir Richard Couch, and Lord Shand.

[*On appeal from the High Court at Calcutta.*]

ZAKERI BEGUM (*Plaintiff*) *v.* SAKINA BEGUM AND OTHERS (*Defendants*). [29th March and 28th May, 1892.]

Mahomedan Law—Dower—Oudh, Law of, relating to reduction in amount of dower—Determination of amount of deferred dower recoverable from representatives of deceased husband married in but a non-resident of Oudh, not affected by law of that Province—Evidence Act (*I of* 1872), *s.* 32, *cl.* (2)*—Entry in Mahomedan Marriage register of amount of dower, admissible in evidence to prove amount fixed.*

A Mahomedan, a resident in Patna, since deceased, married the plaintiff, while he was for a time in Lucknow where she lived. Upon her claim, as **[690]** his widow, for her deferred dower, it was found to have been contracted for at the amount alleged by her.

The question of the amount of her dower was *held* to be determinable without reference to a usage having the force of law in Oudh, rendering dower reducible in certain cases by the Court. The place of celebration of the marriage did not make this applicable.

A register of marriages kept by the Istahad, since deceased, who celebrated this marriage, in which register was entered the amount of the dower, was held to be admissible and relevant, as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within s. 32, cl. (2) of the Evidence Act, 1872.

---

(1) 9 B. 468. (2) 7 M. 255.

[F., 32 A. 477=7 A.L.J. 388=6 Ind. Cas. 568 ; D., 14 Ind. Cas. 486=14 P.R. 1912= 157 P.L.R. 1912=96 P.W.R. 1912.]

1892 MAY 28. —— PRIVY COUNCIL. —— 19 C. 689 (P.C.)= 19 I.A. 157= 6 Sar. P.C.J 213.

APPEAL from a decree (30th June 1885) of the High Court, varying a decree (29th February 1884) of the Subordinate Judge of Patna.

This suit was brought for deferred (moajjal) dower, Rs. 50,000, by the plaintiff, now appellant, the only widow of the late Khaja Mahomed Ismail Khan, a member of the Shia, or Imamia sect, who died at Patna on the 14th November 1880, leaving no children and intestate. The defendants, among whom was Khaja Baker Ali Khan, nephew of Ismail, were relations, heirs and sharers in the estate. Baker Ali died while this appeal was pending. A certificate, under Act XXVII of 1860, was granted to the plaintiff, as widow of Ismail; but Baker Ali and the other defendants continued to hold possession. The plaint, filed on the 8th January 1883, stated the plaintiff's marriage to Ismail on the 16th Rabi-ul-awal, 1284 Hijri, or 19th July 1867, at Lucknow, whence her husband took her to Patna, in which place he was a resident both before and after his marriage. The dower fixed was alleged to be Rs. 50,000.

Baker Ali and the other defendants jointly answered that the dower was fixed at Rs. 5,000 only, and that it had been satisfied. They also contended that if it had been fixed at the amount alleged it would have been excessive ; and that it should be reduced, in accordance with the law in force in Oudh, by the Court.

The proceedings, issues, and facts are stated in their Lordships' judgment.

The Subordinate Judge, Rai Mothura Nath Gupta, found upon the evidence that the plaintiff's dower was fixed at Rs. 50,000. [691] This was in conformity with the Mahomedan law, and was not in excess of what was reasonable in regard to the position of the husband and wife. It would not have been a right exercise of discretion to reduce this amount even if the law of Oudh on this point had been applicable ; and, in his opinion, it was not applicable. He referred to *Mulkah Do Alum Nowab Tajdar Bohoo* v. *Mirza Jehan Kudr* (1) and *Bedar Bukht Muhammed Ali* v. *Khurrum Bukht Yahya Ali Khan* (2).

The decision of the Subordinate Judge was varied by the High Court, which found that Rs. 5,000 only had been fixed as the dower.

The plaintiff now appealed.

Mr. *J. H. A. Branson*, for the appellant, argued that on the evidence the judgment of the first Court should be restored. In regard to the law he referred to the cases mentioned above ; also to Baillie, Imameea Code, Bk. 1, Ch. v. of muhr, or dower, and to *Sugra Bibi* v. *Masuma Bibi* (3), *Mussumat Mulleeka* v. *Mussumat Jumeela* (4).

Mr. *R. V. Doyne*, for the respondents, argued that the High Court had rightly decreed Rs. 5,000 only.

M. *J. H. A. Branson* replied.

JUDGMENT.

Their Lordships' judgment was given by

LORD HANNEN.—The plaintiff in these proceedings (the present appellant) is the sole widow of Khaja Mahomed Ismail Khan, a Mahomedan zemindar resident at Patna in Bengal. The action was brought in the Court of the Subordinate Judge of Patna against the heirs of the deceased

(1) 10 M.I.A. 252.
(2) 19 W.R. 315=2 Suth P.C.J. 823.
(3) 2 A. 573.
(4) I.A. Sup. Vol. 135.

1892 MAY 28. — PRIVY COUNCIL. — 19 C. 689 (P.C.) = 19 I.A. 157 = 6 Sar. P.C.J. 213.

Mahomed Ismail, who are in possession of his estate, to recover from them Rs.50,000, the amount of the plaintiff's dower, alleged to have been agreed upon at the marriage, and unpaid at the death of her husband. The marriage took place on the 19th July 1867 at Lucknow in Oudh, where the deceased was staying on a visit. The deceased died at Patna on the 14th November 1880.

[692] The defendants in their defence alleged that the amount of dower agreed on at the marriage was not Rs. 50,000, but Rs. 5.000, and that this was paid in the lifetime of the deceased. They also contended that, as the marriage took place at Lucknow, the contract of dower was regulated by the usages and customs of Oudh, and that by those usages and customs the agreed amount of dower, if excessive, might be reduced by the Court to an amount suitable to the circumstances and position of the husband and wife, and they claimed that if the agreed dower was Rs. 50,000, it was excessive and should be reduced.

The material issues in the cause were—(*i*) What was the amount of dower. (*ii*) Was it paid in the lifetime of the husband ? (*iii*) Do the usages and customs of Oudh govern the case ; and if so, was the agreed dower excessive ?

In support of the plaintiff's case, of ten witnesses called, seven were present at the marriage. These seven, as might be expected, are all related to the plaintiff. They all agree that the dower was fixed at Rs. 50,000, and that this was the minimum dower used in the plaintiff's family, and it was proved that her sister had received a much larger dower. Their statements are all consistent with one another, except in one particular, namely, whether the dower was prompt or deferred. As the witnesses were speaking of what had occurred sixteen years before, it does not appear to their Lordships that this discrepancy should invalidate their testimony on the more important question in dispute, of the amount of dower agreed upon. The question whether the dower was prompt or deferred only affects the reliance to be placed on the witnesses' recollections, as the plaintiff was in any case not bound to sue for her dower till her husbands's death; and it is not surprising that she did not do so sooner.

In addition to the testimony of the witnesses present at the marriage, the plaintiff offered in evidence the register of marriages kept by the Kazi, in which this marriage is recorded. No objection was taken, when the witnesses were examined, to the admissibility of this register: on the contrary, the defendants' pleader required that it should be inspected by the Court, as he alleged that it showed that the dower was at first entered as Rs. 5,000, and that it had been altered to Rs. 50,000. Some objection seems to have [693] been taken on appeal before the High Court, as that Court discusses the value of the register, on the assumption "that all the suggested difficulties about the admissibility of this document are removed." What those difficulties were, does not appear, but their Lordships are of opinion that the register was admissible and relevant evidence, within the meaning of the 32nd section of the Indian Evidence Act of 1872, as having been made by the Mujtahid in the discharge of his professional duty. This particular register appears to have been kept since the annexation of the province, and all marriages are recorded in it ; it contains columns for the names and descriptions of the parties, the names of the vakils of the bride and bridegroom respectively, and the amount of the dower, together with the date of the marriage.

1892 MAY 28. — PRIVY COUNCIL. — 19 C. 689 (P.C.) = 19 I.A. 157 = 6 Sar. P.C.J. 213.

It appears from the evidence of Syed Mahomed Ibrahim, by profession Istahad or priest, that the register was kept at the time of the marriage by his father, Syed Mahomed Taki, then the priest, who is now dead, and that it has been kept since by the witness himself. The witness acted as the vakil of the bride, and his father was the vakil of the bridegroom; they both of them read the nika, or marriage service. Speaking of the practice, the entry, he says, is made in the register on the day following the night of the marriage, when, as in this case, it is celebrated late at night. The witness, on looking at the entry of this marriage in this register, says that it is in the handwriting of Yad Ali, his servant, formerly servant of his father, and that the amount of dower was as first written Rs. 50,000, and that it has been altered to Rs. 5,000. The witness does not recollect the amount of dower fixed at the time of the marriage.

Yad Ali stated that he had no personal knowledge of the marriage, excepting the recording of it in the register, which he did by the order of Syed Taki, since deceased, whose writer and general agent the witness then was, as he still is of Syed Ibrahim the son. He made the entry in question the morning after the marriage. When the witness was examined under Commission at Lucknow, the original register had not been obtained from the Patna Court, where it had been deposited, but the witness identified a document (Exhibit B) as having been made by him and **[694]** copied from the register; and he stated that the register contained the entry as detailed in that document.

The witness wrote the portion of Exhibit B, which he copied from the register on the application of Mirza Asgar Hossein. The witness's statement of what was the amount of dower recorded by him in the register was objected to, without the production of the register. The original register was afterwards produced, and Mirza Asgar Hossein, on whose application Exhibit B, copied from the Register, was obtained, was examined and cross-examined as to that document. In it the dower is stated to be Rs. 50,000. The exact time when this copy was made does not appear, but it was not long before the commencement of these proceedings. Mirza Asgar Hossein was one of the plaintiff's witnesses present at the marriage, and he proves that the dower of Rs. 50,000 was agreed to by Mahomed Ismail, the deceased husband of the plaintiff. At some time not specified, after the death of Mahomed Ismail, this witness applied to Syed Ibrahim, the priest who had charge of the register, for a copy of the entry of the marriage. The witness obtained from Yad Ali the Exhibit B. Another more formal copy being required, he went with one Mahomed Zaki to Syed Ibrahim to obtain it; Yad Ali produced the register, and asked Mahomed Zaki to copy it. The witness then saw the register, and it contained Rs. 50,000 in the column of muhr (dower) "clearly Rs. 50,000. Now it appears a little blotted which makes it like Rs. 5,000."

Mahomed Zaki says that he went with Asgar Hossein to Syed Ibrahim, and saw the register, and copied the entry of the marriage at Yad Ali's dictation. "It was Rs. 50,000. It has been altered."

This was the evidence for the plaintiff, and appears to their Lordships clearly to establish the appellant's case, unless its effect can be shown to be overcome by clear and consistent counter-testimony.

For the defence Mahomed Askeri was called. He is a nephew of the deceased, and is one of the defendants. He states that when Ismail Khan was ill, he said in the presence of the plaintiff that the dower was Rs. 5,000, and that it was paid. Three or four **[695]** years after, when again ill,

1892 MAY 28. — PRIVY COUNCIL. — 19 C. 689 (P.C.) = 19 I.A. 157 = 6 Sar. P.C.J. 213.

he said the same in her presence; other persons (named but not called) were also present.

Munnu Khan, a servant of the deceased Ismail Khan, says that he went with him to Lucknow. At the time of the marriage he was with Ismail Khan. "I do not know the position of the plaintiff. I saw her house. It was in a very dilapidated state. Her dower was fixed at Rs. 5,000." In cross-examination he stated that since the dispute the plaintiff was not agreeable to his stopping in the house, and so he went away to the defendants.

Mir Khurshed Ali, a professional story-teller, says that he went to the marriage. The dower was fixed at Rs. 5,000. "Syed Ibrahim asked Mahomed Ismail, 'The dower of Mussumat Zakeri Begum is Rs. 5,000; do you agree to this?' Mahomed Ismail replied, 'I agree.'" The dower of witness's first wife was fixed at Rs. 30,000.

Mir Wazir Jan says he accompanied Mahomed Ismail to Lucknow, and was present at the marriage. "The dower was fixed at Rs. 5,000. . . . . On a sudden the amount of dower was fixed in the wedding party. . . . . . There was no conversation about the dower before."

These three were all the witnesses for the defendants said to have been present at the marriage. The only other witness who speaks on the subject of the dower is Mirza Yusuf Beg, who relates a conversation with Mahomed Ismail, which is not relevant evidence.

This closed the case for the defendants.

Upon this evidence the Subordinate Judge, in a carefully considered judgment, came to the conclusion that the dower was fixed at Rs. 50,000 and had not been paid, and on inspection of the register he says that "there is not the least doubt that 50,000 has been changed to 5,000." He also held that the law of Oudh was not applicable to this case, but that if it were the amount of dower was not extravagant, and that no ground had been shown for reducing it.

On appeal the High Court reversed the judgment of the Subordinate Judge, but gave the plaintiff a decree for Rs. 5,000 out **[696]** of her husband's estate, thus rejecting the defendant's evidence that the dower had been paid.

The reasons given for refusing to credit the plaintiff's witnesses are—(*i*) That the plaintiff "was not married with the publicity of a *shadi* marriage," and that after the marriage she was only treated with the respect "naturally paid to a second or nika wife during the lifetime of the first," and that under these circumstances the amount of dower was very large. No evidence was given on this subject, and no authority has been referred to in support of the suggestion that a simple nika marriage amongst Mahomedans would indicate inferiority on the part of the wife to one "married with the publicity of a *shadi* marriage." (*ii*) That there was no *kabinnama*, or written contract; but it was proved in the course of the plaintiff's case, and not contradicted by any witness for the defendants, that though the dower is always fixed, there are sometimes written contracts of dower and sometimes not. Here, as it is alleged, the dower was fixed and written in the register. (*iii*) That the plaintiff herself did not give evidence. But having regard to the unwillingness of Mahomedan ladies to give evidence, and the fact that the dower would naturally be arranged by her relatives, several of whom were called, their Lordships do not consider that the plaintiff's absence as a witness should invalidate the testimony of those who were called. (*iv*) That the male relative, in whose

1892
MAY 28.
PRIVY COUNCIL.
19 C. 689 (P.C.) = 19 I.A. 157 = 6 Sar. P.C.J. 213.

house and in whose charge she was living at the time of the marriage, has not been called. There appears to be some misapprehension as to this. The marriage is proved to have taken place in the house of Mahomed Mirza *alias* Miran Sahed, and this witness has been called, and proved that Mirza Mahomed Wazir, the oldest member of the plaintiff's family, settled this marriage a fortnight before it took place, and that this person is dead. (*v*) That the witnesses differ as to whether the dower was prompt or deferred. This has been already dealt with.

Then it is said that the plaintiff's witnesses are "contradicted on the other side by other witnesses of much the same kind and class as the plaintiff's," and the judgment of the High Court proceeds—" Under these circumstances, if the matter had stood thus, we should have found it impossible to accept the plaintiff's **[697]** story," and the Judges say that as "the plaintiff's witnesses were examined on commission," they are "in the same position in estimating their evidence as the Judge of the Court below was." It is to be observed, however, that the witnesses for the defence were examined *viva voce* before the Subordinate Judge, and that one of the defendants was disbelieved on a most material point, on which he gave distinct evidence, namely, that the deceased stated twice in the presence of the plaintiff that the dower had been paid. This evidence must have been equally discredited by the Judges of the High Court, since they gave the plaintiff judgment for the Rs. 5,000, said to have been already paid, and this notwithstanding the absence of the plaintiff as a witness, on which adverse comment was made. This does not merely invalidate the evidence as to that particular fact, but casts doubt on the defendant's case. The Judges then proceed to consider the effect of the register, and say that "assuming that all the suggested difficulties about the admissibility of this document are removed, it proves nothing." The register was produced for the inspection of the Judges, and they accept the evidence of Syed Ibrahim, against whom they say no suspicion was suggested, that the amount had been altered from Rs. 50,000 to Rs. 5,000, but they say that there is nothing to show that this was not a *bona fide* correction of a mistake made at the time. This is scarcely reconcilable either with the evidence of those who saw the register as already noticed, or with the view presented, apparently for the first time, in the following passage in the judgment: " Having regard to the place where the marriage was celebrated, and all the circumstances connected with it" (what these were is not stated), " we think it just as likely that if Rs. 50,000 was entered in the register at the time, it was not entered as any record of an actual contract to pay Rs. 50,000 but as a sort of form of courtesy intended to raise the honour and dignity of the parties."

Their Lordships can find no justification for this suggestion, which has not been made either on the pleadings or by any of the witnesses examined. The evidence is uncontradicted that the plaintiff was of good family, and that a dower of as much as Rs. 50,000 was usual in it. Her sister received a much larger dower, and others as large are proved.

[698] The Judges of the High Court next consider the evidence of the three witnesses who state that the register remained unaltered from Rs. 50,000 at a recent date, and criticise their testimony unfavourably, because they differ as to the order in which copies were made; and they speak of Zaki as "a person who had no connection with the matter at all, a mere outsider, whose intervention is by no means satisfactorily explained." The order in which the copies were made is a very unimportant

1892 MAY 28. — PRIVY COUNCIL. — 19 C. 689 (P.C.) = 19 I.A. 157 = 6 Sar. P.C.J. 213.

matter, in which disagreement, if it exists, might easily arise, and there does not appear any necessity for further explanation of why an "outsider" was employed to examine the register and procure a copy.

The Judges conclude that this evidence appears to them "to be not of a satisfactory kind, but to leave the whole question as to when the alteration in the register was made in uncertainty." It is obvious, however, that it cannot be suggested that the alteration from Rs. 50,000 to Rs. 5,000 was made in the interest of the plaintiff, and their Lordships can see no reason for holding that the evidence of the three witnesses that the entry remained Rs. 50,000 at a recent date should be rejected.

The Judges of the High Court do not deal with the other points named, as the grounds relied on by them disposed of the case from their point of view. Their Lordships agree with the Subordinate Judge that the usages and customs of Oudh as to dower were not applicable to the marriage in question, but if they were, no reason has been shown why the Subordinate Judge should in the exercise of his discretion have reduced the dower in this case. No evidence was given of the value of the husband's property, or any other relevant circumstances tending to show that Rs. 50,000 was excessive. Dower is often high among Mahomedans, to prevent the husband divorcing his wife, in which case he would have to pay the amount stipulated.

After a careful consideration of the whole evidence in the case, and adopting the view that the testimony of the plaintiff's witnesses have received material corroboration from the entry in the priest's register of marriages, their Lordships are of opinion that the judgment of the High Court should be reversed with costs, and that of the Subordinate Judge restored, and they will humbly advise Her Majesty accordingly. The respondents, other than **[699]** the Deputy Registrar of the High Court, will pay the costs of this appeal.

Appeal allowed.

Solicitor for the appellant: Mr. *J. F. Watkins.*
Solicitors for the respondents : Messrs. *T. L. Wilson & Co.*

C. B.

---

19 C. 699.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

HURRO DOYAL ROY CHOWDHRY (*Plaintiff*) *v.* MAHOMED GAZI CHOWDHRY AND OTHERS (*Defendants*), *Respondents.**
[27th May, 1891.]

Putni Taluq—Sale of Putni tenure for arrears of rent—Bengal Regulation VIII of 1819, *s.* 8, *cl.* 2*—Onus of proof of publication of notice before sale of Putni taluq for arrears of rent—Notice of sale of Putni taluq, onus of proof of publication of—Suit to set aside sale.*

In a suit to set aside a sale of a putni taluq, held under the provisions of s. 8 of Reg. VIII of 1819, on the ground that the notices required by sub-s. 2

---

* Appeal from Appellate Decree, No. 831 of 1890, against the decree of Baboo Nobin Chunder Gangooly, Subordinate Judge of Tipperah, dated the 7th April 1890, reversing the decree of Baboo Nogendro Chunder Mitter, Munsif of Chandpore, dated the 8th of May 1889.

of that section had not been duly published, it lies upon the defendant to show that the sale was preceded by the notices required by that sub-section, the service of which notices is an essential preliminary to the validity of the sale. 1892 MAY 27.

In such a suit, where there was no evidence one way or the other to show that the notice required by that sub-section to be stuck up in some conspicuous part of the Collector's kutcheri, had been published, *Held*, that the plaintiff was entitled to a decree setting aside the sale. APPELLATE CIVIL.

[F., 27 M. 94 (96) = 13 M.L.J. 479 ; R., 13 C L.J. 404 = 16 C.W.N. 805 = 10 Ind. Cas. 90 ; D., 30 C. 1 (11).] 19 C. 699.

THIS was a suit brought by the plaintiff to have a sale of a putni taluq, held under the provisions of Reg. VIII of 1819, set aside on the ground of non-publication of the notices required by cl. 2 of s. 8 of the Regulation, the allegation being that such non-publication was due to fraud on the part of the defendants, the result being that property of the value of Rs. 400 had been sold for Rs. 60 only. The plaintiff alleged that defendant No. 1, Mahomed Gazi Chowdhry, was the proprietor of the zemindari, within which the putni taluq was situated, and of [700] which defendant No. 3, Neari Bibi, was the taluqdar, defendant No. 4, Mahomed Jama, being the husband of defendant No. 3 ; that in execution of a money decree against defendants Nos. 3 and 4, the taluq in suit was brought to sale and was purchased by one Koylash Chunder Basu in September 1887 for Rs. 400, who was a benamidar for the plaintiff, and who executed a kobala of the taluq in his favour on the 27th Aughran 1294 B.S. (12th December 1887). The plaintiff further alleged that defendant No. 1, in collusion with defendants Nos. 3 and 4, on the 14th May 1888 brought the putni to sale for arrears of rent for the year 1294, he being the recognized owner; that the sale was held under the provisions of Reg. VIII of 1819, and was a collusive and fraudulent transaction arranged between the defendants, the purchaser being defendant No. 2 who was a near relative and benamidar for defendants Nos. 3 and 4; that the price paid by defendant No. 2 was Rs. 60 only, the property being worth Rs. 400 ; and that the notices of sale and *istahars* were not published as required by the Regulation. He accordingly sought to have the sale set aside and to be confirmed in possession of the tenure.

Defendants Nos. 1 and 2 contested the suit. They denied that there had been any fraud or collusion in the matter, and pleaded that the notices and *istahars* had been duly published. They further stated that Rs. 60 was the proper value of the taluq.

The only issues raised in the cases were the following :—

(*i*) Whether the notices of sale were served upon the defaulter under the provisions of Reg. VIII of 1819 ? Were there any irregularities in the publication of the sale ? Was the sale a fraudulent one ?

(*ii*) Is the putni sale fit to be set aside ?

The Munsif did not find that there had been any collusion or fraud on the part of the defendants or that the price fetched was inadequate, as he held this to be immaterial for the purpose of the case, which he decided upon the question of the non-service of the notices required by the Regulation. He held that there was no evidence on the record to prove the service of the notice at the Collector's kutcheri ; that though an attempt had been made to [701] prove the service at the zemindar's kutcheri, it had failed ; and even the kutcheri where it was alleged to have been made was not shown to be the zemindar's sudder kutcheri within the meaning

1892 MAY 27. — APPELLATE CIVIL. — 19 C. 699.

of s. 8, cl. 2 of the Regulation; that the plaintiff had no kutcheri or manager on the land, and that there had been no service on him or attempted service, though notices had been affixed on the house of the former putnidar, defendant No. 3, whose rights had admittedly vested in the plaintiff before the date of service; and that even as regarded such service, the attestation by three substantial persons as required by the Regulation was wanting, the attestation being by only two persons, one being a servant of the zemindar. He accordingly held that the service of the notices was insufficient, and on that ground gave the plaintiff a decree setting aside the sale with costs against the zemindar, defendant No. 1, and ordered the refund of the purchase-money to defendant No. 2, the purchaser.

Defendant No. 1 appealed.

The Subordinate Judge considered that the decision of the case depended upon the question of on whom the onus of proof lay, and he held that the plaintiff was bound to prove the irregularities he alleged when he was asking for relief on the ground of such irregularities and fraud; he relied on the provisions of s. 14 of the Regulation to the effect that any one contesting the right of the zemindar to make a sale might, in a suit to reverse such sale, upon *establishing a sufficient plea*, obtain a decree, as supporting this proposition, and stated that he could find nothing in the cases of *Bhugwan Chunder Dass* v. *Sudder Ally* (1), *Mahomed Zamir* v. *Abdul Hakim* (2), and *The Maharani of Burdwan* v. *Krishna Kamini Dasi* (3), which had been relied on by the pleader for the plaintiff, as establishing the contrary proposition, that the onus of proof of service lay on the defendant. Upon the question of fraud and irregularity in publication of the notice at the Collector's kutcheri he agreed with the Munsif in holding that there was no proof of fraud, and no evidence on either side to show that the notice was stuck up at the Collector's kutcheri as **[702]** required by the section; but he held that as the onus of proving the non-publication lay on the plaintiff, he could not find that it had not been so published, or that there had been any irregularity in its publication there. As regarded the publication of the notice at the sudder kutcheri of the Zemindar, he found that this was proved by the defendants' witnesses, whom he saw no reason to disbelieve in the absence of any evidence to the contrary on the part of the plaintiff, and he disagreed with the finding of the Munsif as to the kutcheri, where such service was effected, not being the sudder kutcheri within the meaning of the section. He also came to the opposite conclusion to that arrived at by the lower Court upon the question as to the publication at the kutcheri or at the principal town or village upon the land of the defaulter, and holding that the provisions of s. 8 of the Regulation were merely directory, considered the attestation sufficient. On the whole he came to the conclusion that the plaintiff had wholly failed to establish a *sufficient plea* within the meaning of s. 14, and that the suit should have been dismissed, and he accordingly reversed the decision of the Munsif, and dismissed the plaintiff's suit with costs.

Baboo *Hem Chunder Banerjee* and Baboo *Bassunt Coomar Bose*, for the appellant.

Dr. *Rash Bihary Ghose* and Baboo *Bhuban Mohan Doss*, for the respondent.

---

(1) 4 C. 41. (2) 12 C. 67. (3) 14 C. 365.

The judgment of the High Court (PIGOT and MACPHERSON, JJ.) was as follows:— 1892 MAY 27.

APPELLATE CIVIL.

19 C. 699.

JUDGMENT.

In this case the appellant brings a suit to set aside the sale of a putni under Reg. VIII of 1819, on the ground that the sale was invalid, and his case is that the sale was invalid by reason of the notices required by sub-s. 2, s. VIII, not having been proved. The Courts have held that there is no evidence one way or another as to the service of such notices.* The plaintiff [703] says that in the absence of such evidence the case must be decided in his favour. The defendant says that it lies on the plaintiff to prove that such notices were not served, and unless that is proved the defendant is entitled to a decision in his favour upon that issue. We think that the decisions of their Lordships of the Privy Council in the case of *Maharajah of Burdwan* v. *Tarasundari Debi* (1), and particularly the passage at p. 624 of that report, and also the case of *Mahomed Zamir* v. *Abdul Hakim* (2), decided in this Court, in which that Privy Council case is referred to, establish the proposition that in such a case it lies upon the defendant to show that the sale was preceded by the notices required by s. 8, cl. 2, the service of which notices is an essential preliminary to the validity of the sale.

We therefore allow the appeal, set aside the decree of the lower Court, and decree the suit with costs of this appeal and in the lower Courts.

H. T. H. *Appeal allowed.*

---

19 C. 703.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Tottenham and Mr. Justice Ghose.

RAJNARAIN MITRA, THE RECEIVER IN THE PLACE OF THE DEFENDANTS NOS. 1 TO 4 *v.* ANANTA LAL MONDUL AND ANOTHER (*Plaintiffs*), AND KARALI CHARAN MUKERJEE AND OTHERS (*Defendants*),*

AND

KRISTO LAL CHOWDHURI AND OTHERS (*Defendants*) *v.* ANANTA LAL MONDUL AND ANOTHER (*Plaintiffs*), AND THE REMAINING DEFENDANTS.† [5th March, 1892.]

Putni Taluq—Sale of Putni tenure for arrears of rent—Bengal Regulation VIII of 1819, s. 8, *cl.* 2, *and s.* 14—*Publication of notice in the Collector's kutcheri—Non-publication of notices in manner prescribed, effect of, on the validity of a sale of a Putni-tenure—"Sufficient plea."*

The sticking up or publication in a conspicuous part of the Collector's kutcheri of a notice in accordance with the provisions of cl. 2 of s. 8

---

* *Editor's note.*—This statement should be limited to the service of the notice at the Collector's kutcheri, the arguments during the hearing of the appeal having been confined to the effect of the non-service of that particular notice on the validity of the sale. See *post* 19 C. p. 725. This note is added with the approval of the Judges (Pigot and Macpherson, JJ.) who decided the case.

† Appeals from Original Decree Nos. 126 and 133 of 1890 against the decree of Baboo Kedar Nath Chatterjee, Subordinate Judge of Birbhum, dated the 23rd of January 1889.

(1) 9 C. 619=10 I.A. 19. (2) 12 C. 67.

1892 MARCH 5. — APPELLATE CIVIL. — 19 C. 703.

[704] of Regulation VIII of 1819 is essential to the validity of a sale of a putni tenure under that Regulation.

Where a notice of sale, instead of being stuck up and published in some conspicuous part of the Collector's kutcheri as required by law, was, in accordance with the practice which prevailed during the incumbency of the Nazir of the Collector's kutcheri at Birbhum and of his predecessors in office, kept by the Nazir with other petitions for sale and notices relating to them in a bundle, which was at night locked up for safe custody, and in the daytime kept in a conspicuous place near his seat, at the entrance to the kutcheri, any person who choose to ask for it or wished to see it being at liberty to inspect the whole bundle:

Held [by PETHERAM, C J., and GHOSE, J. (TOTTENHAM, J., dissenting)] that this was not a publication of the notice within the meaning of cl. 2 of s. 8 of the Regulation, and that it was a 'sufficient plea' for the defaulting putnidars within the meaning of s. 14 to have the sale set aside.

Maharaja of Burdwan v. *Tarasundri Debi* (1) relied on.

Ahsanulla Khan Bahadoor v. *Hurri Churn Mozoomdar* (2) distinguished.

[R., 13 C.L.J. 404 = 16 C.W.N. 805 = 10 Ind. Cas. 90.]

THIS was a suit instituted by the plaintiffs to set aside the sale of a putni tenure held under the provisions of Reg. VIII of 1819.

The names of the putnidars as recorded in the zemindars' books were Madan Mohan Mondul, Hara Mohan Das, Nittyanund Mondul and Ram Kisto Mondul. The plaintiffs were the sons and legal representatives of Madan Mohan Mondul and Hara Mohan Das.

The plaintiffs alleged that on the 1st Assin 1269 (16th September 1862) Madan Mohan Mondul, Hara Mohan Das, the *pro forma* defendant Nittyanund Mondul, and Ram Kristo Mondul took from Rajah Protab Chunder Singh, the ancestor of the defendants Nos. 1 to 4 a putni lease at an annual rent of Rs. 3,125 of mouzah Naikpore in the district of Birbhum, and obtained possession thereof: that Madan Mohan's share was 8 annas, Hara Mohan's 4 annas, Nittyanund's 2 annas, and Ram Kisto's 2 annas: that upon the death of Madan Mohan in 1273 (1866-67), the plaintiff Ananta Lal Mondul succeeded to his 8 annas share, as his son and legal representative, and that subsequently in 1289 (1882-83) he purchased from Ram Kisto his 2 annas share, thus acquiring a 10 annas share in the putni: that upon the death of Haro Mohun Das in 1279 (1872-73), the [705] plaintiff, Radha Kisto Das, succeeded to his 4 annas share as his son and legal representative: that the plaintiffs and the *pro forma* defendant, Nittyanund Mondul, were in possession of their respective shares in the putni, and paid rent to the defendants Nos. 1 to 4, who were the heirs of Rajah Protab Chandra Singh: that the rent for the latter half of the year 1295 (1888-89) having fallen into arrear, the defendants Nos. 1 to 4, although fully aware of the putni rights of the plaintiffs and the *pro forma* defendant Nittyanand Mondul, improperly instituted proceedings in the Collectorate of the district of Birbhum, under Reg. VIII of 1819 against the four recorded putnidars, and caused the putni to be sold on the 1st Joisto 1296 (13th May 1889), and the defendants Nos. 5 and 6 purchased the same in the name of the defendant No. 5 for Rs. 5,310: that the plaintiffs sustained substantial injury by reason of such proceedings and sales, and submitted that the sale should be set aside for the following reasons:—

1*st*—that the notices required by Reg. VIII of 1819 were not duly published.

(1) 9 C. 619 = 10 I.A. 19.

(2) 17 C. 474.

1892 MARCH 5. — APPELLATE CIVIL. — 19 C. 703.

2nd—that the zemindars had acted illegally in having instituted proceedings under the Regulation against Madan Mohan Mondul and Hara Mohan Das, who had died long prior to the date of the institution of the proceedings.

3rd—that Kulodanand Mukerjee (defendant No. 6), the father of Karali Charan Mukerjee (defendant No. 5), was the gomastah of the plaintiff Ananta Lal: that both father and son lived in commensality and used to make collections in the putni: that when the plaintiffs heard that the putni was to be sold, they sent Rs. 1,886-8, the amount of the arrears, through the defendant No. 5, to Suri to be paid in either to the zemindars' agent, or to the Collectorate in time to save the putni from sale; but that the defendant No. 5, instead of paying the money, allowed the property to be put up for sale, purchased it himself for Rs. 5,310, and paid the earnest money out of the money which had been entrusted to him for the payment of the arrears: that the defendant No. 5 informed the plaintiff Ananta Lal of what he had done, and promised to restore the property to the **[706]** plaintiffs, and that it was then arranged that the plaintiffs should deposit the balance of the purchase-money in due time, and the defendants Nos. 5 and 6 should relinquish the purchase in their favour: that subsequently they resiled from this agreement, and having represented themselves as the real auction-purchasers, obtained the balance of the purchase-money from the defendants Nos. 7 to 10, and then conveyed the putni to them for Rs. 5,510, thus making a profit of Rs. 200.

4th—that defendants Nos. 7 to 10, being fully acquainted with the circumstances connected with the sale, purchased the property from persons who had no title to it.

5th—that the auction-purchase was made with money belonging to the plaintiff Ananta Lal.

6th—that in consequence of the non-publication of the notices at the defaulter's kutcheri in the mofussil, and at the sudder kutcheri of the zemindars, the putni was sold for an inadequate price.

The plaintiffs, therefore, prayed for a declaration that the sale was illegal and void, and for possession of their respective 10 annas and 4 annas shares. They further prayed as against the defendants Nos. 7 to 10 that, if the sale was valid, it should be declared that it did not destroy the rights of the plaintiffs, inasmuch as the purchase was made on their behalf, and the earnest money deposited at the time of the sale was their money, the bidder being defendant No. 5, who was the son of the gomastah of the plaintiff Ananta Lal.

The zemindar defendants (defendants Nos. 1 to 4), through the Receiver to their estate, contended that the suit was bad for misjoinder of parties, as they had not interest in common with the other defendants. They also contended that the plaintiffs had no right to sue, as they were not the recorded putnidars; and denied that there had been any defect in the publication of the notices.

The defendants Nos. 5 and 6 contended that the suit was bad for misjoinder of parties and causes of action and for multifariousness. They denied any breach of faith. They also denied that **[707]** the plaintiffs had sent the whole amount of the rent in arrear to be paid in, in order to save the putni from sale. They alleged that only the plaintiff Ananta

1892
MARCH 5.
——
APPEL-
LATE
CIVIL.
——
19 C. 703.

Lal's share, Rs. 1,156-8, had been sent to Suri: that the zemindars' agent refused to accept part payment only, and so the sale proceeded: that the defendant No. 5, in the interest of the plaintiff Ananta Lal, bid for the property at the sale and was declared the purchaser: that he deposited the earnest money, Rs. 796-8, out of the money he had received, and returned the balance, Rs. 360, to the plaintiff: that the defendants Nos. 5 and 6 requested the plaintiff Ananta Lal to raise the balance of the purchase-money, and as he was unable to do so, and the earnest money was in danger of being forfeited, the defendants Nos. 7 to 10 were induced to take up the purchase, and the plaintiff Ananta Lal was a consenting party to the negotiations with them.

The defendants Nos. 7 to 10 supported all the contentions raised by the other defendants, and defended their purchase from defendant No. 5 by denying any knowledge that defendant No. 5 had bid on behalf of the plaintiffs, and by alleging that the plaintiff Ananta Lal had fully assented to the transaction to which they were parties.

On these pleadings the following issues were settled by the Court below:—

1. Is this suit bad for misjoinder of parties and of causes of action, and for multifariousness?

2. Have the plaintiffs a right to sue to set aside the putni sale by reason of their names not having been registered in the zemindars' serishta?

3. Were the notices of sale, as required by law, duly published?

4. Was any receipt given by the gomastah of the plaintiff No. 1 in acknowledgment of the publication of the notice of sale? Is that receipt legally sufficient as to due service of notice?

5. Had the original putnidars died before proceedings for sale in this case were taken under the Regulation? Were the zemindars aware of this fact?

6. Are these proceedings illegal owing to their having been instituted against dead persons?

[708] 7. Are the plaintiffs now estopped from raising this objection by reason of their having paid into Court the putni rents due from them when former proceedings for the recovery of the same had been instituted against the dead putnidars?

8. Was the disputed property sold for an inadequate price?

9. Is the putni sale liable to be set aside?

10. What sum, if any, was made over by the plaintiff No. 1 to the defendant No. 5?

11. Was the purchase by the defendant No. 5 made by the plaintiff? and can he legally claim the benefit of that purchase as against the zemindar defendants?

12. Was the purchase by the defendants Nos. 7 to 10 made with the consent and knowledge of the plaintiff No. 1? If so, can he maintain this suit?

13. Was the purchase by defendants Nos. 7 to 10 fraudulent with notice of the plaintiffs' right?

The Subordinate Judge decided the 1st issue in favour of the plaintiffs solely on the ground that the purchasers were necessarily proper parties to a suit brought to set aside a putni sale for non-service of notice.

With regard to the 2nd issue, he held that the plaintiffs were entitled to maintain the suit, as they were the heirs of deceased putnidars.

With regard to the 3rd and 4th issues, the Subordinate Judge found that the notice was stuck up in a conspicuous place in the zemindars' Kutcheri, but that there was no due publication of the notices either at the Collector's kutcheri or at that of the defaulters in the mofussil. He was of opinion that the receipt of service of notice in the mofussil could not be accepted as proof of such service, inasmuch as it contradicted the oral evidence as to the manner of service, and while it purported to have been written and signed by the gomastah of Ananta Lal, Kulodanund Mukerjee, it was really written by his son Karali Charan, who was not the defaulter's manager, and was attested by persons who were not present at the publication. Accordingly he decided these issues in favour of the plaintiffs.

In deciding the 5th and 6th issues, the Subordinate Judge found that the fathers of the plaintiffs had died in 1273 and 1279 [709] respectively, as alleged in the plaint; that the zemindars' mukhtar had been informed of their death, and that the proceedings under Reg. VIII of 1819 had been instituted against putnidars, two of whom were dead at the time. He was of opinion that there was no obligation on the plaintiffs to get their names registered in the zemindars' serishta, and that under cl. 2 of s. 14 of the Regulation they were entitled to contest the zemindars' demand of arrears of rent. He therefore came to the conclusion that the proceedings under the Regulation were illegal, and decided these issues in favour of the plaintiffs.

With regard to the remaining issues, the Subordinate Judge found that the plaintiffs suffered loss by the sale; that Rs. 1,886-8 were made over to defendant No. 5 to be paid to the zemindars' agent in liquidation of the arrears of rent; that the purchase was made on behalf of the plaintiffs; that neither of the plaintiffs consented to the sale of the property to the defendants Nos. 7 to 10; that the defendants Nos. 7 to 10 were well aware of the plaintiffs' rights and of the circumstances connected with the auction sale, and that their purchase from the defendants Nos. 5 and 6 was fraudulent. He was of opinion that the plaintiffs were not estopped from objecting to the proceedings on the ground that they had paid into Court the rents due in respect of the putni when former proceedings for the recovery of the same had been instituted against deceased putnidars. Accordingly he decided all these issues in favour of the plaintiffs.

The Subordinate Judge consequently decreed the suit, setting aside the sale and giving the plaintiffs possession of 14 annas of the putni.

Against this decree there were two appeals to the High Court.

Appeal No. 126 of 1890 was preferred on behalf of the zemindar defendants (Nos. 1 to 4) by the Receiver to their estate.

Appeal No. 133 of 1890 was preferred by the defendants Nos. 7 to 10.

In appeal No. 126 of 1891:

Baboo *Srinath Das*, Baboo *Taruck Nath Sen* and Baboo *Sham Lal Mitter*, for the appellant.

Baboo *Mohini Mohun Roy* and Baboo *Lal Mohun Das*, for the (plaintiffs) respondents.

[710] In appeal No. 133 of 1891:

Dr. *Rash Behary Ghose* and Baboo *Nalini Ranjan Chatterjee*, for the appellants.

Baboo *Mohini Mohun Roy* and Baboo *Lal Mohun Das*, for the (plaintiffs) respondents, and

1892 MARCH 5. — APPELLATE CIVIL. — 19 C. 703.

Baboo *Srinath Das*, Baboo *Taruck Nath Sen* and Baboo *Sham Lal Mitter*, for the Receiver respondent.

The two appeals were originally heard together by a Bench consisting of TOTTENHAM and GHOSE, JJ.; the contentions of the parties are sufficiently stated in the judgment of the former.

The following judgments were delivered :—

JUDGMENTS.

TOTTENHAM, J.—These are two appeals against a decree of the Subordinate Judge of Birbhum setting aside a putni sale at the suit of two of the defaulting putnidars. One appeal is on behalf of the zemindars, preferred by the Receiver to their estate ; and the other is preferred by the assignees of the auction-purchasers of the putni.

The name of the putni is Naikpore, and the names of the putnidars, as recorded in the zemindar's books, are Madan Mohan Mondul, Hara Mohan Das, Nityanund Mondul, and Ram Kisto Mondul. The two first named are dead, and the two plaintiffs are their sons and representatives. The plaintiff Ananta Lal was owner of an 8 annas share of the putni by inheritance from Madan Mohan, and alleges that he had purchased the 2 annas share of Ram Kisto. The other plaintiff, Radha Kisto, was owner of a 4 annas share ; and Nittyanund, owner of the remaining 2 annas share, was a *pro forma* defendant in the suit.

The plaintiff sued to have the sale set aside upon the ground that the notices required by Reg. VIII of 1819 had not been published according to law, and that the proceedings were likewise bad in law, because they were taken against the deceased putnidars and the two survivors, and not against the plaintiffs personally. They further claimed as against the purchasers that, if the sale was valid, it did not destroy the right of the plaintiffs, inasmuch as it was made on their account, and the earnest money [711] deposited at the time of the sale was their money, the bidder being defendant No. 5, the son of the gomastah of the first plaintiff. It was alleged that the final purchasers, defendants Nos. 7 to 10, obtained the property by collusion with the defendant No. 5 and his father, and well knowing that the plaintiffs were the true purchasers. It was not denied that there had been default in payment of the putni rent such as warranted proceedings being taken under the Regulation ; but it was alleged that the whole amount of the arrears had been sent by the plaintiffs through the defendant No. 5 to Suri to be paid in, either to the zemindars' agent or to the Collectorate, in time to save the putni from sale, but that the defendant No. 5, instead of paying the money, allowed the property to be put up for sale, purchased it for Rs. 5,310, and paid the earnest-money, 15 per cent., out of the money which had been entrusted to him for the liquidation of the arrears. He informed the plaintiff No. 1 of what he had done, and it was arranged that the plaintiffs should deposit the balance of the purchase-money in due time, and that defendants Nos. 5 and 6 should relinquish the purchase in their favour. But subsequently it is said they resiled from this agreement, and made a profit of Rs. 200 by obtaining the balance of the purchase money from defendants Nos. 7 to 10, and then conveying the putni to them for Rs. 5,510.

The defendants put in three written statements in accordance with their respective positions in regard to the suit.

The zemindars contended that there was misjoinder, as they had no interest in common with the purchasers. They contended that the plaintiffs had no right to sue, as they were not the recorded putnidars, and

they denied that there had been any defect in the publication of the notices.

The defendants Nos. 5 and 6 denied any breach of faith. They denied that the plaintiffs had sent the whole of the rent in arrears to be paid in to save the putni from sale. They said that only the plaintiffs' own shares had been sent; that the zemindars' agent declined to accept part payment only, and so the sale proceeded. The defendant No. 5 in the interests of the plaintiffs bid for the property, and was declared the purchaser, and then informed the plaintiff No. 1 what he had done. Plaintiffs being unable to [712] raise the balance of the purchase-money and the earnest-money being in danger of being forfeited, the defendants Nos. 7 to 10 were induced to take up the purchase, and that the plaintiff No. 1 was a party to the negotiation with them.

The defendants Nos. 7 to 10 in their defence adopted the line taken by the zemindars as to the validity of the sale, and defended their own purchase from defendant No. 5 as against the plaintiffs by denying any knowledge that defendant No. 5 had bid on their behalf, and alleging that the plaintiff No. 1 had fully assented to the transaction to which they were parties.

On these pleadings 13 issues were laid down by the lower Court, which have been reproduced *in extenso* in the judgment of the Subordinate Judge who found on each issue in favour of the plaintiffs; and consequently decreed the suit in their favour giving them possession of 14 annas of the putni.

In the appeals all the findings of the lower Court have been challenged; and the whole case has been ably and exhaustively argued from every point of view, with the result that we are compelled to differ from the lower Court as to many of the issues, while we agree with it on others.

The first issue was as to the plea of misjoinder of parties and causes of action, and of multifariousness. The Subordinate Judge has decided this issue in favour of the plaintiffs merely on the ground that the purchasers are necessarily proper parties to a suit brought to set aside a putni sale on the ground of non-service of notice. The Subordinate Judge has thus missed the whole point of the plea which was directed against the prayer, that if the sale be held good in law, the purchase by defendants Nos. 7 to 10 should not be maintained against the plaintiffs, but the purchase should be held to have been for plaintiffs. Babu Mohini Mohun Roy, for the plaintiffs, respondents, admitted that he could not support the lower Court's decision on this issue, and admitted that unless the sale itself be found bad in law, the whole suit must be dismissed.

On the second issue we agree with the lower Court in holding that the plaintiffs are entitled to maintain a suit to set aside the sale, although they are not registered as putnidars: that they [713] were *de facto* and *de jure* putnidars in the room of their deceased fathers is admitted; and s. 14 of the Regulation expressly gives the right to sue to any party desirous of doing so.

The third issue is perhaps the most important of all, *viz.*, were the notices of sale as required by law duly published? The law is contained in cl. 2 of s. 8 of Reg. VIII of 1819, and it requires a three-fold publication of the notice of sale—the first to be "stuck up" in a conspicuous part of the Collector's kutcheri, the second at the zemindars' sudder kutcheri, and the third to be similarly published at the kutcheri or at the principal town or village upon the land of the defaulter, and it is provided that this last publication shall be attested by the production of a receipt

1892 MARCH 5. — APPELLATE CIVIL. — 19 C. 703.

signed by the defaulter or his manager; or, in default of this, by other modes of attestation mentioned in the section. The lower Court found that there was no proper publication either in the Collector's kutcheri or at the defaulter's.

A question was raised in that Court, as well as here, as to which party must bear the burden of proof in respect of the publication or non-publication of the notices. The lower Court placed that burden on the defendant zemindars, and held that they had not proved proper publication. The lower Court gave no particular reason for relieving the plaintiff of this burden, but in this Court the vakeel for the respondents has supported this ruling by pointing out that the Regulation makes the zemindars exclusively answerable for the observance of the forms prescribed, and by reference to the authority of the cases of the *Maharajah of Burdwan* v. *Tarasundari Debi* (1) and *Mahomed Zamir* v. *Abdul Hakim* (2) and of an unreported case, *Hurro Doyal Chowdhry* v. *Mahomed Gazi Chowdhry* (3), decided lately by Pigot and Macpherson, JJ. The first two cases do not lay down that the plaintiff need not give *prima facie* evidence of non-publication sufficient to require the defendant zemindars to prove the affirmative: and having regard to the general principle that a plaintiff is bound to prove his case, and to the terms of s. 14 of the Regulation, which is the law authorizing a suit to be brought **[714]** to set aside a putni sale, I confess that I do not see why the plaintiff should be relieved of the burden of starting his case. The Regulation entitles any person to sue the zemindar for the reversal of the sale, and *upon establishing a sufficient plea* to obtain a decree. Non-service of notice may be a sufficient plea, but to allege it is not itself sufficient to *establish* it; and if no evidence as to publication was adduced on either side, it seems to me that the plaintiff would not be entitled to a decree. The provision in s. 8, that the zemindar is exclusively answerable for the observance of the forms, means, I take it, that the Collector shall not be held responsible; and does not mean that in a suit by the defaulter to set aside the sale on the plea of non-observance of the forms he shall not be required to do more than allege that they were not observed. In the present case, however, there is evidence on both sides as to the notice at the defaulter's kutcheri, and it is therefore unnecessary to decide where the onus lay: and the case of *Hurro Doyal Chowdhry* v. *Mahomed Gazi Chowdhry* (3) does support the lower Court's view.

As regards the notice at the Collector's kutcheri, although the plaintiffs adduced no evidence, the defendants did produce evidence which proves in the plaintiff's favour that the notice was *not* published in the manner prescribed by the law, *viz.*, by being stuck up. The Nazir's return of service sets out that the notice had been stuck up in a conspicuous part of the kutcheri; but at the trial, the Nazir, being examined as a witness for the defence, deposed that it was not *stuck up*, but that it was otherwise published in a manner which, he said, had prevailed during his own incumbency and the incumbency of his predecessors. Upon this evidence we must agree with the lower Court in holding that the publication at the Collector's kutcheri was not in accordance with the law. We shall have later to consider whether in the present case this defect in the publication is a sufficient plea for the reversal of the sale.

The lower Court also found, as has been said, that the notice had not been duly published at the defaulter's kutcheri in the mofussil; and if

(1) 9 C. 619 = 10 I. A. 19. (2) 12 C. 67. (3) 19 C. 699.

any one of the three notices prescribed by the law is more important and more essentially necessary than the [715] others it is this, for it is especially the notice to the defaulter himself, and to the undertenure-holders in the putni. As regards the publication of this notice, we entirely dissent from the finding of the lower Court, which we consider to be opposed to the weight of evidence, and equally opposed to reason and probability. For it is admitted that for several years the rent of this putni had never been paid until after process for sale had been taken out by the zemindars, and that the half-yearly kists had on each occasion been paid only in time to save the putni from sale. It is admitted that on each previous occasion the notice had been duly published at the defaulter's kutcheri; and on this particular occasion there has been in this Court no contention that the notice did not in fact come to the knowledge and into the possession of the defaulters. So that there is no reason for supposing *a priori* that the zemindars, who never failed before, failed on this occasion to effect the due publication of the most essential of the three notices required by law.

So much for probability. Then as to the direct evidence, both parties adduced witnesses; the plaintiffs to prove that no notice was published, and the defendants to prove the affirmative. The lower Court, without any comparison of the evidence on both sides, observes that the plaintiffs have produced oral evidence to show that no notice was served, and does not examine that evidence to see what it is worth; and on the other hand offers a decidedly hostile criticism of the evidence for the defence, and, as we think, unreasonably rejects it as unworthy of credit. But in our opinion nothing can be more worthless than the evidence adduced by the plaintiffs, including the deposition of the plaintiff Ananta Lal himself, who on almost all the most important points in the case has been flagrantly untruthful, and we think there is absolutely no reason for discrediting the evidence as to this notice of Karali Charan Mukerjee, Gholam Mundul, and Raghunundun Singh, the latter being the peon who served the notice. The lower Court seems to have considered that the receipt filed contradicts the oral evidence as to the manner of service, and it finds fault with the receipt itself. We think that neither of these reasons are good ground for questioning the oral evidence of publication. The receipt purports to show that Ananta Lal, through [716] his agent, received the notice, and the term "receipt" implies that the giver has received the thing for which he gives a receipt, and this receipt declares that the notice was served by Raghunundun Singh. We take this to mean that it was duly served according to law: and the oral evidence proves that it was so. The lower Court objects to the receipt on the ground that, while it purports to have been written and signed by the gomastah of Ananta Lal, Kulodanund Mukerjee, it was really written by his son, Karali Charan, who was not the defaulter's manager. But the circumstance is satisfactorily explained by Karali, who states that he, not being himself competent to grant the receipt, brought the peon to his father's house, to get it; that his father being ill in bed authorized him to write and sign the receipt in his name, which he did in his father's presence. There are, indeed, certain legal objections to the receipt not noticed by the Court below; but, however that may be, we are satisfied, apart from that document, that the publication of the notice in the mofussil is most amply proved by the oral evidence. The legal objection to the receipt is that, whereas it purports to have been given by the manager of one only of the defaulters, and therefore should have been signed also or supplemented

1892 MARCH 5. — APPELLATE CIVIL. — 19 C. 703.

by another one signed by three substantial persons residing in the neighbourhood in attestation of the notice having been brought and published on the spot, it was in fact signed by persons who were not present at the publication; and had there been any doubt upon the evidence that the publication had really been effected according to law, this defect in the receipt would have been fatal to the sale. The learned pleader for the plaintiffs, respondents, relied upon the cases of the *Maharajah of Burdwan* v. *Tarasundari Debi* (1) and *Mahomed Zamir* v. *Abdul Hakim* (2), as showing that whenever the publication of the notice at the defaulter's kutcheri is disputed, the evidence of the fact must be preserved in the way prescribed. But we do not understand their Lordships in the Privy Council, or the learned Judges who decided the latter case, to lay down that if other evidence establishes the due publication beyond doubt, a defect in the receipt will vitiate the sale; and that this is not so is, we think, established on the [717] authority of the case of the *Maharani of Burdwan* v. *Krishna Kamini Dasi* (3), in which *Tarasundari's* case was discussed. This disposes of the 3rd and 4th issues; and we agree with the lower Court only as to that part of the 3rd issue which relates to the notice in the Collector's kutcheri.

The 5th and 6th issues relate to the fact that two of the recorded putnidars were dead before these proceedings under the Regulation were taken. We think that the fact is immaterial, and that the Court below was wrong in holding that the proceedings were illegal by reason of their having been directed against dead persons; for proceedings under the Putni Regulation taken for the realization of arrears of putni rent are not taken against *persons* at all, but against the *tenure*. And the zemindar is quite right in setting out in his petition and notices the name of the putni and the names of the putnidars as recorded in his books. The findings therefore of the lower Court upon these issues cannot avail the plaintiffs. And in the view we take of this matter, the 7th issue is not relevant, and the finding of the Court below, that the plaintiffs are not estopped from objecting to the proceedings on the ground taken in the 5th issue, does not affect the case; and the 8th issue, as to whether the putni was sold for an inadequate price, is equally irrelevant in this suit and need not be decided.

The 9th issue is the question—"Is the putni sale liable to be set aside?" This means simply should the suit be decreed or dismissed? and depends upon the findings on all the material issues raised. The lower Court answered the question in favour of the plaintiffs; that being the necessary result of deciding all the other issues in their favour. We have had to dissent from the lower Court as to many of those issues, and our final decision of the question must depend upon the effect upon the sale of the defect in the publication of the notice in the Collector's kutcheri. And it seems convenient to discuss that question now; for the remaining issues in the case do not touch the validity of the sale proceedings, but relate to the question whether, in the event of their being declared to be valid, the plaintiffs are entitled to be treated as the purchasers; and their vakeel has admitted that [718] unless they are entitled to the reversal of the sale they cannot in this suit obtain any other relief.

The result of our deliberations as to the effect upon the sale of the non-publication in the manner prescribed by law of the notice in the Collector's kutcheri is unfortunately a difference of opinion between us.

(1) 9 C. 619=10 I.A. 19. (2) 12 C. 67. (3) 14 C. 365.

1892 MARCH 5. — APPELLATE CIVIL. — 19 C. 703.

My learned colleague is of opinion that the defect in the publication is fatal to the sale, and necessitates its being set aside; for he holds that in fact there was in law no publication at all. I, on the contrary, hold that, although the notice was not "stuck up," it was sufficiently published; and that therefore the non-fulfilment of the letter of the law is not a sufficient plea within the meaning of s. 14 to entitle the plaintiffs to have the sale reversed.

I am of course aware that this Court and the Judicial Committee of the Privy Council have repeatedly held that the process prescribed by the Regulation must be followed, and that neglect to observe a substantial portion of that process is a sufficient plea within the meaning of the Regulation. But it has been held that not everything prescribed to be done is a substantial part of the process, *e. g.*, the obtaining of a receipt if there is other satisfactory proof of the service in the mofussil, *Sona Beebee* v. *Lall Chand Chowdhry* (1); and the sticking up in the Collector's kutcheri of the zemindar's petition for sale, *Ahsanulla Khan Bahadoor* v. *Harri Churn Mozoomdar* (2); and therefore that defect in these matters do not necessarily invalidate the sale.

It is certain that no Court would be satisfied with the fulfilment of the mere letter of the law if in substance the law had been ignored. For instance, in such a case as the present one, *the letter* of the law would be obeyed if the notice were stuck up in a conspicuous part of the Collector's kutcheri with its face to the wall or upside down, or so high in the wall as to be illegible, but such "sticking up" would not be held to fulfil the object of the law. Conversely, it seems to me that if the Court finds that there has been substantial publication in the Collector's kutcheri it ought not to set aside the sale, because there was no literal sticking up of the notice. The real question is whether the notice was made **[719]** public in such a manner that anybody interested in the matter had an opportunity of becoming aware of it. I think that the Nazir's evidence, while it shows that the notice was *not* "stuck up," shows also that, however irregularly, there was substantially a publication of it, *i.e.*, the public had opportunities of inspecting it. The Nazir deposes that his practice in regard to the putni sale petitions and notices made over to him for publication is to keep them in his "serishta," and that the public come and see them there. "The place where I sit is a conspicuous place, and people come to that place and see these petitions, and there is no objection to it." He says again: "I allow every one to see the petition and notice. The notice is served in this way since the time of my predecessor's predecessor, and my predecessor, and in my time also;" and he had been Nazir four years.

The Court would not, I think, be justified in construing this evidence to mean that in fact the public have no access to the notices. I think it means that the public, that is, the mukhtars and revenue agents who are the interested public in a Collector's kutcheri, know where the putni sale notices are to be seen, and that they do inspect them freely at their pleasure. The irregular practice described by the Nazir has been so long established that it is as efficacious probably for the fulfilment of the object of the law as would be the literal carrying out of the provision that the notice shall be stuck up; and I therefore consider that the absence of the sticking up is not in this case a sufficient plea for the

(1) 9 W. R. 242. (2) 17 C. 474.

1892 MARCH 5.

APPELLATE CIVIL.

19 C. 703.

reversal of the sale, and I would consequently dismiss the suit, reversing the decree of the Court below.

But assuming that the defect found in the publication of the notice in the Collector's kutcheri is one which would, under ordinary circumstances, entitle the plaintiffs to a decree for the reversal of the sale, we must proceed to consider the other issues and determine whether the other circumstances of the case warrant the making of a decree against defendants Nos. 7 to 10 for restitution of the putni. And in regard to this question there are two aspects of the case: one presented by the conduct of the plaintiffs in claiming that the purchase was made by themselves, and the other by the fact that the nominal purchaser who had bid on behalf of the plaintiffs, or one of them, they subsequently **[720]** assenting to the course he had taken, had conveyed the property to the defendants Nos. 7 to 10 with the express assent of at least the plaintiff No. 1.

The plaintiffs are, I think, entitled to assert, as they do, that the purchase at auction by Karali was made for themselves, because Karali's own evidence shows that he informed the plaintiff No. 1 that he had made it for him, and the latter shows that he understood it to be equally on account of plaintiff No. 2, and both of the plaintiffs acquiesced in what Karali had done; and no doubt they considered that he had done the best possible thing for them, and we feel certain that had they been able to make good the purchase-money in due time, this suit would never have been instituted. But as they failed to do this, they now endeavour to get the sale set aside; and in furtherance of this object they have endeavoured in the lower Court successfully to fasten upon Karali Charan Mukerjee, defendant No. 5, the imputation of having acted dishonestly towards the plaintiffs by not paying in the amount of the putni rent in time to avoid the sale, and in then having for his own purposes bid for the property, so they alleged that to him had been made over the full amount due, Rs. 1,886-8. Karali declared that he only received the 10 annas share payable by plaintiff No. 1, Rs. 1,156-8, and that plaintiff No. 2 sent his 4 annas share by his own man, Bonomali. The share of 2 annas payable by the *pro forma* defendant, Nittyanund Mondul, was not sent at all.

The Subordinate Judge has believed the plaintiffs' allegation, and rejected Karali's story as false. We have come to the opposite conclusion, and think that all the circumstances support Karali Charan, and that the plaintiffs' story is false, and the entry of Rs. 1,886-8 in the Khata-book of the plaintiff No. 1 is a fabrication of very improbable evidence. The story told is that plaintiff No. 1 had by him only a small proportion of the required sum; that he therefore borrowed from plaintiff No. 2 money enough to make up his own share of the arrears, and also received from him the whole balance due both for his 4 annas share and the 2 annas share of Nittyanund, and that he made over the whole sum to Karali, after entering the money in his khata-book. The khata in which this money was credited and debited is that which **[721]** concerns the plaintiff's silk business. There seems to us no good reason why the rent contributed by the plaintiff No. 2 for his own share and for that of the *pro forma* defendant, Nittyanund, should be entered in any khata of plaintiff No. 1, and still less in that of his silk business. We have abundant reason for disbelieving his testimony in several particulars, and we believe that the entry in the khata was a mere fabrication of evidence for the purpose of this suit.

On the other hand, the circumstances admitted seem to us strongly to support Karali's story. Bonomali, the servant of plaintiff No. 2, certainly went with him to Suri, and we believe him when he says that Bonomali conveyed his master's share of the rent; and Nittyanund supports the story by stating that at Suri they asked him to contribute his share of the rent that the arrears might be paid and the sale stayed. He declined to do so, as he did not care to retain the property. There was no reason whatever why Karali should not have paid the whole rent in if he had it; and he acted apparently in good faith and entirely for the benefit of his master in making the purchase and in depositing the earnest-money out of the amount he had brought in from plaintiff No. 1.

We observe also that the fact that plaintiff No. 2 received back the identical notes which were said to have been contributed by him in respect of his own share, supports the theory that those notes had been in the custody of his own man, Bonomali.

Then it is admitted that Karali's action was reported immediately to plaintiff No. 1, that he did not offer any remonstrance or censure Karali for having let the putni be sold, but on the contrary readily acquiesced in what had been done. Up to this point, therefore, there is not the slightest reason in our judgment for the lower Court's dictum that Karali had acted dishonestly towards the plaintiff, and the plaintiff No. 2 also assented subsequently to the arrangement proposed. But when it was necessary to pay in the balance of the purchase-money, the plaintiffs had been unable to raise it, and they were in danger of forfeiting the earnest-money deposited. The only means of saving it was to get others to take the purchase off their hands, and this led to the conveyance by Karali, the declared auction-purchaser, to the defendants Nos. 7 to 10, who advanced the requisite sum upon [722] Karali giving them a promissory note and an agreement to execute a kobala after the auction-purchase had been rendered complete; and we think there can be no doubt that plaintiff No. 1 did sign that note as a witness, and that his denial of it on his oath is one among several instances of perjury committed by him in this case.

We are satisfied that he fully assented to the conveyance by Karali to defendants Nos. 7 to 10, and that he cannot be allowed now to take advantage of any defect in the proceedings in order to deprive them of the benefit of their purchase; and even if the sale under the Regulation was bad, we must hold that the plaintiff No. 1 is not entitled to oust the defendants Nos. 7 to 10 from the 10 annas share of the putni of which he was proprietor, at any rate without repaying them the amount of their purchase-money. No offer to do this has been made.

There was, as has been mentioned, a slight excess in the amount at which the defendants Nos. 7 to 10 purchased the putni over that which was bid at the auction sale, and we find that a dispute occurred between the plaintiff No. 1 and Karali Charan as to who should have the benefit of the surplus. And under all the circumstances of the case there seems good reason for believing that this dispute was the real cause of this litigation. If this be so, there is all the less reason for allowing the plaintiff No. 1 to disturb the title of defendants Nos 7 to 10.

As regards the position of plaintiff No. 2 in respect of those defendants, there is no evidence that he was any party or privy to the conveyance to them, and therefore if the auction sale be found invalid by reason of

1892 MARCH 5. — APPELLATE CIVIL. — 19 C. 703.

defect in the publication of the notice in the Collector's kutcheri, we cannot say that this plaintiff will not be entitled to recover his share of the putni from the hands of the defendants Nos. 7 to 10.

In that view the result would be that the zemindars' appeal No. 126 would be dismissed with costs, and that the appeal of the defendants Nos. 7 to 10 would be decreed with costs in proportion as against plaintiff No. 1, and dismissed as against plaintiff No. 2 with costs in proportion.

But if the sale is not invalidated by the defect in publication of the notice, the result will be that both appeals will be decreed with costs.

[723] The last issue is as to whether the purchase by defendants Nos. 7 to 10 was fraudulent and with knowledge of the plaintiff's right. The lower Court finds in favour of the plaintiffs that the purchasers were aware of their right. We have no reason to doubt the correctness of this view: we fail to see how any fraud can be imputed or brought home to them on that account. Their knowledge seems to us immaterial so far as this suit is concerned.

GHOSE, J.—I regret I have the misfortune to differ from my learned colleague upon the matter indicated in his judgment, *viz.*, "as to the effect upon the sale of the non-publication in the manner prescribed by law of the notice in the Collector's kutcheri." He is of opinion as I understand him, that although the notice was not published in accordance with s. 8, Reg. VIII of 1819, still it was sufficiently and substantially published, and therefore the putnidar has not made out a "sufficient plea" within the meaning of s. 14 of the Regulation to have the sale set aside.

The only evidence that we have in the matter of the publication of the notice in the Collector's kutcheri is that of the Nazir, and I am unable to hold upon that evidence that the requirements of the law in this respect have been sufficiently or substantially complied with.

In the *Maharajah of Burdwan* v. *Tarasundari Debi* (1), the Judicial Committee of the Privy Council, in referring to Reg. VIII of 1819, observed as follows:—"That is a very important Regulation, and no doubt it was enacted for a certain and defined policy, and ought, as a rule, to be strictly observed. Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the zemindar, who institutes the proceeding, exclusively responsible for its regularity."

The Judicial Committee uses the expression "due publication." This, I think, refers not only to the actual publication of the notice, and the time at which it is to be published, but also to the mode and place of publication. It will be observed that the **[724]** Regulation gives to the zemindar a summary power, a power to bring to sale a putni without any suit; and therefore it seems to me that the directions prescribed by the Regulation as to the mode and place of service must be strictly followed.

Section 8 of the Regulation distinctly lays down the mode and place of the publication of the notice, *viz.*, that it is to be *stuck up* in a *conspicuous part of the kutcheri.* The Nazir's evidence shows that this was not done. The notice was not only not "stuck up" in the kutcheri, but it was not placed in a "conspicuous part of the kutcheri," so that the public, whenever they chose to inspect it, had the fullest opportunity of doing

(1) 9 C. 619=10 I.A. 19.

so. The Nazir, no doubt, says that the place where he sits is a "conspicuous place" in the kutcheri, "and people come to that place and see these petitions, and there is no objection to it," and, further, that he allows every one to see the petitions and notices; but it will be observed that nobody could have any access to the petitions and notices without the permission of the Nazir. And that officer in the early part of his deposition says (as I understand him) that he used to keep *all* the petitions and notices (*i.e.*, in regard to *all* the putnis to be sold) in one and the same bundle. If he kept all the petitions and notices in the same bundle, it is obvious that nobody could ascertain whether any particular putni was, or which putnis were, advertized for sale, unless and until, with the permission of the Nazir, the bundle was opened and the papers in it were examined. This I am disposed to think is no *publication* of the notice of sale. Then again, the Nazir's "serishta" would be kept open between certain specified hours of the day, and the public would have no opportunity of inspecting the notices at any other time than when the Nazir would be in his "serishta." The Nazir says what has been the practice in previous years as to the publication of notices; and no doubt the mukhtars and revenue agents would very probably know where to look for these notices. But the mukhtars and revenue agents are not the only members of the public who might desire to acquaint themselves with such notices. It seems to me that the practice which has been followed in other years does not constitute the act of the Nazir a due publication of the notice, which under the law it is not.

[725] The law in s. 8 lays down distinctly, as has already been noticed, how the notice is to be published: it is to be *stuck up* in a conspicuous part of the kutcheri; and s. 10 says that at the time of sale the *notice previously stuck* up in the kutcheri shall *be taken down*.

If the Regulation is to be strictly followed, and if the publication of the notice in the Collectorate is not directory but mandatory, and if it is a substantial part of the process prescribed by the Regulation, it seems to me that an essential requirement of the law has not been observed in this case, and that a "sufficient plea" within the meaning of s. 14 has been made out. If an authority were required for this, I would refer to the case *Hurro Doyal Chowdhry* v. *Mohamed Gazi Chowdhry* (1), decided by Pigot and Macpherson, JJ., on the 27th May last, and which is referred to in the judgment of my learned colleague. There the failure on the part of the zemindar to prove publication of the notice in the Collector's kutcheri was held to be fatal to the validity of the sale. The judgment no doubt speaks of the "notices," but it will be observed on a reference to the decision of the lower appellate Court in that case that the zamindar did prove the service of the other two notices. I take it, therefore, that the learned Judges held that the sale was bad by reason of the notice not having been served in the Collector's kutcheri.

There is another matter in regard to which I should like to say a word; and that is as to the true position of the plaintiff No. 2. The plaint, indeed, alleges, as has been pointed out by my learned colleague, that the purchase made by Karali at the auction was on behalf of both the plaintiffs, but the evidence seems to show clearly that this was not so, and that it was a purchase with the money belonging to the plaintiff No. 1 alone, which Karali had been entrusted with. Neither Karali nor Bonomali (the servant of the plaintiff No. 2) had been authorized to bid at the sale;

(1) 19 C. 699.

1892 MARCH 5. — APPELLATE CIVIL. — 19 C. 703.

but they both did so, and apparently against each other, and the property was eventually knocked down to Karali, who subsequently reported the matter to the plaintiff No. 1, and the latter by his acts and conduct ratified what had been done. But [726] so far as the plaintiff No. 2 is concerned, all that appears on the evidence of the two plaintiffs is that plaintiff No. 1 afterwards mentioned the matter of this purchase to the plaintiff No. 2, and said that if they (the two plaintiffs) could pay the balance of the purchase-money, they would get the property; and the plaintiff No. 2 was apparently content with this, and expressed his willingness to pay. He, however, subsequently went to Suri to get copies of the sale proceedings, evidently with the object of taking action to have the sale set aside; and it does not appear that, beyond the conversation he had with plaintiff No. 1, he did any act indicating that he acquiesced in what had been done by Karali, much less in what Karali and the plaintiff No. 1 did in the matter of the sale of the property to the defendants Nos. 7 to 10. In these circumstances, I think that, notwithstanding the allegation in the plaint that the purchase at the auction was made by both the plaintiffs, the fact seems to be that it was a purchase with the money of the plaintiff No. 1 alone, and that the plaintiff No. 2 had really nothing to do with it. He had also nothing to do with the transaction entered into with the defendants Nos 7 to 10, and it therefore seems to me that, if the auction-sale is bad, the plaintiff No. 2 is entitled to get back his share from the hand of the purchasers, and in this respect I entirely agree with my learned colleague.

As to the question of the *onus* of the proof in connection with the publication of the sale notices which was discussed before us, I prefer to express no opinion, as it does not arise in this case.

In consequence of the difference of opinion between their Lordships "as to the effect upon the sale of the non-publication in the manner prescribed by law of the notice in the Collector's kutcheri," these appeals were referred to the learned Chief Justice for his decision upon such difference of opinion. The parties were represented at this hearing by the same pleaders as at the hearing before the Division Court, and the same arguments were used.

JUDGMENT.

The following judgment was delivered by—

PETHERAM, C. J.—This is a suit brought by the putnidars to set aside the sale of a putni which took place under Reg. VIII of 1819 for default of payment of putni rent.

[727] The matter came before two Judges of this Court, and they have each of them written a judgment in which they have agreed upon everything but one matter, and that one has come before me for decision upon their disagreement. The question upon which they have differed is whether what took place with reference to the notice of this sale at the Collector's *serishta* was a compliance with s. 8 of the Regulation, and if it was not, whether the non-compliance was sufficient to invalidate the sale.

When I first read the papers it struck me that the question was really a question of fact arising on the construction to be placed upon the evidence of the Nazir, who describes what did take place, but upon speaking to the two learned Judges upon the matter I found that there was no difference of opinion between them as to the fact. They both considered that that evidence showed one thing, and consequently the

1892 MARCH 5. — APPELLATE CIVIL. — 19 C. 703.

only thing I have to decide is whether, upon the view of the evidence which they take, a sufficient compliance with the provisions of the Regulation has been shown.

What they considered was the case, and I accept their finding upon that matter of fact, is this, that the practice in this Collector's *kutcheri*, with reference to these notices, was that the Nazir, who sat near the entrance to the Collector's kutcheri, instead of sticking up the notice and the petition for sale against the wall of the *kutcheri*, and instead of sticking it up anywhere, kept the various petitions which came before the Collector for sale together with the notices relating to them in a bundle, that he kept that bundle in his own possession, that at night he locked it up in some safe place for safe custody, but that in the day he took it out from the place of safe custody where he had placed it the night before, and kept it near him, but in some place where the whole bundle could be seen by anyone coming to the *kutcheri*. He then goes on to say that he allowed anyone who chose to ask for it or wished to see it to inspect the bundle. The Judges find as a fact, and I agree with them in their view of the matter, that the only persons who would see the contents of the bundle, including the petitions relating to the various lots to be sold, and the notice according to which those lots would be put up for sale, were persons who knew where to find them, in the sense that they were persons who knew whom to ask for them, and that they would go to the Nazir and **[728]** ask him to show the bundle which contained the notices. That being the state of the facts, the question is whether this is a compliance with the law.

Now cl. 2 of s. 8 of the Regulation directs that the petition to the Collector shall be stuck up in some conspicuous part of the *kutcheri*, with a notice that if the amount claimed be not paid before the 1st of Jyet following, the tenure of the defaulter will on that day be sold by public sale in liquidation. As it seems to me the meaning of that is that the petition and the notice are to be advertised: and as to that it is material to notice that, in s. 10 of the same Regulation, the word "advertise" is actually used, which strongly confirms my view that the meaning of sticking up in a conspicuous part of the "*kutcheri*" is that it is to be advertised in the ordinary acceptance of the word. Now 'advertised' in the ordinary acceptance of the word, means placing it in such a position that persons who have to use that place for their ordinary business may see it. It is clear that if the petition is put in such a place that only those who ask for it may see it, it is not advertised in any sense whatever. So that I come to the conclusion that the provisions of the Regulation that this petition is to be stuck up in some conspicuous part of the kutcheri has not been complied with at all; and then the question arises whether that in itself is sufficient to invalidate the sale.

As to that I think the judgment of their Lordships of the Privy Council in the case of the *Maharajah of Burdwan* v. *Tarasundari Debi* (1) is conclusive. In delivering the judgment of the Judicial Committee, Lord Fitzgerald, after quoting different portions of the second clause of the section with which we are at present concerned, says :—"That is a very important Regulation, and no doubt it was enacted for a certain and defined policy, and ought, as a rule, to be strictly observed. Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which,

(1) 9 C. 619=10 I.A. 19.

1892 March 5. — Appellate Civil. — 19 C. 703.

the summary power of sale is exercised, and makes the zamindar, who institutes the proceeding, exclusively responsible for its regularity."

It seems to me that when one has come to the conclusion that this notice was not published or advertised in the Collector's [729] *kutcheri* which is the conclusion at which I have arrived, that the judgment of the Privy Council concludes the matter, because they say that this is to be strictly complied with, and they point out that the zemindar is to be exclusively responsible for the strict performance of it. One argument which has been pressed before me is that the zemindar is responsible for what takes place in the moffussil, but is not responsible for what takes place in the Collector's *kutcheri*. I think that argument cannot be sustained, and for this reason: the words of the clause are that "the zemindar shall be exclusively answerable for the observance of the forms above prescribed," and among the forms above prescribed is the form that the petition shall be stuck up in a conspicuous part of the *kutcheri*.

The only other case which it is necessary to notice is the judgment of Mr. Justice Norris and Mr. Justice Macpherson in *Ahsanulla Khan Bahadoor* v. *Hurri Churn Mozoomdar* (1). In the judgment at p. 480, their Lordships say—"It was further urged by Mr. Woodroffe that non-compliance with the provisions of the Regulation, which require that the petition shall be stuck up in some conspicuous part of the *kutcheri*, was fatal to these proceedings. We think, to use the words of the Privy Council in the case of the *Maharani of Burdwan* v. *Krishna Kamini Dasi* (2), that this publication of the petition is not a substantial portion of the process to be observed by the zamindar. No injury could result to the putnidar or any one holding under him by the non-publication of this petition, which, as I have already pointed out, is only the method prescribed by the Regulation for putting the executive machinery in force." That may well be so, but that is not the case here. The objection here is not that the petition was not stuck up, but that the petition and notice were not stuck up. The petition, it is true, does not affect the purchaser or intending purchaser in any way; but the notice does. The notice is a notice of what lots are to be sold, and when the sale takes place it is upon that notice that the lots are sold, and it shows the order in which the lots will be sold, and is the very thing which the public ought to have access to, and which the public ought to be in a position to see; and which should be so situated as to catch the eye of the public, and bring persons to know that such and such properties [730] are being offered for sale, and therefore is the very thing which ought to be stuck up in a conspicuous part of the kutcheri.

In the result I think that this notice was not stuck up at all within the meaning of this clause of s. 8 of Reg. VIII of 1819, and, in accordance with the decision of the Privy Council, I think that the sticking up or publication of it was essential to the validity of the sale, and consequently, agreeing with the decision at which Mr. Justice Ghose has arrived, the sale, to the extent mentioned in the judgment of the learned Judges who heard the case in the first instance, must be set aside, and a decree made in accordance with the said judgment.

Appeal No. 126 *of* 1890 *dismissed.*
Appeal No. 133 *of* 1890 *decreed in part.*

C. D. P.

(1) 17 C. 474. (2) 14 C. 365.

1890
JUNE 12.

APPEL-
LATE
CIVIL.

19 C. 730.

19 C. 730.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Gordon.

POONA LALL (*Opposite party*) v. KANHAYA LALL BHAIA, GYAWAL (*Petitioner*).* [12th June, 1890.]

Insolvency—Civil Procedure Code (Act XIV of 1882), ch. XX—Discharge of insolvent —Future earnings of insolvent, power of Court to compel payment out of, towards liquidation of debts.

The function of the Court, acting under ch. XX of the Code of Civil Procedure, is to compel insolvent-debtors to pay their debts if it can, either by its compulsory process, or, where that cannot be used, by withholding from them, when it has the power of doing so, the relief to which they might otherwise be considered entitled.

The granting of an order of discharge under that chapter is to a certain extent discretionary with the Court, and if the Court be of opinion that an insolvent may reasonably be expected to possess an income accruing during the time of his insolvency and likely to continue, even if such income be from sources such that it could not be attached, it ought very seriously to consider whether under such circumstances it ought to exercise its power to discharge the insolvent, and not rather stay its hands and require him as a condition of such discharge to satisfy it by payments on account of his debts, that he really desires, so far as he can, honestly to discharge the debts that he owes.

A Gyawal who was in receipt of a very considerable income, derived from offerings made by pilgrims, applied to be declared an insolvent under [731] the provisions of ch. XX of the Code of Civil Procedure. He was opposed by a judgment-creditor who, *inter alia*, contended that the insolvent should be compelled to contribute out of his income towards the payment of his debts. The Court finding that there were no assets, and holding that such income was not property capable of being attached, and that it had no power to order an insolvent to pay anything out of future earnings towards the discharge of his debts, declared the applicant an insolvent and granted him his discharge.

Held, that the Court had power to withhold the discharge until the insolvent had satisfied it, by payments on account of his debts, that he really desired to discharge his debts; and that, under the circumstances of the case, both having regard to the fact that the inquiry into the estate of the insolvent had been insufficient, and to the fact that he was in a position to contribute out of his income towards the payment of his debts, the order was wrong and should be set aside.

THIS was an appeal against an order passed by the District Judge of Gaya, under the provisions of ch. XX of the Code of Civil Procedure, declaring the petitioner Kanhaya Lall Bhaia an insolvent and granting him his discharge.

The petition by the insolvent was filed on the 3rd April 1889, and it was opposed by Poona Lall, the appellant, who was the only creditor, and who held a decree for Rs. 5,000 against the insolvent and his brothers, as representatives of their deceased father, which he had purchased from one Lakshmi Narain Dass, in whose favour it had been passed by the High Court.

It appeared that the insolvent was one of a family of Gyawals, and that in August 1885 he had previously been declared an insolvent, jointly with his father, who was then alive, and his mother and brothers. The debts existing at the date of that insolvency had never been paid off, nor had the insolvent been discharged from further liability in respect thereof. With the exception of the debt covered by the opposing creditor's

* Appeal from Order No. 26 of 1890, against the order of J. Crawfurd, Esq., District Judge of Gaya, dated the 31st of October 1889.

1890 JUNE 12. — APPELLATE CIVIL. — 19 C. 730.

decree, however, it did not appear that any other debts had been incurred by the insolvent since the date of the previous insolvency.

The grounds of opposition included concealment of property, and it was urged that the insolvent was in receipt of a very considerable income derived from offerings made by pilgrims, and that he was perfectly able thereout to defray his debts. With reference to the allegation that the insolvent had concealed property, [732] the opposing creditor was unable to substantiate the charge, but it was one of his grounds of appeal to the High Court that the lower Court had not compelled the production of the books of the family or examined witnesses, the production and examination of which would, he contended, have enabled him to prove his case.

The lower Court, after adjourning the hearing twice to enable the opposing creditor to produce his evidence, refused to adjourn it again, and found the allegation as to concealment of property in favour of the insolvent. Upon the question as to the insolvent being compelled to contribute from his income for the purpose of liquidating his debts, the District Judge observed as follows :—

"There remains the question as to the income which the petitioner admits that he receives from the offerings of pilgrims. He states that he has now separated from the rest of the family, and that the income from this source has fallen off and is precarious. The Civil Procedure Code gives this Court no power such as the Insolvency Act gives to the Commissioner in Insolvency to require the petitioner to pay part of his future earnings to the payment of his debts. The mere chances that pilgrims will come to the petitioner and employ his services and give him gratuities is not, in my opinion, saleable property, either under s. 266 of the Civil Procedure Code or s. 6 of the Transfer of Property Act. Supposing the Court were to sell it, there would be no power to compel the pilgrims to employ the purchaser, who would have no right to force the petitioner after the sale to work for him as lessee or otherwise. That the rights or chances of the petitioner were not saleable seems to have been the view taken by my predecessor, or else they would have been sold in the previous insolvency. Under the circumstances I see no objection to the grant of a declaration of insolvency. The fact of the previous insolvency would not prevent this, for that did not affect debts subsequently contracted. Under these circumstances I declare the petitioner an insolvent, and as there are no assets I grant his discharge. The insolvent will within three days pay in Rs. 5 for the issue of the usual Gazette notification, when a date will be fixed for framing the schedule."

The opposing creditor appealed to the High Court on various grounds, in addition to those indicated above. The only grounds [733] material, however, to notice are those relating to the lower Court not compelling, the production of the books and giving the opposing creditor a sufficient opportunity for proving his allegation as to concealment of property, and the fact that the Court had not compelled the insolvent to contribute out of his income towards the liquidation of his debts. It was contended that such income was attachable, and, as regards the amount of it, it was pointed out that there was evidence to show that at the date of the previous insolvency it amounted to at least Rs. 1,800 a year.

Baboo *Jogesh Chunder Dey* appeared for the judgment-creditor, appellant.

Baboo *Kali Kishen Sen*, for the insolvent, respondent.

The judgment of the High Court (PIGOT and GORDON, JJ.) was as follows :—

JUDGMENT.

We think the appeal must be allowed and the order set aside. The jurisdiction under the insolvency sections of the Civil Procedure Code is no doubt one most difficult to administer satisfactorily, but it still is competent for the Court so to exercise its powers as to secure to the creditors a better chance of recovering something from the insolvent-debtor than we think has been, under the cricumstances of this case, allowed. We are dissatisfied with the course taken by the lower Court in two respects. We do not think that sufficiently active means of searching into the insolvent's affairs was afforded by the Court to the appellant, who for some mysterious reason is called the objector, and we think that both in respect of the rules, an order for the production of which he asked for, and as to the issue of summons to examine witnesses, and summons to examine the books relating to the religious business carried on by the insolvent and his family, the Court ought to have, in the interest of the creditor, furthered, in place of refusing the application made by the appellant, although it may be, perhaps, that the evidence and the documents which the appellant sought to lay before the Court might not, when laid before it, add much to the Court's knowledge of the insolvent's position and means, still this source of information ought, we think, to have been searched out and used to its full extent. Further, it does appear that the religious business, a term which for want of a [734] better name we apply to the insolvent's occupation and that of his family, undoubtedly does bring in a very considerable income, although it may well be that that income is not of a nature such that it can be the subject-matter of attachment, or seizure, or the like under the Code. That, we are told, is the view which has been taken by another Bench of this Court, and we need not say any more as to that. But the District Judge has discharged the insolvent, and has discharged him after his having filed a schedule in which the debt of the present creditor was set out; that is to say, he has absolutely obliterated the debt due under the decree. Now we have asked the respondent's vakeel for any ground, if he had any, for contending that it was the imperative duty of the Court under the circumstances to grant that discharge. He was unable to point out to us anything statutory or generally for so contending. We think that the issue of an order of discharge must, in its nature, having regard to the character of the insolvency jurisdiction, be to a certain extent discretionary, and if the Court be of opinion that the insolvent may reasonably be expected to possess an income accruing during the time of his insolvency and likely to continue, even be it an income from sources such that it could not be attached, still the Court ought very seriously to consider whether under such circumstances it ought to exercise its power to discharge the insolvent, and not rather stay its hands and require the insolvent, as a condition of such discharge, to satisfy it, by payments on account of the debt, that he really desires, so far as he can, honestly to discharge the debts that he owes. It may be shocking to the idea of some insolvents that they should be under obligation to pay debts which they have any chance of getting out of; that is very true, but the function of the Court is to compel them to do so, if it can, either by its compulsory process, or, where that cannot be used, by withholding from them, where it has the power of doing so, the relief to which they might otherwise be considered entitled. We think the Court ought to have taken these views into consideration in the present case, even supposing that the inquiry into the insolvent's estate, which we think ought to have been made and which

1890 JUNE. 12. — APPELLATE CIVIL. — 19 C. 730.

we now direct should be made, were to have resulted in the discovery of nothing, strictly speaking, attachable or seizable on behalf [735] of his creditors. We set aside the order of discharge and direct that, upon the appellant supplying the necessary funds, notice be issued in the Gazette notifying the setting aside of the order of the District Judge and the cancelment of the order of discharge. We direct that an inquiry into the insolvent's means do proceed, the appellant having such opportunity as we have shown by this judgment that we think he ought to have had, and after such inquiry the District Judge will make such order in the matter of the insolvency as, having regard to the views expressed in our judgment, would be proper for him to make.

The appellant will be entitled to recover the amount of the costs of this appeal against any estate, if any, as shall be discovered, can be realized in the insolvency.

H. T. H. *Appeal allowed and further inquiry directed.*

---

19 C. 735.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Gordon.

PERGASH LAL *(Defendant)* v. AKHOWRI BALGOBIND SAHOY AND OTHERS *(Plaintiffs)*.* [5th August, 1890.]

Rent suit—Landlord and tenant—Co-sharers, suit by one of several, for separate share of rent, or, in alternative, for whole rent due if more than share claimed should be found due.

The plaintiffs, some of the co-sharers in certain land, instituted a suit against a tenant and the remaining co-sharer P, alleging that the tenant held under a pottah granted by all the co-sharers; that rent was due from him for the period in suit; and that they had ascertained from P that he alleged that he had received his share of the rent for that period from the tenant, and that he refused to join as plaintiff in the suit. They accordingly prayed (*a*) for a decree for the amount of their share of the rent against the tenant; (*b*) if it should appear that any part of P's share of the rent remained unpaid, the requisite extra Court-fee might be received and a decree made for the whole of the arrears in favour of themselves and P, and that the latter might, if he consented, be made a co-plaintiff; (*c*) that if it appeared that P had realized more than his share of the rent, a decree might be made against him for the excess and against the tenant for the balance. The plaint also asked for costs and further relief. The tenant contested the suit and submitted that it was in effect a suit for plaintiffs' share of the rent only and could not therefore be maintained. [736] He further pleaded that the plaintiffs and P were members of a joint Hindu family, of which P was the manager, and that, under arrangement with the latter, he had applied the rent due under the pottah towards the liquidation of debts due under bonds in P's name, but for which the joint family were liable.

The first Court dismissed the suit on the preliminary issue that it was in substance a suit for a specific share of the rent by some only of the co-sharers, and that, there being no agreement by the tenant to pay the co-sharers their respective shares of the rent separately, such a suit would not lie.

Held (upholding the order of the lower appellate Court), that the order of the first Court was wrong. The suit, as framed, was necessarily a suit in the alternative; and as the plaintiffs were necessarily not aware whether any portion of P's share of the rent was due or not, but believing that none was due, they

---

* Appeal from Order No. 335 of 1889 against the order of J. Crawfurd, Esq., District Judge of Gaya, dated the 7th of August 1889, reversing the decree of Gopee Nath Maytay, Munsif of Gaya, dated 15th December 1888.

could only claim their share, asking to have the plaint amended so as to include the whole rent due if it should appear that anything was due to P, and thus bring the suit within the rule that, in the absence of special agreement between a tenant and co-sharers to pay their rateable proportion of the rent, a suit by one of co-sharers must be for the entire rent due, making his co-sharers defendants if they refuse to join as plaintiffs. The prayer of the plaint fully provided for this, and the suit should have been tried on its merits and the plaint amended if the facts proved showed that any rent remained unpaid and due to P, as asked for by the plaintiffs.

[R., 17 C.L.J. 372 (375) = 19 Ind.Cas. 865.]

THE plaintiffs and the defendant No. 2, Akhowri Rambharose Lal, were the mokuraridars of a four-anna share in mouza Barowan Anrudpore, and the defendant No. 1, Pergash Lal, who was the appellant, was the lessee of that share under a registered pottah, dated the 29th November 1878. The suit was for the recovery of the sum of Rs. 450, principal and interest, from the defendant No. 1, being the arrears of rent of the plaintiffs' 3 annas 4 dams share out of the 4 annas share so owned by the plaintiffs and defendant No. 2, the remaining 16 dams share belonging to the defendant No. 2.

The plaint stated that the 4 annas mokurari right had been let out in *ticca* by them and the defendant No. 2 to defendant No. 1 under a joint pottah and kabuliyat, dated the 29th November 1879, at an annual jama of Rs. 579, and on a zurpeshgi of Rs. 1,900 payable with interest, the term of the *ticca* extending up to the year 1295 F.; that the lease provided that the plaintiffs and defendant No. 2 should receive out of the *saii* jama the sum of [737] Rs. 150 only every year till 1294 F., and the sum of Rs. 296-5 in the year 1295 F., the rest of the money being credited in payment of the zurpeshgi; that the plaintiffs had realized their share of the rent up to the year 1291 F.; that, with a view to save trouble attending joint collections and to avoid mutual disagreements, the plaintiffs had asked the defendant No. 1 to pay their share of the rent separately and gave him a notice, dated the 25th February 1885, stating that, according to the terms of the lease, he should, from the year 1292 F., make a set off on account of the *satua* zurpeshgi, and out of the balance pay the defendant No. 2 his proportionate share of the rent and pay the plaintiffs' share to the plaintiff No. 1, Akhowri Balgobind Sahoy, but that the defendant No. 1 took no notice of such instructions and sent no reply to the notice; that, notwithstanding the notice, defendant No. 1 had, at the instigation of defendant No. 2, paid no rent to the plaintiffs from the year 1292 F. to the year 1294 F., and that the sum of Rs. 450 for their share of the rent for three years and interest thereon was due to them.

The plaint went on to state that, as the pottah was joint and defendant No. 2 did not join in the suit, and as he on being asked alleged that he had received his share of the rent from defendant No. 1, the plaintiffs had made him a defendant.

The prayer of the plaint was to the following effect :—

(*a*) For a decree for the sum of Rs. 450 on account of arrears of rent and interest thereon for the years 1292—1294 F. against the defendant No. 1.

(*b*) That in case the defendant No. 2 should allege that the whole or any part of his share of the rent was unpaid and was willing to join in the suit as plaintiff, or if the Court held that under the circumstances of the case the plaintiff had no right in law to bring a separate suit for their share of the rent, they prayed that the extra court-fees required might be received,

1890
AUG. 5.
——
APPELLATE
CIVIL.
——
19 C. 735.

and that a decree might be passed for the whole of the arrears of rent in favour of them and defendant No. 2, and that the defendant No. 2 might, if he were willing, be made a co-plaintiff.

[738] (*c*) That if it should appear that defendant No. 2 had realized more than his share of the rent, a decree might be passed against him for the excess and against defendant No. 1 for the balance.

(*d*) That the defendant against whom the decree might be made should be ordered to pay the costs of the suit ; and

(*e*) That the plaintiffs might be granted any other relief which the Court might hold they were entitled to.

Defendant No. 1 alone contested the suit, defendant No. 2 not appearing at all. In his written statement defendant No. 1, *inter alia*, contended that as he admittedly held the *ticca* under a joint pottah and kabuliyat, and the shares of the plaintiffs and the defendant No. 2 were not therein defined, the suit could not proceed. He alleged that the plaintiffs and the defendant No. 2 were members of a joint Hindu family amongst whom there had been no partition, and that the shares of the plaintiffs could not therefore be ascertained, and they had no right to claim a 3 annas 4 dams share of the rent as they had done. He stated that defendant No. 2 had managed all the joint family matters, and that the plaintiffs had acknowledged and ratified his acts and were therefore bound thereby ; that defendant No. 2 had, prior to the lease, taken loans from him and others, the proceeds of which had been applied to joint family purposes, and that, in respect of such loans, he had executed bonds in his favour as well as the others from whom he had so borrowed money; that after the lease had been executed defendant No. 2 had borrowed from him Rs. 2,050 upon various bonds, carrying interest at Re. 1-8 per cent. per month, which he had spent on the joint family; and that he in good faith had, at the request of defendant No. 2, applied the rent payable under the lease towards liquidation of the amount due to him under the bonds, and that the whole of the rent due under and up to the end of the lease had, under an arrangement with defendant No. 2, been so applied and nothing was due to the plaintiffs or defendant No. 2 on account of such rent, but that, on the contrary, the plaintiffs and defendant No. 2 were owing money to [739] him. He alleged that the suit was brought by the plaintiffs in collusion with defendant No. 2 to defraud him, and denied the plaintiffs' right to give him the notice they had, and contended that such notice could not affect their rights or his liability under the lease and give them the right to demand payment of their share of the rent separately ; but, even if it could otherwise be held to do so, that he had, prior to the receipt thereof, entered into the said arrangement, as to the appropriation of the rent, with defendant No. 2, and he could not therefore be affected by it or prejudiced by the fact that he had taken no notice of it. He submitted therefore that the suit should be dismissed.

The Munsif upon these pleadings, without going into the merits, held that the suit was not maintainable and dismissed it. His grounds for doing so were that it was an admitted fact that there had been no arrangement between defendant No. 1 and the plaintiffs, under which the former had agreed to pay their share of the rent separately, and that the plaintiffs had never realized their share separately; that the suit was, in substance, not to recover the whole rent, making defendant No. 2 a party, but for a specific amount in respect of a particular share, and that

1890 AUG. 5. — APPELLATE CIVIL. — 19 C. 735.

applying the rulings in *Jodoo Shat* v. *Kadumbinee Dassee* (1) and *Prem Chand Nuskur* v. *Mokshoda Debi* (2) such a suit would not lie.

The plaintiffs appealed, and the lower appellate Court reversed that decision and remanded the case for trial on its merits.

The material portion of the judgment of the District Judge was as follows :—

"The Munsif threw out the suit relying on the rulings in *Jodoo Shat* v. *Kadumbinee Dassee* (1) and *Prem Chand Nuskur* v. *Mokshoda Debi* (2). The first of these rulings decided that, in the absence of any arrangement with a tenant, a co-proprietor could not sue for her share of the entire rent. The latter ruling held that a suit might proceed in which what was claimed was the entire rent, the other co-proprietors being made defendants. This is settled law, and it seems to me that the question in this case, where no **[740]** arrangement with the tenant is alleged, is whether the suit can proceed where what is claimed is the entire rent so far as unpaid. The principle applicable seems to me to be exactly the same as applied in the cases last mentioned above. The difficulties in the way of deciding the case seem to be these: The decision in the suit as to the exact amount of rent in arrears will not be binding as between defendant No. 2, who has not appeared, and defendant No. 1. What is there to prevent the former in a suit, similar to this, again suing the latter, with the allegation of a different state of facts? The solution of the difficulty seems to me to be in the pleadings in the suit. Defendant No. 1 does not allege that the plaintiffs have claimed anything short of the whole arrears. He says he has paid the whole rent, and that there is nothing in arrear. If this statement be false, he has to thank himself for any inconvenience he may subsequently suffer.

"Some only of the co-proprietors being plaintiffs in the suit, the defendant No. 1, is put in a worse position than if all had been plaintiffs, because he may be deprived of the right of set off which he might possibly have a right to claim as against all and not as against some only. The answer to this is that in the present suit what is claimed is not really a set-off. What is alleged is a payment to defendant No. 1. The fact that such payment was made by way of writing off the interest due under certain bonds standing in the name of defendant No. 2 does not affect the case. It has been repeatedly held that payment to one of several co-proprietors is a good defence to a suit for rent.

"It seems to me that the suit is brought in the only form possible under the circumstances. The plaintiffs express their willingness to sue for the whole rent due, whatever it is, but ask only for what, according to their information or view of the facts, remains unpaid. The question whether in a rent suit they are entitled to join a claim against a co-sharer for money received on their account is not one which has to be decided at present. All that I now find is that the Munsif was wrong in throwing out the suit on the ground stated by him. I therefore set aside his decree and remand the case for decision on the merits."

Against this order of remand defendant No. 1 now appealed to the High Court.

[741] Baboo *Kali Kissen Sen*, for the appellant.

Baboo *Jogendro Chunder Ghose*, for the respondents.

The judgment of the High Court (PIGOT and GORDON, JJ.) was as follows :—

---

(1) 7 C. 150. (2) 14 C. 201.

1890 AUG. 5. — APPELLATE CIVIL. — 19 C. 735.

JUDGMENT.

We think this appeal must be dismissed. We quite agree with the view taken by the learned District Judge in this case, and it is unnecessary for us to do more as to the nature of the case, than say that we agree with the District Judge. It may, however, be desirable to add this, that the suit, as framed, is necessarily a suit in the alternative. The plaintiffs are necessarily not aware whether any portion of the share of the rent to which the defendant No. 2 is entitled has or has not been satisfied by the first defendant in favour of the defendant No. 2. They believe that that has been done and, if so, there is no rent due except that part of it which admittedly falls to their, the plaintiffs' share ; but if a portion of the rent additional to what would constitute the plaintiffs' share of it remains unpaid, or if the whole of the rent remains unpaid, the plaintiffs ask that the plaint shall be amended accordingly and the suit brought into conformity with the rule that, in the absence of special agreement between the tenant and the co-sharers to pay their rateable proportion of the rent, a suit by one of the co-sharers must be for the entire rent due, making his co-sharers defendants if they will not join as plaintiffs. The prayer in the plaint entirely provides, we think, for the evidence disclosing non-payment of a part of the rent, and should it appear in the course of the hearing that a portion of the rent remains unpaid by the defendant in addition to an amount equal to the plaintiffs' share of the rent, the suit ought to be amended, as the plaintiffs in their alternative prayer ask that it should be. We add this rather *ex abundanti cautela*, because, in truth, what the District Judge has said means in effect that such is the character of the suit. We agree with the District Judge and dismiss the appeal with costs.

H. T. H. *Appeal dismissed.*

---

19 C. 742.

[742] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Banerji.

HASSAN ALI (*Plaintiff*) *v.* CHUTTERPUT SINGH DUGARH AND ANOTHER (*Defendants*).* [17th December, 1891.]

Registration, exemption from, of documents purporting to be, or to evidence grants or assignments by Government of land or of any interest in land—Registration Act III of 1877, *s.* 90, *cl.* (*d*)—*Nawab Nazim's Debts Act* (*XVII of* 1873).

The Agent to the Governor-General in a letter to the Nawab Bahadur of Murshidabad announced the intentions of the Government as to his position and income, and informed him that he was to have possession of the State lands and jewels. In a suit by the son of the Nawab to recover possession from a person wrongfully in possession of land which was held by the lower Courts to be portion of such State lands, it was *inter alia* objected that the letter required registration.

Held, that the letter operated as a grant or an authority from Government, and was exempt from registration, under the provisions of s. 90, cl. (*d*) of the Registration Act.

---

* Appeal from Appellate Decree, No. 1796 of 1890, against the decree of W.H. Page, Esq., District Judge of Murshidabad, dated the 11th of September 1890, reversing the decree of Babu Raj Chunder Sanyal, Subordinate Judge of Murshidabad, dated the 9th of June 1890.

1891 DEC. 17. APPELLATE CIVIL. 19 C. 742.

Held, further, that the Commissioners appointed under the Nawab Nazim's Debts Act had jurisdiction to declare the land claimed in the suit to be State property, notwithstanding the fact that an alienation of such land had taken place before the date of the Commissioners' award.

Omrao Begum v. *The Government of India* (1) followed.

THE plaintiff's father, the late Nawab Nazim of Bengal, by an *atanama*, dated the 10th Bhadro 1267, made a gift of a lakhiraj mahal Shridhurbati with its mudafats and mauza Alinagar, in the district of Murshidabad, in favour of one Tarini Sankar Bhatta, since deceased, the father of the second defendant, Upendro Narain Bhatta. Subsequently a decree was obtained against Tarini Sankar by Luchmiput Singh Dugarh, the father of the first defendant, who purchased the above properties at an execution sale on the 17th November 1874 and obtained possession of the same. The Commissioners appointed under the Nawab Nazim's Debts Act (XVII of 1873) ascertained and certified that these mauzas were *nizamut* properties (that is, properties held by the Government for the [743] purpose of upholding the dignity of the Nawab Nazim for the time being), and the plaintiff, as the heir of the late Nawab Nazim, who died on the 4th November 1884, sued Chutterput Singh, the son of Luchmiput Singh, making Upendro Narain Bhatta, a *pro forma* defendant, to have the *atanama* above referred to declared void, and to have his title to khas possession of the properties declared, alleging that the properties were not transferable or liable to be attached or sold by auction in satisfaction of the debts of Tarini Sanker Bhatta, whose right therein (if any) determined upon the death of the late Nawab Nazim.

The defendant, Chutterput Singh Dugarh, in his written statement traversed the above allegations, and pleaded, *inter alia*, that his father obtained a decree for Rs. 42,202 against Tarini Sanker Bhatta which was still unsatisfied; that the declaration made by the Commissioners under Act XVII of 1873 was made without jurisdiction and invalid; that the properties had passed to Tarini Sanker before the Act came into operation, and that Luchmiput Singh was a *bona fide* purchaser for value without notice of the rights of the Government.

The Subordinate Judge found that the plaintiff's cause of action arose on the 4th November 1884, the date of the late Nawab Nazim's death; that the Commissioners had full jurisdiction in respect of properties purporting to have been alienated by the late Nawab Nazim prior to the passing of the Act, as settled in the Privy Council decision of *Omrao Begum* v. *The Government of India* (1), that the alleged gift to Tarini Sanker became void upon the death of the late Nawab Nazim, and that the plaintiff had established his right to khas possession.

Upon appeal the District Judge held that the Secretary of State alone was entitled to institute a suit for immoveable property held by the Government of India. The concluding portion of his judgment was as follows:—
"I apprehend that so far as State property is concerned, there is no ground for saying that the present plaintiff is the legal representative of the deceased Nawab Nazim, for the Act of 1873 only gave the Commissioners power to declare what property was held by the Government for the purpose of upholding the dignity of the Nawab Nazim for the time being, [744] and there has been no Nawab Nazim since 1884, when the father of the plaintiff died.

"The Subordinate Judge says that 'Ex. II shows that the plaintiff is competent to bring a suit for possession of a *mahal* which has been

(1) 9 C. 704.

1891 DEC. 17. — APPELLATE CIVIL. — 19 C. 742.

declared to be State property by the Commissioners.' Ex. II is a letter from the Commissioner of the Presidency Division to the Collector of Murshidabad, giving his opinion on some points and instruction on others, but it does not show that the plaintiff is competent to sue for possession of a *mahal* or of any thing else, and it is impossible in the nature of things that it should. The Government pleader, in supporting the decree, says that if Ex. II does not, then Ex. III does. Exhibit III is a letter from the Agent to the Governor-General to the present Nawab Bahadur, and is dated 1st September 1881, that is to say, three years before the Nawab Nazim's death. The Agent communicates the orders of Government respecting the future position and income of the present Nawab Bahadur and other matters. Paragraph 2 of the letter announces what will be the Nawab's title and stipend, and continues 'you will also have possession of the State lands and jewels.' I do not consider this as equivalent to a conveyance of immoveable property or any right to sue for immoveable property, and if it were so, the Registration Law would be a bar to its being used in evidence in its present condition. I observe that the judgment of the lower Court is silent on the subject, and the document does not appear to have been put forward as having any such character as is attributed to it here.

"It appears to me that I must hold that only the Secretary of State can institute a suit of this nature, and that this suit should be dismissed."

The material portion of the Agent's letter was as follows:—

"His Highness the Nawab Nazim Syed Mansur Ali, Khan Bahadur, having relinquished his position as such, and having renounced all personal rights of interference with *nizamut* affairs, I am directed to communicate to you the following orders of Government regarding your future position and income, and the allowances to be assigned to the other members of the Nawab Nazim's family.

[745] 2. "You will be styled the 'Nawab of Murshidabad.' Your stipend will be Rs. 1,50,000 per annum, and you will receive an allowance of Rs. 30,000 per annum for the repair of the Palace, &c. *You will also have possession of the State lands and jewels.* The terms upon which you hold these latter will form the subject of a future communication."

The subsequent paragraphs contained the orders and directions of Government as to the allowances of the other members of the Nawab Nazim's family, establishment charges, buildings assigned as residences to members of the family, and other matters of a similar nature.

Mr. *Evans* and Moulvie *Seraj-ul-Islam*, for the appellant.

Dr. *Rash Behari Ghose*, Baboo *Degumber Chatterjee*, and Baboo *Dwarka Nath Chuckerbutty*, for the respondent.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J. and BANERJEE, J.) was delivered by

PETHERAM, C.J.—This was a suit brought by the Nawab Bahadur of Murshidabad to recover possession of certain property, on the ground that it was a part of the State property of the Nizamut of Murshidabad which was wrongfully in the possession of the defendants under an alienation from the last Nawab Nazim.

The Subordinate Judge decreed the suit. The District Judge reversed his decision, and has dismissed the suit on the ground that the only person who could bring such a suit was the Secretary of State, that the title was in the Secretary of State, as representing the Government of India, and that no one could bring the suit but that person.

The matter has been argued before us by Mr. *Evans* for the plaintiff and by Dr. *Rash Behari Ghose* for the defendants, and Mr. *Evans*, on this point which I have mentioned, relies upon the letter of the Agent to the Governor-General, which is referred to in the judgment of the District Judge.

That was a letter in which the Agent conveyed to the plaintiff, the Nawab Bahadur, the intentions of the Government with reference to his future, and as to his income, and the provision which was to be made for it; and in that letter he says, "you will also have possession of the State lands and jewels." Both Courts **[746]** found that the property in question was part of the State lands referred to in that letter, but the District Judge considers that that letter did not transfer the title to this property to the Nawab Bahadur, and even if it did, it would be shut out by the Registration Act.

We think that it was not necessary that the letter in question should transfer the title to give a right of action in this case. These lands were found by the Commissioners to be a part of the State lands, and I do not think it is necessary for us to enquire in whom the title, in the English sense of the word, in these lands is vested. It is sufficient, we think, that the Government of the country, which had power to do what it pleased with these lands, informed the Nawab Bahadur, the present plaintiff, that he was to have possession of them for his life. It is not necessary for us to enquire what was the technical interest created in him for the purpose of this suit, that is to say, for the purpose of a suit to recover possession from a person who has no title. It is enough, we think, that he was entitled to the possession under a grant, or an authority, given him by the only person who could give him right of possession.

Then comes the objection which is raised by the learned District Judge that, even if this is so, it cannot be used because of the provisions of the Registration Act. We think it is enough to quote s. 90 of that Act, sub-s. (*d*), which provides that "Sanads, inam title-deeds, and other documents purporting to be, or to evidence, grants or assignments by Government of land or of any interest in land" shall be exempted from registration.

If this is a grant by any one, it is a grant by Government, and consequently it is exempted from the operation of that Act, so that both the objections to this suit fail.

Then Dr. *Rash Behari Ghose* takes a point here that if you look at the Commissioners' award, as a whole, it will be found that it does not determine that this particular property was one of the State lands of this Nizamut, and consequently the Nawab is not entitled to possession of it under the award and under the letter, and he relies upon paragraph 24 of the award.

In that paragraph the Commissioners say—"We have confined our enquiries to the property now in the possession of the **[747]** Nawab Nazim. It appears to us that the Act does not empower us to follow property which has been wrongfully alienated, or of which other parties have acquired wrongful possession." Dr. *Rash Behari Ghose* says that, inasmuch as it appears that the alienation by the Nawab Nazim of this property had taken place before the date of this award, that shows that this award did not operate on this particular property, But this is recital only, and when one comes to the operative part of the award, the Commissioners deal with this property by name and declare it to be State land.

1891 DEC. 17. — APPELLATE CIVIL. — 19 C. 742.

This, one would think, should be enough to decide this point; but, in addition to that, the same point had been argued in the Privy Council in the case of *Omrao Begum* v. *The Government of India* (1), and in that case the same point was decided in exactly the same way. So that, both on principle and authority, we think this award clearly deals with this particular property, and declares it to be State property. We think that the letter, which authorized or informed the present plaintiff that he was entitled or was to hold possession of all these State lands, and which has been acted upon ever since, is sufficient to entitle him to bring an action for possession of this property against a person wrongfully in possession, and consequently this appeal must be allowed, the decree of the lower appellate Court reversed, and the decree of the Court of first instance restored with all costs.

A. A. C. *Appeal decreed.*

---

19 C. 747.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

YAKUTUN NISSA BIBEE (*Plaintiff*) *v.* KISHOREE MOHUN ROY AND OTHERS (*Defendants*).* [11th August, 1891.]

Court-fee—Memorandum of appeal insufficiently stamped—Deficiency in stamp on memorandum of appeal made good after period of limitation—Court Fees Act (VII of 1870), s. 28.

A memorandum of appeal, insufficiently stamped, was presented in the Court of the District Judge on the 24th May, the last day allowed for it **[748]** by limitation, and was received and a memorandum endorsed on it, "Appeal within time; stamp duty insufficient Rs. 204 odd." On the 27th May an order was passed by the District Judge, and endorsed on the memorandum, allowing the appellant one week within which to supply the deficiency, and this period was on the 5th June further extended by another fortnight being allowed. On the 13th June the full stamp duty was paid by the appellant.

Held, that the facts of the case did not bring it within either the spirit or the letter of s. 28 of the Court Fees Act, and that these proceedings were not such as were contemplated by that section, or to put the appeal in order when the stamp duty was received on the 13th June, and that the appeal had been properly dismissed as being out of time.

Balkaran Rai v. *Gobind Nath Tiwari* (2) referred to.

[**N.F.**, 21 Ind. Cas. 866; **R.**, 32 M. 305=1 Ind.Cas. 507=6 M.L.T. 129 (**F.B.**); **Cons.**, 15 A. 65 (71); **D.**, 27 C. 814 (819).]

IN this case the plaintiff sought to recover the sum of Rs. 3,535-12-9, and to have it declared a charge upon certain specific immoveable property. There were 14 defendants, some of whom appeared and contested the plaintiff's claim. The case was tried out on its merits in the Court of first instance with the result that the Subordinate Judge gave the plaintiff an *ex parte* decree against some of the defendants who did not appear, but dismissed the suit with costs as against those who did appear.

---

* Appeal from Appellate Decree, No. 1101 of 1890, against the decree of D. Cameron, Esq., District Judge of Dacca, dated the 28th May 1890, affirming the decree of Babu Beni Madhub Mitter, 2nd Subordinate Judge of that district, dated the 30th of March 1889.

(1) 9 C. 704. (2) 12 A. 129.

The plaintiff being dissatisfied with that decree, on the last day allowed under the Limitation Act, presented a petition of appeal in the Court of the District Judge with only an 8-anna stamp affixed, instead of a stamp for Rs. 204-8, the proper amount of stamp duty required having regard to the value of the suit.

The petition of appeal was presented on the 24th May 1889 and was received, an endorsement being put on it to the effect that it was within time, but that the stamp duty was insufficient. On the 27th May the District Judge passed an order, which was also endorsed on the petition, allowing the plaintiff one week within which to supply the deficiency in the stamp duty. On the 5th June 1889 this period was further extended by a fortnight; the proper amount of stamp duty was paid on the 13th June 1889.

The appeal came on for hearing before the District Judge on the 28th May 1890, and, on a preliminary objection taken by the respondent's pleader, was dismissed, the District Judge holding **[749]** that, though the deficient stamp duty had been paid in within the period allowed by the Court, by the time it was paid the period of limitation had long expired, and therefore, upon the authority of the ruling in *Balkaran Rai* v. *Gobind Nath Tiwari*(1) the appeal must be held to have been out of time.

Against the decree dismissing the appeal the plaintiff now appealed to the High Court.

Dr. *Rash Behary Ghose* and Baboo *Ashootosh Mukerji*, for the appellant.

Mr. *Khundkar* and Moulvie *Seraj-ul-Islam*, for the respondents.

The judgment of the High Court (PIGOT and BANERJEE, JJ.) was as follows:—

JUDGMENT.

We think this appeal must be dismissed. We need not deal with the case referred to by the District Judge [*Balkaran Rai* v. *Gobind Nath Tiwari* (1)], as to which we say nothing save that it is in some respects not on all fours with the decision of this Court in *Syud Ambur Ali* v. *Kali Chand Doss* (2), but quite apart from that case we think that the present case does not come within either the spirit or the letter of s. 28 of the Court Fees Act. The memorandum of appeal was presented on the last day with an 8-anna stamp, it was received with a memorandum upon it, "the appeal within time; stamp duty insufficient Rs. 204 odd." That was on the 24th of May, the last day. On the 27th an endorsement was made upon it, signed by the District Judge, allowing the appellant one week; on the 5th of June there is a further endorsement allowing him a fortnight, and he appears to have paid the full stamp duty on the 13th of June. We think that the District Judge was quite right in holding that these proceedings were not such as s. 28 contemplates, and were not such as to put the appeal in order when the stamp was ultimately received on the 13th of June. We think he was bound to dismiss the appeal.

We dismiss the appeal with costs.

H. T. H. *Appeal dismissed.*

---

(1) 12 A. 129. (2) 24 W. R. 258.

1891
AUG. 29.

APPELLATE CIVIL.

19 C. 750.

19 C. 750.

[750] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

KRISTO CHURN DASS AND OTHERS (*Judgment-debtors*) *v.* RADHA CHURN KUR (*Decree-holder*).* [29th August, 1891.]

Limitation Act (*XV of* 1877), *sch. II, art.* 179, *para.* 2—*Execution of Decree—Appeal by plaintiff against part of decree making all defendants respondents—Execution of part of decree not appealed against.*

On the 23rd March 1886 the plaintiff obtained a decree in the Court of first instance against five defendants, declaring his right to certain specific immoveable property, which was, however, modified on an appeal preferred by the defendants, the decree of the lower appellate Court giving the plaintiff a decree for only two-thirds of the property claimed, and dismissing his suit in respect of the remaining one-third in favour of defendants Nos. 2 and 4. The lower appellate Court's decree was dated the 13th July 1886. Against that decree plaintiff preferred a second appeal to the High Court, making all the defendants respondents, which appeal was, however, dismissed on the 16th June 1887. The plaintiff on the 13th June 1890 applied for execution of the decree in his favour in respect of the two-thirds of the property held to belong to him, and defendants Nos. 1 and 5 objected on the ground that the right to execution was barred, limitation running from the 13th July 1886, the date of the lower appellate Court's decree in the plaintiff's favour.

Held that limitation ran from the 16th June 1887, and that the application was not therefore barred. All the defendants were parties to the second appeal, and the Court to which the application was made for execution was not bound, before allowing execution, to go into all the circumstances of that appeal, and consider whether the decree of the lower appellate Court in favour of the plaintiff for the two-thirds of the property was or was not practically secure; the High Court had all the parties before it, and, if it had been right to do so, might have altered the decree against any of them.

Quære.—Whether under such circumstances the Legislature could have intended the Court executing a decree to go into questions so complicated, as to whether in such a case the whole decree was or might have been or become imperilled in the Court of appeal, and whether the plain words of art. 179 might not be followed with less of possible inconvenience and complexity, even though in some cases it might result in execution of a [751] decree going against a defendant a little more than three years after such decree was practically secure against him.

Nundun Lall v. *Rai Joykishen* (1) cited with approval.

[R., 22 B. 500 (507); 16 Ind. Cas. 370; 22 Ind. Cas. 685.]

THIS was an appeal from an order of the District Judge of Sylhet, dismissing an appeal from an order of the Munsiff of that district passed on an application of Radha Churn Kur, the plaintiff (respondent in the appeal), for execution of a decree in his favour, and which latter order allowed such application and disallowed an objection taken thereto by some of the judgment-debtors, based on the ground that the right to execution of the decree was barred by limitation.

It appeared that on the 23rd March 1886, Radha Churn Kur obtained a decree in the Court of first instance against the appellants and others, five in number, who were defendants in the suit. Against that decree an appeal was preferred and resulted in the decree being modified by the lower appellate Court, the plaintiff's claim as regards one-third of the

---

* Appeal from Order, No. 66 of 1891, against the order of R. H. Greaves, Esq., District Judge of Sylhet, dated the 3rd of December 1890, affirming an order of Baboo Koylash Chunder Mozumdar, Munsif of that district, dated the 31st of July 1890.

(1) 16 C. 598.

1891 AUG. 29. — APPELLATE. CIVIL. — 19 C. 750.

property claimed in the suit being disallowed in favour of defendants Nos. 2 and 4, and his suit in that respect being dismissed, while the decree in his favour for the remaining two-thirds of the property was confirmed. The decree of the lower appellate Court was dated the 13th July 1886. The plaintiff preferred a second appeal against that decree to the High Court, making all the defendants respondents, as he claimed the property as against all the defendants. That appeal was dismissed by the High Court on the 16th June 1887.

On the 13th June 1890 the plaintiff made his present application for execution of the decree in his favour as regards the two-thirds of the property, and in answer to the application defendants Nos. 1 and 5 filed objections, contending that the right to execution was barred by reason of the application being made more than three years after the date of the decree of the lower appellate Court, which was passed on the 13th July 1886. They contended that although the application was made within three years of the date of the decree of the High Court, the appeal to that Court did not concern the plaintiff's right to the two-thirds share of the property in respect of which he now sought to execute his decree, and **[752]** that the period of limitation therefore must be taken as running from the 13th July 1886.

The Munsif held that, though there was no appeal to the High Court regarding the two-thirds share of the property, the objecting defendants were necessary parties to the appeal, the property in suit being claimed as against all the defendants, and that therefore cl. 2 of art. 179 of sch. II of the Limitation Act governed the case, and that the period of limitation must be counted from the date of the decree of the High Court. In support of his view he referred to the decisions in *Akshoy Kumar Nundi* v. *Chunder Mohun Chathati* (1) and *Nundun Lali* v. *Rai Joykishen* (2). He accordingly overruled the objection and allowed the application for execution.

Against that order the judgment-debtors appealed. The material portion of the judgment of the District Judge was as follows:—

"The application for execution of the decree was made within three years from that date (16th June 1887). On behalf of the appellants it is contended that the period within which the decree against them can be executed runs from the date of the decree of the lower appellate Court. Appellant's pleader has referred to several rulings. He contends that the rulings in *Nundun Lall* v. *Rai Joykishen* (2), *Hur Proshaud Roy* v. *Enayet Hossein* (3), and *Sangram Singh* v. *Bujharat Singh* (4) support his case. I observe, however, that in each of the cases referred to in these rulings one of several defendants appealed. It was held that no question between the other defendants and the plaintiffs was involved. In the case now under consideration the plaintiff appealed and all the defendants were respondents; this fact is admitted by appellant's pleader, and it seems to me very important. I find also that there are rulings in *Gangamoyee Dassee* v. *Shib Sunker Buttacharjee* (5), *Basant Lal* v. *Najmunnissa Bibi* (6), and *Nur-ul-Hasan* v. *Muhammad Hasan* (7), which strongly support the respondent's case. I think that the words of cl. 2, **[753]** art. 179 of Act XV of 1877 are clear. The appellant's pleader has not shown me any ruling which deals with circumstances similar to those in this case. I dismiss the appeal with costs."

(1) 16 C. 250. (2) 16 C. 598. (3) 2 C. L. R. 471.
(4) 4 A. 36. (5) 3 C. L. R. 430. (6) 6 A. 14.
(7) 8 A. 573.

1891
AUG. 29.

APPELLATE CIVIL.

19 C. 750.

The judgment-debtors now appealed to the High Court.

Baboo *Lal Mohun Dass*, for the appellants.

Baboo *Tara Kishore Chowdhry*, for the respondent.

The judgment of the High Court (PIGOT and MACPHERSON, JJ.) was as follows:—

JUDGMENT.

The respondent obtained a decree against the appellants on March 23rd, 1886. On appeal the decree was modified: the claim for one-third share of the property claimed by the defendants 2 and 4 was dismissed, and the decree for the remaining two-thirds affirmed on the 13th July 1886. On appeal to the High Court the appeal was dismissed on June 16th, 1887.

In this appeal all the defendants were made respondents, and not merely those in respect of whose one-third claim the plaintiff's suit had been dismissed.

The plaintiff decree-holder now seeks for execution of the decree to the extent of a two-thirds share of the property and costs. Judgment-debtors Nos. 1 and 5 object that execution is barred because not applied for within three years from the date of the order of the lower appellate Court of the 13th July 1886. The Courts below have both rejected this objection and the defendants appeal.

They rely on the principle laid down in the case of *Wise* v. *Rajnarain Chuckerbutty* (1), and on some of the cases decided since that Full Bench decision.

We quite agree with the opinion expressed on this subject by Tottenham and Gordon, JJ., in *Nundun Lall* v. *Rai Joykishen* (2), at page 602: "In one of these cases, namely, *Gungamoyee Dassee* v. *Shib Sunkur Bhuttacharjee* (3), the Judges went entirely upon the words of the article, and it seems to us that, in a question of limitation we ought to abide as strictly as possible by the terms of the law. We should not be disposed to import into the law any further restrictions as to the rights of parties to sue and to execute their **[754]** decrees than the law itself expressly provides; but we are bound to recognise the fact that the law has been by interpretation, so to say, modified by decisions of this Court and the High Court of Allahabad. If, therefore, those cases were on all fours with the present one, we should feel bound to follow the decisions, unless we thought it right to refer the matter to a Full Bench. But we think that the present case does not come exactly under the rule laid down in those cases. In those cases in which execution was held to be barred as against parties who were not parties to the appeal, the decision rests expressly upon the ground that the appeal made by one did not and could not affect the decree as against others of the parties concerned in the case. In one case a former Chief Justice, Sir Richard Couch, in delivering judgment, said that the decree being against various parties for various reliefs in reality amounted to several decrees, although embodied in one paper. The rule governing this decision appears to be shortly this, that unless the whole decree was imperilled by the particular appeal which was preferred, the decision in the appeal would not alter the period of limitation in respect of execution of the decree as between other parties to the suit."

We would even go so far as to express a doubt whether the Legislature can have intended the Court executing a decree to go into questions

(1) 10 B.L.R. 258. (2) 16 C. 598 (602). (3) 3 C.L.R. 430.

so complicated as those which must sometimes arise in determining whether, in such a case as the present, the whole decree was, or might have been, or become, imperilled in the Court of appeal. It does appear to us that the plain meaning of the words of art. 179 might be followed with less of possible inconvenience and complexity, even though in some cases execution against a defendant, the decree against whom was practically secure, might have been operative against him a little more than three years after it was so practically secure. But in the state of the authorities this doubt, if well founded, could only be given effect to by a Full Bench.

The authorities just referred to decided after the Full Bench in *Wise* v. *Rajnarain Chuckerbutty* (1), do not, however, constrain us, in the present case, to hold execution to be barred. All the defendants were parties to the appeal : and the Court is not, we think, bound, **[755]** before allowing execution, to go into all the circumstances of that appeal, consider whether the decree against the present appellants was most probably practically secure, and, on concluding that it was so, refuse execution. Here the High Court had all the parties before it, and had it been right to do so could have altered the decree against any of them.

We think we are at liberty to apply the terms of the article in the case in their plain meaning : and we agree with the Courts below and dismiss the appeal with costs.

H. T. H. *Appeal dismissed.*

---

19 C. 755.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

RAM CHUNDER CHUCKRABUTTY (*Plaintiff*) v. GIRIDHUR DUTT AND OTHERS (*Defendants*).* [1st September, 1891.]

Bengal Tenancy Act (*VIII of* 1885) *ss.* 52, 188—*Co-sharers—Suit by one co-sharer, entitled to collect rent separately, for additional rent for land brought under cultivation, payable in terms of lease—Joint proprietors—Rent suit—Collection of rent separately.*

A tenant held 19½ bighas of land under a kabuliyat granted by three joint landlords, which provided, *inter alia*, that rent was to be paid at the rate of Re. 1-8 per bigha in respect of 8 bighas only, and that the remaining 11½ bighas which were then unculturable, should, when they became fit for cultivation, be assessed with rent at the same rate. One of the co-sharers, who was admittedly entitled, under arrangement, to collect his share of the rent separately, instituted a suit against the tenant, joining his co-sharers as defendants, to recover arrears of his share of the rent for a specific period, and claimed to be entitled to recover rent in respect of the whole 19½ bighas, on the allegation that the 11½ bighas had then become fit for cultivation, and were therefore liable to be assessed with rent at the rate mentioned in the kabuliyat. The tenant objected that, having regard to the provisions of s. 188 of the Bengal Tenancy Act, the suit would not lie at the instance of the plaintiff alone.

Held—That the suit did lie. It was clearly not one for enhancement of rent in the sense in which that term is used in the Bengal Tenancy Act, **[756]** nor was it one for additional rent for excess land within the meaning of s. 52

---

* Appeal from Appellate Decree, No. 842 of 1890, against the decree of Baboo Krishna Mohun Mookerjee, Subordinate Judge of Zillah Khoolnah, dated the 16th April 1890, modifying the decree of Babao Norendra Krishno Dutt, Officiating 1st Munsif of Bagirhat, dated the 27th May 1889.

(1) 10 B.L.R. 258.

1891 SEP. 1. — APPELLATE CIVIL. — 19 C. 755.

of that Act, and as the plaintiff was entitled to collect his share of the rent separately, there was no reason why he should not be entitled to claim separately the rent payable, not upon any fresh adjustment of the rent inconsistent with the continuance of the old tenancy, but upon an ascertainment of the rent payable in accordance with the terms of the original letting.

Guni Mahomed v. *Moran* (1) and *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2) distinguished.

[F., 22 C. 658 (666); Rel., 3 C.W.N. 225; R., 21 Ind. Cas. 556=25 M.L.J. 641=14 M. L.T. 386=(1913) M.W.N. 926.]

THIS was a suit instituted by the plaintiff to recover from the principal defendant, Giridhur Dutt, arrears of rent and cesses for the years 1291 to 1294, in respect of a *nimhowla* held by that defendant under the *howla* of the plaintiff and the other two defendants, the plaintiff's share being eight annas. The area of the land was 19½ bighas, and the principal defendant held it under a kabuliyat executed by his predecessors in title in favour of the predecessors of the plaintiff and the other defendants, who had granted a pottah in exchange therefor. The pottah and kabuliyat provided, *inter alia*, that the tenant was to pay Re. 1-8 per bigha for 8 bighas of the land which were then only culturable, and that, as regarded the remaining 11½ bighas, rent should be assessed thereon at the same rate when they became fit for cultivation. It was not disputed that the plaintiff was, under arrangement with the defendant, entitled to collect his share of the rent separately from his other co-sharers.

The plaintiff alleged in his plaint that the 11½ bighas had become fit for cultivation, and as such they were liable to be assessed with rent at the rate provided in the pottah and kabuliyat; that the defendant had not paid him his share of the rent for the years in suit, and that he was entitled to recover rent at the rate of Re. 1-8 per bigha for the whole 19½ bighas in respect of his share of the land, together with the cesses and interest.

The principal defendant contested the suit on various grounds, and amongst others, contended that the suit being one for enhancement of rent could not lie at the instance of the plaintiff alone, having regard to the provisions of s. 188 of the Bengal Tenancy **[757]** Act. He also pleaded *res judicata* and limitation, and denied that the whole 19½ bighas were fit for cultivation.

Ten issues were fixed for trial by the Court of first instance, but the only one material for the purpose of this appeal was that relating to the question as to whether the plaintiff was entitled to maintain the suit. Upon that issue the Munsif held that, as the plaintiff was admittedly entitled to collect his share of the rent separately, and the suit was not a suit for enhancement of the rent, but one to recover rent at the rate agreed on in terms of the pottah and kabuliyat for the increased area brought under cultivation, and as the other co-sharers were parties to the suit, s. 188 of the Act was no bar to the plaintiff maintaining it. Having found all the other issues of law and fact in favour of the plaintiff, he gave him a decree for the amount claimed, less a small portion on account of the cesses which he held the plaintiff was only entitled to at a rate less than that claimed by him.

On appeal by the defendant this decree was modified. Upon the principal question in the suit the Subordinate Judge observed as follows :—

"In the cases of *Guni Mahomed* v. *Moran* (1) and *Jogendro Chunder Ghose* v. *Nobin Chunder Chottopadhya* (3) it has been held by two Full

(1) 4 C. 96. (2) 17 C. 695. (3) 8 C. 353.

Bench decisions (*sic*) of the High Court that, although upon the facts found, each co-sharer could enforce from the tenant the payment of rent separately, he could neither sue for a kabuliyat for such rent, nor bring a suit to enhance it, because such suits would be inconsistent with the continuance of the original joint tenure. The facts of the present case are on all fours with the cases reported in the Full Bench rulings. The plaintiff alleges in the plaint that his co-sharers, defendants Nos. 2 and 3, do not join with him out of animosity. He has failed to adduce evidence on the point. By making his co-sharers defendants in the case, he has complied with one condition of Mr. Justice Field's ruling in *Kali Chandra Singh* v. *Rajkishore Bhudro* (1), but he has failed to comply with the second condition, **[758]** *viz.*, he has not sued for the entire increased rent so as to prevent multiplicity of suits. I am therefore of opinion that the frame of this suit is bad, so I decline to pass a verdict for the increased rent. The decree of the Court below will stand good in respect of the current rent, *viz.*, Rs. 6 a year. The decree of the Court below is modified accordingly with proportionate costs and interest."

Against that decree the plaintiff appealed to the High Court.

Mr. *Evans* and Baboo *Grija Sunkur Mozoomdar*, for the appellant.

Mr. *Garth* and Baboo *Chunder Kant Sen*, for the first defendant respondent.

The judgment of the High Court (PIGOT and BANERJEE, JJ.) was as follows :—

JUDGMENT.

The only question raised in this case is whether the plaintiff who is a fractional shareholder in the superior tenure, in separate receipt of rent from the tenant-defendant in respect of his share, is entitled to maintain this suit for arrears of rent in accordance with the terms of a kabuliyat executed by the predecessor of the defendant. The first Court decided the question in favour of the plaintiff, but the lower appellate Court has reversed that decision.

It is contended before us, on behalf of the plaintiff, that this is not a suit for enhancement in the ordinary sense of the term, nor even is it a suit for additional rent for land found in possession of the tenant in excess of what he was paying rent for, but it is a suit for arrears of rent under the terms of the kabuliyat, at the original rate specified in that document in respect of the land demised, part of which was left unassessed at the time by reason of its not being then culturable ; and that, as the plaintiff is admittedly in separate receipt of his share of the rent, there can be no bar to his maintaining the suit.

We think this contention is sound. The kabuliyat provides that, of the $19\frac{1}{2}$ bighas of land demised, rent shall be paid at the rate of Re. 1-8 per bigha in respect of only 8 bighas, the remaining $11\frac{1}{2}$ bighas being unculturable, and that, when these $11\frac{1}{2}$ bighas become fit for cultivation, rent shall be assessed thereon at the rate of Re. 1-8. These being the terms of **[759]** original letting, and the additional rent that is claimed being in respect of these $11\frac{1}{2}$ bighas, the suit is clearly not one for enhancement of rent in the sense in which the term is used in the Bengal Tenancy Act, nor is it a suit for additional rent for excess land within the meaning of s. 52 of that Act ; and if the plaintiff is entitled to realize his share of the rent separately, as he admittedly is, there is no

(1) 11 C. 615.

1891 SEP. 1. — APPELLATE CIVIL. — 19 C. 755.

reason why he should not be entitled to claim separately the rent that is payable, not upon any fresh adjustment of the rent inconsistent with the continuance of the old tenancy, but upon an ascertainment of the rent payable in accordance with terms of the original letting.

Two cases were relied upon by the learned Vakil for the defendant-respondent—*Guni Mahomed* v. *Moran* (1) and *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2), but they are clearly distinguishable from the present for the reasons stated above. In the former case, GARTH, C.J., in delivering the judgment of the Full Bench, said:—"The rent law, in our opinion, does not contemplate the enhancement of a part of an entire rent; and the enhancement of the rent of a separate share is inconsistent with the continuance of the lease of the entire tenure." And in the latter the Court held that the same principle that was applicable to a suit for enhancement applied also to a suit for additional rent for excess land found in the tenant's possession. In both the cases the ground of decision is that any alteration of the rent will be inconsistent with the continuance of the original tenancy. The claim in the present case, however, does not involve any such inconsistency.

We think therefore that this appeal ought to be allowed and the decree of the lower appellate Court reversed, and that of the first Court restored, with costs in this Court and the Court below.

Appeal allowed.

---

19 C. 760.

[760] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

JIBANTI NATH KHAN, AND HEMANDRI NATH KHAN, MINOR, BY HIS MOTHER AND NEXT FRIEND, JOGODISHWARI DABEE (*Plaintiffs*) *v.* GOKOOL CHUNDER CHOWDHRY AND ANOTHER (*Defendants*).* [1st September, 1891.]

Merger of putni interest in zemindar who purchases it—Putni interest, merger of, in that of zemindar—Co-sharers—Rent suit—Parties to suit, transfer of defendants to category of plaintiff, effect of—Limitation—Land Registration Act (Bengal Act VII of 1876), *s.* 78.

The doctrine of merger does not apply to the case of a putni interest coming into the same hands as the zemindari interest.

A and B, two joint zemindars, having brought a putni within their zemindari to sale for arrears of rent, purchased it themselves. During the existence of the putni a dur-putni had been created, of which C was in possession. A instituted a suit against C to recover arrears of rent of the dur-putni for a period of three years, setting up his claim thereto both as zemindar and putnidar, and joined B as a *pro forma* defendant, alleging that he was away from home at the time of the institution of the suit and could not therefore join as co-plaintiff. It appeared that A's proprietary interest was registered under the provisions of Act VII (B.C.) of 1876 (the Land Registration Act), but that B's interest had not been so registered. Prior to the suit coming on for hearing, but after the right to recover the rent for the first two out of the three years in suit had become barred by

---

* Appeal from Appellate Decree, No. 274 of 1891, against the decree of F. E. Pargiter, Esq., District Judge of Rajshahye, dated the 15th January 1891, reversing the decree of Babu Purno Chunder Ghose, Munsif of Beauleah, dated the 30th of June 1890.

(1) 4 C. 96. (2) 17 C. 695.

limitation, assuming no suit to have been brought, B was transferred from the category of defendant in the suit into that of co-plaintiff. In answer to the suit C pleaded limitation, and also contended that the non-registration of B's interest precluded the plaintiffs from maintaining the suit at all, A's share not being specified, having regard to the provision of s. 78 of the Act. The lower appellate Court having dismissed the suit on this latter ground, and also held that the right to recover the rent for the first two out of the three years in suit was barred by limitation:

Held, on second appeal, that the right of the plaintiffs as putnidars did not merge in their right as zemindars, and that the Land Registration Act had therefore no application to the case, the plaintiffs being entitled to maintain the suit, *qua* putnidars.

Held, further, that when B was sued as a party-defendant, he was made a party in violation of the rule applied in *Dwarka Nath Mitter* v. *Tara* **[761]** *Prosunna Roy* (1) and that the suit was not therefore in the first instance properly brought, B not being properly on the record at all. That the effect of making B, co-plaintiff was practically to institute a new suit on the date when he was so changed into co-plaintiff, and that the suit had been rightly dismissed on the ground of limitation so far as the rent of the first two years was concerned, but that the plaintiffs were entitled to a decree for the rent in respect of the third year, which was not barred by limitation at the time B was made co-plaintiff.

[**R.**, 13 C.W.N. 913=2 Ind. Cas. 654; 7 Ind. Cas. 346; 22 Ind. Cas. 966; **Disc.**, 36 C. 802=3 Ind. Cas. 994; **D.**, 25 C. 285 (288); 28 C. 744 (750); 2 Ind. Cas. 273=12 O.C. 97.]

THIS suit, as originally framed, was instituted on the 11th April 1889 by Jibanti Nath Khan, one of the plaintiff-appellants, against Gokal Chunder Chowdry, defendant No. 1, Grish Chunder Chowdhry, defendant No. 2, the respondents, and Hemandri Nath Khan, an infant *pro forma* defendant, who was, however, by an order of Court dated the 12th June 1890, struck out of the list of defendants and added as a co-plaintiff to the suit and was the other appellant in this appeal.

The plaint alleged that Jibanti Nath Khan and the infant *pro forma* defendant, Hemandri Nath Khan, were the owners of a certain zemindari named Gopalpara, of which one Ram Sunder Sircar had been the putnidar under a putni lease executed by their predecessors in title; that while in possession Ram Sunder had, on the 27th Shrabun 1272, granted a dur-putni lease to one Kali Sunduri Chowdhrani, the predecessor in title of defendants Nos. 1 and 2, in the name of a servant as benamidar for her, and that, on Kali Sunduri's death, the defendants Nos. 1 and 2 had come into possession of the dur-putni and were still in possession thereof; that, Ram Sunder having defaulted in paying his rent, the putni was brought to sale under Reg. VIII of 1819 for arrears of rent, and was purchased by the plaintiff, Jibanti Nath Khan, and the infant-defendant themselves, and that they had since such purchase remained in possession and had realized the dur-putni rent from the defendants Nos. 1 and 2, both in their right of zemindars as well as of putnidars.

The plaint further stated that the plaintiff, Jibanti Nath Khan, brought the suit alone, as the infant *pro forma* defendant, not being at home, had not joined in bringing it, and that he had therefore made him a *pro forma* defendant, and it sought for a decree for the sum of Rs. 221-12, the arrears of the dur-putni rent, **[762]** for the years 1292 to 1295 Pous, and Rs. 6-15-10 as cesses, together with interest and costs.

Defendant No. 1 alone appeared and filed a written statement. He, *inter alia*, pleaded that the right to recover rent for the year 1292 was

(1) 17 C. 160.

1891 SEP. 1. — APPELLATE CIVIL. — 19 C. 760.

barred by limitation; that a previous suit for rent for the years 1290 to 1293 had, on the objection of the defendants, been withdrawn, and that the present suit was barred as *res judicata*; that the suit would not lie at the instance of the plaintiff without the infant co-sharer being a co-plaintiff, and that it must on that ground be dismissed; and that the plaintiff and the infant-defendant were neither the zemindars nor putnidars of the estate in respect of which the rent was claimed, and that the relationship of landlord and tenant did not exist between them and the defendants. Defendant No. 1 further alleged that his co-sharer, defendant No. 2, was at enmity with him, and that the plaintiff had taken advantage of the disagreement between them to institute a vexatious suit.

Defendant No. 2 did not appear in the suit at all or contest the plaintiff's claim.

The case came on for hearing on the 30th June 1890 before the Munsif, the infant-defendant, Hemandri Nath Khan, having previously on the 12th June 1890 been made a co-plaintiff. The Munsif fixed three issues for trial, *viz.*—(i) Does the relationship of landlord and tenant exist between the plaintiffs and the defendants? (ii) Is any portion of the plaintiffs' claim barred by limitation? (iii) Is the suit barred by *res judicata*?—and having found all of them in favour of the plaintiffs, gave them a decree for the full amount claimed.

Defendant No. 1 appealed, and in the lower appellate Court an additional issue was framed, *viz.*, whether the suit could be maintained, having regard to the provisions of s. 78 of the Land Registration Act of 1876 (Bengal Act VII of 1876).

The District Judge found the plaintiffs' title both as zemindars and putnidars to be proved, and that the defendants were in possession of the *dur-putni* in respect of which the rent was claimed, and he therefore found the first issue in the plaintiffs' favour. On the second issue he held that, as Hemandri was not made a co-plaintiff till the 12th June 1890, when the period allowed by **[763]** limitation for recovery of rent for the years 1292 and 1293 had expired, and as the only reason for Hemandri not joining in the suit was that he was absent from home, the plaintiff Jibanti could not, on the authority of *Dwarka Nath Mitter* v. *Tara Prosunna Roy* (1) be entitled to maintain the suit alone, and therefore that this issue must be decided against the plaintiffs as regarded the rents for those years. He further agreed with the lower Court in its decision on the third issue and upon the fourth issue observed as follows :—

"I now come to the last issue, which is a new one. This was not raised expressly in the lower Court. It appears that the plaintiff, Jibanti, is registered as proprietor under the Land Registration Act (Act VII B.C. of 1876), but the minor plaintiff, Hemandri, is not so registered. The latter is clearly precluded from suing for rent, under s. 78 of the Act, and the ruling in *Surya Kant Acharya, Bahadur* v. *Hemant Kumari Devi* (2), and the objection being a substantial one, imposed by the law, I do not think the defendant is estopped from raising it in this appeal. The defendants' further objection that, if Hemandri's claim fails, the other plaintiff, Jibanti, cannot get a decree, because there is no specification of his shares in the plaint, seems also sound. The fourth issue must also be decided against the plaintiffs."

---

(1) 17 C. 160. (2) 16 C. 706.

1891 SEP. 1. — APPELLATE CIVIL. — 19 C. 760.

Having therefore found the second and fourth issues against the plaintiffs, the District Judge reversed the decision of the Court of first instance and dismissed the suit with costs.

The plaintiff appealed to the High Court on the following amongst other grounds—(*a*) that the lower appellate Court was wrong in applying s. 78 of the Land Registration Act, 1876, to the case, as the plaintiffs were suing as putnidars to recover rent from the defendants as dur-putnidars; (*b*) that the Court erred in dismissing the whole suit, as there was evidence as to the share of the plaintiffs in the Land Registration Proceedings; (*c*) that the transfer of Hemandri to the category of plaintiff did not bring the case within s. 22 of the Limitation Act, 1877, as it was not the case of a new plaintiff being added, and that the Court **[764]** consequently erred in holding any portion of the claim to be barred by limitation.

Baboo *Mohini Mohan Roy*, for the appellants.

Baboo *Kissori Lal Sircar*, for the respondents.

The judgment of the High Court (PIGOT and BANERJEE, JJ.) was as follows:—

JUDGMENT.

In this case we think the District Judge was right in holding that as to the claim in respect of 1292 and 1293 the suit is barred.

When the infant was first made a party-defendant, he was made a party in violation of the rule applied in the case of *Dwarka Nath Mitter* v. *Tara Prosunna Roy* (1) cited before us and the suit was not properly brought. When he was made a party-plaintiff the claim in respect of 1292 and 1293 was barred. It is not necessary to decide whether, if the suit in its original form had been properly framed, the change of the infant from a defendant into a plaintiff would have been in violation of the Limitation Act. Perhaps not. But he was not properly on the record at all; and when he was made a plaintiff, after the claim had been barred, the effect of doing this was practically to institute a new suit. This was an attempt to evade the Limitation Act; it cannot be done; and as to the claim in respect of 1292 and 1293, the suit was properly dismissed.

As to the operation of the Registration Act, the correctness of the view taken by the District Judge depends, of course, on the question whether the putni on its being brought by the zemindar did or did not merge in the zemindar's interest; for if the suit is well brought by plaintiffs as putnidars, in which capacity they seek to sue as well as in that of zemindars, the Registration Act does not apply. No authority has been shown us for holding that the doctrine of merger applies to such cases as this in India, that is, that a putni interest must merge in the zemindari interest if they come into the same hands, and we do not think that we should, for the first time, so far as we are aware, apply the doctrine to such a case.

[765] We therefore hold that the suit was well brought by plaintiffs as putnidars; that the Registration Act does not apply, and that, as to the rent for 1294, the plaintiffs are entitled to a decree. To this extent we allow the appeal. No order as to costs.

H. T. H. *Appeal allowed in part.*

(1) 17 C. 160.

1892
MARCH 4.

APPELLATE CIVIL.

19 C. 765.

19 C. 765.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

NUR ALI DUBASH (*Defendant No.* 1) *v.* ABDUL ALI (*Plaintiff*).*
[4th March, 1892.]

Contract in restraint of trade—Contract Act (*IX of* 1872), *s.* 27—*Restraint of trade.*

S. 27 of the Contract Act does away with the distinction observed in the English cases between partial and total restraint of trade, and makes all contracts falling within its terms void unless they fall within its exceptions. The section was intended to prevent a partial as well as a total restraint of trade.

A and *B*, two ghat serangs, entered into a contract with *X* and five others who carried on the business of dubashes at Chittagong for the purpose of carrying on their respective businesses in unanimity and not injuring one another's trade. The contract, which was to last for three years, provided, *inter alia*, that *A* and *B* were to act as ghat serangs only and do no service to ships in any other capacity; that *X* and the other dubashes were to give *A* five vessels, secured by them every year for him to act as ghat serang to; and that *A* was only to act as ghat serang to the said five ships, and, with the exception of ships for which he had previously acted as ghat serang, he should not act as ghat serang or do any other services for ships belonging to any one else. The contract also contained provisions as to the apportionment of the five ships so to be given to *A* amongst the various dubashes and amongst such, an agreement by *X* to give *A* the third ship he should secure. It also contained a provision for the payment of Rs. 1,000 as damages by any one breaking the contract to the person who should suffer by the breach.

In a suit by *A* against *X*, alleging a breach of the contract by the latter in not giving him the third ship as agreed, and claiming Rs. 1,000 by way of damages, *X* pleaded that the contract was void under s. 27 of the Contract Act as being in restraint of trade.

[766] *Held*, that the contention was sound and that the suit must be dismissed. The consideration for the promise by *X* to give the ship to *A* was the agreement by *A* not to carry on any other business than that of a ghat serang, and that only in respect of his old ships and the five agreed to be so furnished to him by the dubashes. The effect of this agreement was absolutely to restrain *A* from carrying on the business of a dubash and to create a partial restraint on his power to carry on the business of a ghat serang and whether or not (even had the latter stipulation not been illegal), the contract would have been void under the provisions of s. 24 of the Act, by reason of part of the consideration being the undertaking by *A* absolutely to refrain from carrying on the business of a dubash, it was void for both reasons under the provisions of s. 27, and *A*, was not entitled to recover any damages under it.

[R., 22 B. 861; 13 C.W.N. 388=9 C.L.J. 216=1 Ind. Cas. 94.]

THIS was a suit for damages for breach of contract.

The plaintiff and defendant No. 7 were ghat serangs and the other six defendants were dubashes at Chittagong, and as they were all competing with each other, they entered into a joint agreement on the 27th August 1888, which was in the following terms:—

"We, the persons Nos. 1, 2, 3, 4, 5, and 6, carry on business as dubashes of European ships, and we the persons Nos. 7 and 8 carry on business as ships' ghat serangs. But there being no unanimity amongst us in respect of conducting the said business, we injure one another. We therefore have entered into a mutual agreement and contract as follows; and this contract shall be in force for three years:—

* Appeal from Order, No. 160 of 1891, against the order of Baboo Upendro Chunder Mullick, Subordinate Judge of Chittagong, dated the 20th March 1891, reversing the decree of Baboo Bepin Behary Mookerjee, Munsif of that district, dated the 17th of April 1890.

I.—To secure ships, we, the dubashes Nos. 1, 2, 3 and 4, shall use one boat each and we the dubashes Nos. 5 and 6 only one joint boat, and none shall use, nor shall be at liberty to use, more boats.

II.—Each of us shall get that ship which his boat shall catch, and shall supply her bazar and render other services to that ship; and none of the rest of us shall get into that ship or render any services to her.

III.—He who is an old dubash to any captain, shall get that captain's ship and render her services. Even if any of the rest of us catch such ship he shall give her up.

IV.—If any of us catch a ship, and her captain, refusing to avail of the services of the person who has caught his ship, agrees to avail of the services of any other of us, then the person who has caugh t the ship shall give her up in favour of the person whose services the captain is willing to avail of, and the latter shall do her services; but he to whose hands such a ship shall pass, shall in lieu of that ship give to the person who first caught her another ship similar to that one.

[767] V.—Those of the steamers belonging to Turner, Morrison and Co. and Haji Isak and Co., that shall call at this port shall be given to Yakub Ali, dubash No. 1, even though the same may be caught by any one else of us. None of the rest of us shall do services to these steamers.

VI.—We the dubashes Nos. 2 and 3 shall give two jute vessels every year to the dubash No. 1 to act simply as their stevedore, and shall ourselves do all other services to those vessels. Accordingly I, the dubash No, 1, shall do no services to these vessels except as stevedore, nor shall sell them stores. With reference to the said two ships to be given, it is to be stated here that I, the dubash No. 2, shall give the said dubash No. 1, the vessel, not being a rice vessel, that I may get after getting three ships, and so I, the dubash No, 3, shall give to the said dubash No. 1, the vessel not being a rice veesel, that I may get after getting two ships.

VII.—We, the persons Nos. 7 and 8, shall act as ship's ghat serangs only, and shall do no services to ships in any other capacity.

VIII.—We, the dubashes Nos. 2, 4, 5, and 6, shall give five jute vessels every year to the ghat serang No. 7 to act as their ghat serang. I, ghat serang No. 7, shall act only as ghat serang of the said five ships, but shall not get into or do any services to ships belonging to anybody else; provided that none shall be at liberty to take any objection to my doing services to my old ships. I, the dubash No. 3, alone shall give four jute vessels every year to the ghat serang No. 8 to act as their ghat serang; and accordingly I, the ghat serang No. 8, shall do no services to the said four ships except as their ghat serang, and shall not get into ships belonging to anybody else; provided that none shall be at liberty to take any objection to my doing services to my old ships.

IX.—It is to be noted here that I, the dubash No. 2, shall give the next ship after the first; I, the dubash No. 4, the next ship after the second; I, the dubash No. 5, the first ship; and I, the dubash

1892
MARCH 4.

APPELLATE CIVIL.

19 C. 765.

No. 6, the first two ships,—in all five jute vessels, to the ghat serang No. 7 to act as their ghat serang.

X.—We all of us shall fully carry out and act upon the above terms. If any of us disregard or violate any of the said terms, he who shall commit such violation shall pay Rs. 1,000 as damages to the person who may sustain loss in consequence of such violation; and the person who shall sustain such loss will be at liberty to recover the same by a law suit, to which no objection on the part of anybody shall be allowed.

[768] To the above effect we give in writing this deed of agreement to remain in force for a period of three years. 27th August 1888, corresponding with the 12th Bhadro 1250 Maghi."

In this agreement the plaintiff and the defendant No. 1 were respectively mentioned and referred to as ghat serang No. 7 and dubash No. 4. And the agreement was duly executed by them and by the other six defendants, who were referred to in the agreement as dubashes Nos. 1,2,3,5, and 6 and ghat serang No. 8.

The plaintiff sued Nur Ali Dubash, defendant No. 1 to recover the sum of Rs. 1,000 as damages for breach of the terms of the agreement, and he added the other parties to the agreement as *pro forma* defendants. The plaint stated that since the execution of the agreement defendant No. 1 had got two ships, and after them a third, called the "*Madagascar*," of which, in accordance with cls. VIII and IX of the agreement, he, the the plaintiff, was entitled to act as ghat serang, but that the defendant No. 1 had wrongfully refused to allow him to act as such, and had himself acted to that ship both as dubash and ghat serang, making a profit of not less than Rs. 1,200 in the latter capacity only. That after the "*Madagascar*" defendant No. I had got two other ships, both of which he had also refused to give to the plaintiff. That by reason of the agreement he, the plaintiff, was unable to secure employment as ghat serang, and that but for it he might have got employment as ghat serang and dubash of a number of ships and made a profit of more than Rs, 1,000. The plaintiff accordingly contended that he was entitled to recover the sum of Rs. 1,000 as and by way of damages under cl. X of the agreement.

Defendant No. 1 alone appeared and disputed the plaintiff's claim. In his original written statement he set out that, in accordance with the terms of the agreement, he was bound to give the plaintiff the third ship he secured. That such ship was a barque of 1,000 tons, called the "*Camperdown*," which he had offered to the plaintiff, but that the plaintiff would not take it. That the "*Madagascar*" was a vessel of 2,000 tons, and being the fourth ship secured by him, he was not bound to give it to the plaintiff, and that the latter was therefore not entitled to the damages he sought, there having been no breach of the agreement **[769]** on his part. Subsequent to filing his written statement, defendant No. 1 filed a petition asking leave to raise the additional defence that the contract was illegal, and that the suit should be dismissed on that ground.

At the hearing in the Court of first instance three issues were framed, two of which related to the questions of fact raised in the pleadings, the third being—Is the agreement legal, and can it be enforced?

The Munsif only dealt with the last issue, upon which the material portion of his judgment was as follows:—

"The agreements with which we are concerned in the present suit are those contained in cls. VII, VIII, and IX of this deed. Under cl. VII plaintiff agreed not to carry on any other business besides that

of a stevedore. By the terms of cl. VIII defendants Nos. 1, 2, 3, and 4, who are all dubashes, agreed to give five jute ships to plaintiff every year for stevedoring, and the latter agreed not to do any work in any other ship with the exception of his old ships. By cl. IX defendant No. 1 agreed to give to plaintiff the third ship he would be able to secure. Clause X provides penalties for non-performance of the stipulations contained in the deed, and also that the agreements are to remain in force for three years.

"Now, it is sufficiently clear that the defendant's promise to make over a ship to plaintiff for stevedoring work, was the agreement made by the latter not to carry on any other business besides that of a stevedore, and also the agreement on his part not to do stevedoring work in respect of any ship except the one to be given him by defendant. The effect of these agreements was to absolutely restrain plaintiff from carrying on the business of a dubash, and also to create a partial restraint upon his power to carry on the business of a stevedore.

"Now agreements, even in partial restraint of a trade or business, are rendered void by s. 27 of the Contract Act. The High Court has repeatedly laid down this view of the section [*Madhub Chunder Poramanick* v. *Rajcoomar Doss* (1); *The Brahmaputra Tea Company, Ld.* v. *Scarth* (2)]. Plaintiff's vakil pointed **[770]** out a precedent from English cases [*Collins* v. *Locke* (3)] quoted at page 87 of Sutherland's Contract Act. The paragraph runs thus:—'Agreements in restraint of trade are against public policy, and void unless the restraint they impose is partial only, and reasonable in relation to the objects of the contract, and also unless they are made upon a real and *bona fide* consideration. When the object of an agreement is to parcel out the stevedoring business of a particular port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also it may be to keep up the price to be paid for the work, such an agreement is not invalid, if carried into effect by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.' The facts of this case are not clearly set out, and it connot be said that it was similar to the present case; and besides, there is material difference between the English law and the Contract Act in the matter of agreements in the partial restraint of trade. The English law may allow reasonable and partial restraints, but the Contract Act does not.

"Now, the agreements on the part of the plaintiff as contained in cls. VII and VIII of the deed being void, there in no consideration for defendent's agreement to make over a ship to him for stevedore's work and the contract cannot be enforced. Plaintiff is therefore not entitled to any damages. In this view I do not think it necessary to enter into the other issues."

The suit having been dismissed with costs by the Munsif, the plaintiff appealed. After stating the facts the Subordinate Judge observed as follows :—

"The defendent did not object in his first written statement that the contract was illegal, but afterwards a petition was put in as a supplemental defence, objecting against the legality of the contract and relying on s. 27 of Act IX of 1872, and the Munsif has dismissed plaintiff's suit on that ground only.

---

(1) 14 B.L.R. 76. (2) 11 C. 545. (3) L.R. 4 App. Cas. 674.

1892 MARCH 4. — APPELLATE CIVIL. — 19 C. 765.

"This section run thus :—'Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void.'

[771] "These words do not mean an absolute restriction, and are intended to apply to a partial restriction—a restriction limited to some particular place.

"Let us now see whether the business of stevedores or provision suppliers of ships which chance to visit port towns such as Chittagong is a trade within the meaning of the law. I think the work or business of stevedores does not come within the purview of trade described in the law; besides, there was lawful consideration for the contract, the plaintiff foregoing all gains and profits of other ships, whose benefits the defendants are to enjoy. Again, the putting a stop to the dissensions, quarrel, and the consequent loss to the competitors was a reasonable contract, and as such enforceable in law. An agreement the result of which is to create a monopoly and deprive the public of the benefit of competition is not illegal. [*In re Carew's Estate* (1), Sugden's Vendors and Purchasers, 14th Ed., 11. See also *Collins* v. *Locke* (2) and s. 65 of the Contract Act.] It is clear, therefore, that the agreement relied on by the plaintiff does not come within the meaning of s. 27 of Act IX of 1872. There was no lawful profession, trade, or business. What the plaintiff gave up was a sort of his good-will of the business of stevedore in respect of ships coming to the port of Chittagong; the test is that the restriction must not be greater than the protection of the person interested requires, or such as to inflict injury on the public. Here no such thing existed, so that the agreement would go against public policy. I however, proceed uppn the principle that s. 27 does not apply to the business of a stevedore at Chittagong. The judgment of the lower Court is set aside, and the case is remanded to be tried on its merits; the costs will abide the ultimate result."

Against the order of remand the defendant No. 1 appealed to the High Court.

Moulvie *Seraj-ul Islam*, for the appellant.

Moulvie *Mahomed Yusuff*, for the respondent.

The judgment of the High Court (PIGOT and MACPHERSON, JJ.) was as follows :—

JUDGMENT.

Tha plaintiff sues upon an agreement entered into between him and all the defendants. His claim in this suit is made against [772] defendant No. 1 alone, the other defendants being made parties *pro forma*.

Plaintiff and defendant No. 7 are ghat serangs or stevedores, and defendants 1 to 6 are dubashes at the port of Chittagong. The plaintiff says that there being competition between plaintiff and the defendants, they sustained serious losses in their respective business, and hence they entered into an agreement dated 27 th August 1888.

The plaintiff's case is that under that agreement the defendant No. 1 became bound to allow the plaintiff to act as ghat serang of a certain ship the "*Madagascar*," which arrived at Chittagong, and of which defendant No. 1 was dubash; that defendant No. 1 refused to allow plaintiff so to act; that this refusal caused loss to the plaintiff; and that defendant No. 1 thereby became liable under the agreement to pay the plaintiff Rs. 1,000 as damages for this breach of it.

---

(1) 26 Beav. 187. (2) L. R. 4, App. Cas, 674.

1892 MARCH 4. — APPELLATE CIVIL. — 19 C. 765.

The defendant No. 1 contended (besides other defences which were not gone into) that the contract was illegal, and that the suit could not be maintained. The Munsif held that the consideration for the promise sued on consisted of an agreement by the plaintiff which was, as being in restraint of trade, illegal under s. 27 of the Indian Contract Act; that the defendant No. 1's agreement was therefore made without consideration, and dismissed the suit.

The Subordinate Judge set aside the judgment of the Munsif and remanded the case for a trial on the merits. The appeal is against this order.

The agreement upon which the suit is brought contains divers stipulations between the dubash parties to it, regulating, as between themselves, their competition for the custom of ships arriving in the port, which need not be referred to here. The articles of the agreement material to the present case, as affecting the ghat serang parties, are Nos. VII, VIII, and IX, in which plaintiff is referred to as ghat serang No. 7, and defendant No. 1 as dubash No. 4. They are as follows:—(*Set out above.*)

It should be noticed that it was part of the defendant's case, on which an issue was raised, that the "*Madagascar*" was not in fact within the meaning of the agreement, the "third ship" contemplated by it, but a fourth ship, plaintiff having refused the third. **[773]** This question of fact has not of course been decided, the Munsif having held that the agreement as to the "third ship" was itself without consideration and could not be enforced by suit; and the appeal is upon that question alone.

We agree with the Munsif, and, for the reasons given by him, we think the consideration for the promise by defendant No. 1 to the plaintiff contained in art. IX was the agreement by the plaintiff in art. VII and VIII; and that the effect of those articles was absolutely to restrain the plaintiff from carrying on the business of a dubash, and also to create a partial restraint upon his power to carry on the business of a stevedore. As to the first, nothing need be said; as to the second, the case of *Collins* v. *Locke* (1) shows (were authority needed for the proposition) that the plaintiff's agreement "to act only as *ghat serang* of the said five ships" and not to "do any services to ships belonging to anybody else" (save his old ships), was in partial restraint of trade in the strict legal meaning of the expression.

The case of *Madhub Chunder Poramanick* v. *Rajcoomar Doss* (2) lays down that in s. 27 of the Contract Act, it was intended to prevent not merely a total restraint from carrying on trade or business, but a partial one. That decision has been always followed. In the last case in which it has been referred to [*Mackenzie* v. *Striramiah* (3)], Handley, J., though declining to apply the principle in the particular case before him, thus summarises the decisions as establishing "that s. 27 of the Indian Contract Act does away with the distinction observed in English cases following upon *Mitchel* v. *Reynolds* (4) between partial and total restraint of trade, and makes all contracts falling within the terms of the section void, unless they fall within the exceptions."

We think the decision of the Subordinate Judge cannot be sustained on any of the grounds on which he bases it, so far as we are able to appreciate them. There was in the agreement before us a partial restraint upon the exercise of a perfectly well-known trade or business:

(1) L.R. 4 App. Cas. 674.
(2) 14 B.L.R. 76.
(3) 13 M. 472.
(4) 1 Sm. L. C. 9th Ed. p. 430.

1892 MARCH 4. — APPELLATE CIVIL. — 19 C. 765.

this was under the law void, as it did not come within any of the exceptions to the Act.

[774] It is not necessary to consider the effect of s. 24 of the Contract Act upon the case; whether, even had the stipulation in partial restraint of trade not been illegal, the defendants' agreement would not nevertheless have been void, part of the consideration for it having been the undertaking by the plaintiff absolutely to refrain from carrying on the business of dubash: probably that would be the proper construction of the contract.

The appeal is allowed, the order of the Subordinate Judge is set aside, and the decree of the Munsif dismissing the suit restored. Appellant to have his costs throughout.

H. T. H. *Appeal allowed.*

---

19 C. 774.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

DINOBUNDHU ROY AND OTHERS (*Defendants*) *v.* W. C. BANERJEE AND ANOTHER (*Plaintiffs*) AND OTHERS (*Defendants*).*
[3rd May, 1892.]

Landlord and tenant—Transfer of tenure—Contract regarding transfer of tenure—Bengal Tenancy Act (*VIII of* 1885), *s.* 12.

A transfer of a tenure made in terms of the provisions of the Bengal Tenancy Act of 1885 is not binding on the landlord if there be a contract between the landlord and the tenant that the transfer shall not be valid and binding until security to the satisfaction of the landlord has been furnished by the transferee, and such security has not been furnished. The tenant is still liable for the rent.

THE plaintiffs as *mourusi mokuraridars* of certain mouzas sued the defendants for arrears of rent for the years 1293 to 1296. Defendant No. 5 was the widow of one Shib Narain Roy, who on the 7th Chait 1279 (19th May 1872) executed in the plaintiffs' favour a *dur-mokurari* kabuliyat for the said mouzas. The kabuliyat contained amongst others the following provisions:—"If the *talook* hypothecated as security be sold for arrears of rent, then within 15 days the lessee shall give fresh security to be approved by you. Failing that, you may take *khas* possession until satisfactory security be given. *Dur-mokurari* right is transferable by sale, &c., but if my vendee does not furnish to your satisfaction security [775] in due course, such sale will not be valid, and you will not be bound to recognize it."

On the 27th Asar 1295 (10th July 1888) the defendants, who were members of the same joint family, by a registered deed of sale transferred their rights to one Ram Jibun Ghosal. Ram Jibun neither gave nor offered any security to the plaintiffs. Notice of the transfer, after registration, was given to the plaintiffs by the Collector, and the landlord's fee was also sent to them. Defendant No. 5, after the institution of the suit, deposited the rents for the years 1293 and 1294, and joined the other defendants in a plea of non-liability for the rents of the subsequent years,

* Appeal from Appellate Decree, No. 671 of 1891, against the decree of J. Pratt, Esq., District Judge of Midnapore, dated the 31st of January 1891, affirming the decree of Babu Juggobundhoo Gangooly, Subordinate Judge of that district, dated the 19th of July 1890.

because she and the other defendants had transferred their interest to Ram Jibun Ghosal by the registered deed of sale of the 27th Asar 1295.

1892 MAY 3. — APPELLATE CIVIL. — 19 C. 774.

The Subordinate Judge found that the transfer to Ram Jibun was a mere benami transaction, that the plaintiffs had in no way recognized it, and were not bound to do so. He consequently gave the plaintiffs a decree for rent for the years 1295 aud 1296.

On appeal this decision was upheld by the District Judge, who agreed with the Subordinate Judge that the transfer was one which the plaintiffs were not bound to recognize, and in fact never recognized.

The defendants Nos. 1, 6, 7, and 8 appealed to the High Court.

Baboo *Sreenath Das* and Baboo *Kishen Dyal Roy*, for the appellants.

Mr. *R. E. Twidale* and Baboo *Umakali Mookerjee*, for the plaintiffs, respondents.

The judgment of the Court (PRINSEP aud BEVERLEY, JJ.) was as follows:—

JUDGMENT.

The plaintiffs, landlords, contracted with the defendants, tenants, that they were at liberty to make a transfer of the under-tenure given to them, but that, unless the transferee furnished security, they (defendants) were not to be absolved from liability; in other words, the sale would not be valid, and the plaintiffs would not be bound to recognize the transferee.

It seems that, notwithstanding this contract, the defendants have sold the tenure to one Ram Jibun by a registered document, and that the formalities prescribed by s. 12 of the Bengal Tenancy **[776]** Act have been observed; that is to say, the Registration officer has received and sent the "landlord's fee" as prescribed by that section. Notwithstanding this, the transferee, Ram Jibun, has not furnished security, and the plaintiffs, landlords, therefore, in accordance with the terms of the kabuliyat executed by their under-tenants, the transferor-defendants, have refused to recognize the transfer.

It is contended, in appeal, that all the preliminaries required by the Bengal Tenancy Act having been observed, the transfer became valid notwithstanding any contract made with the landlords to the contrary.

We do not find that the Bengal Tenancy Act contains any provision to this effect. It merely provides that a permanent tenure shall, subject to the provisions of that Act, be capable of being transferred in the same manner and to the same extent as other immoveable property. It then provides that no such transfer shall be made, except by a registered instrument, and next it provides that the Registering Officer shall not register any document of transfer unless the landlord's fee is deposited with him, and that, on such deposit being made, he shall send it to the landlord. But it nowhere provides that such a transfer between the parties shall be valid and binding on the landlord if he should have made a contract with the transferor requiring certain other conditions such as there are in the present case. Section 178 does not deal with this matter, and therefore it must be dealt with under the ordinary law of contract. The appeal must, therefore, be dismissed with costs.

C. D. P. *Appeal dismissed.*

1892
MAY 9.

APPELLATE CIVIL.

19 C. 776.

19 C. 776.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

JAGAN NATH DAS (*Plaintiff No.* 1) *v.* BIRBHADRA DAS AND OTHERS (*Defendants*).* [9th May, 1892.]

Limitation Act (*XV of* 1877), *sch. II, arts.* 120 *and* 124—*Shebait nominated to office, limitation to suit brought to oust—Suit to oust a shebait from office, the appointment to which is made by nomination.*

A suit to oust a shebait from his office, the appointment to which has been made by nomination, is one for which no period of limitation is [777] specially provided, and is therefore governed by art. 120 of sch. II of the Limitation Act.

The plaintiff, as shebait of a certain Hindu endowment, instituted a suit to set aside certain leases and alienations created by one who had formerly been shebait, but who it was alleged had relinquished and abandoned the office, on the ground that such leases and alienations were void and not binding on the endowment, and he sought to obtain khas possession of the lands occupied by the defendants under such leases and alienations. Although it was admitted that the plaintiff had held possession as shebait, and managed the properties connected with the endowment for more than ten years, on the nomination of the Hindu residents of the locality, the defendants put the plaintiff to proof of his title as shebait. The lower Courts found that the plaintiff had failed to prove his title, and, holding that on this ground he had no *locus standi*, dismissed the suit.

Held, that as a suit to oust the plaintiff from his office would have been barred by limitation, by reason of his having held the office for a period exceeding that provided by the law of limitation, he had acquired a complete title for the purposes of any litigation connected with the affairs of the endowment, and that the suit had been wrongly dismissed on the ground that the plaintiff had failed to prove his title.

[**F.**, 26 M. 113 (115); **Cited & Appr.**, 2 Ind. Cas. 107 = 53 P.R. 1909 = 37 P.W.R. 1908; **R.**, 37 C 263 (278) = 11 C.L.J. 304 = 14 C.W.N. 497 = 3 Ind. Cas. 419; 39 C. 227 (231) = 14 C.L.J. 369 = 16 C.W.N. 129 = 11 Ind. Cas. 884; 18 M. 342 (347); 18 Ind.Cas. 373; **D.**, 25 C. 354 (364); 8 C.P.L.R. 49 (51).]

IN this case there were originally three plaintiffs, of whom the principal one Jagan Nath Das, plaintiff No. 1, alone preferred this appeal to the High Court. The suit was to set aside certain alleged perpetual leases purporting to have been granted by one Ram Chunder Nandha, who had admittedly been a former shebait of the endowment to which the lands covered by such leases belonged. Plaintiff No. 1 claimed in his capacity of shebait. He alleged that Ram Chunder Nandha, the former holder of the office, while leading a vicious life, had disappeared long before 1286, and had not since been heard of; that he, the plaintiff, with the sanction of the District Collector, had been nominated as shebait by the general public in the year 1287, since which time he had been in possession of the properties belonging to this endowment and duly performing the duties of his office.

The other two plaintiffs claimed as tenants of the lands in suit, and the plaint contained a claim for damages for the value of certain paddy grown on the lands, which it was alleged had been cut and misappropriated by the defendants. As their claim was dismissed by both the lower Courts, and they did not appeal to the High Court, it is unnecessary to refer further to that portion of the case.

* Appeal from Appellate Decree No. 777 of 1891, against the decree of Baboo Bulloram Mullick, Subordinate Judge of Cuttack, dated the 18th of February 1891, affirming the decree of Baboo Khetter Mohun Mitter, Munsif of Balasore, dated the 6th of September 1890.

[778] The defendants, in answer to the case of plaintiff No. 1, pleaded, *inter alia*, that according to custom only Brahmins and Baistabs could be eligible for the office of the shebait in question, and as the plaintiff was neither the one nor the other, he had no *locus standi*, and could not maintain the suit.

Numerous issues were fixed for trial in the Court of first instance, amongst them one relating to the above-mentioned plea, which alone was decided by the lower Courts. In consequence of the course so adopted by those Courts, as well as the question upon which the decision of the High Court turned, it becomes immaterial for the purposes of this report to refer to the remaining issues, or to the facts bearing on the merits of the case. As regards the issue referred to above, it is only necessary to state that it was admitted that the plaintiff No. 1 had held the office of shebait for more than ten years, but although it was contended on his behalf that this fact precluded the defendants from questioning his title, both the lower Courts held that this could not be so, and decided the issue in favour of the defendants, and, without going into the merits of the case or the other issues raised, dismissed the plaintiff No. 1's suit with costs.

The plaintiff No. 1 appealed to the High Court.

Baboo *Monmotho Nath Mitter*, for the appellant.

Baboo *Jagut Chunder Banerjee*, for the respondents.

The Court (PRINSEP and BANERJEE, JJ.) delivered the following judgment :—

JUDGMENT.

In this case the plaintiff, as shebait of a certain Hindu endowment, sues to set aside certain leases and alienations created by a person who, he says, has relinquished and abandoned the right of shebait, and consequently he asks to obtain khas possession of the land occupied by the defendants under such title.

The defendants put the plaintiff to the proof of his title as shebait, and on failure of such proof the suit has been dismissed.

It has been admitted that the plaintiff has held possession as shebait, and managed the properties connected with the endowment for more than ten years, on the nomination of the Hindu residents of the locality. It has not been shown that there is any local custom or authority for such appointment, and we may dismiss the suggestion that the appointment was made by the Collector, [779] for it does not appear that anything further was done than that the appointment made was notified for the information of the Collector. It has been contended before us in second appeal, as it was contended in the lower Courts, that inasmuch as a suit to oust the plaintiff from his office as shebait of this endowment is now barred by limitation, it was not competent to the defendants to call upon the plaintiff to prove the validity of his title.

We can find no direct authority for limitation in such a suit as this. The suit is for possession of an office, the appointment to which is made by nomination. The Law of Limitation, sch. II, Art. 124, provides for a suit for possession of an hereditary office, and, if the appointment to the office of shebait in the present case had been by succession through inheritance, a suit for possession of such office would be covered by that article. Any suit to oust such a person as the plaintiff from his office as shebait would not necessarily be a suit for possession of immoveable property, or an interest in immoveable property, because, by the nature of the endowment, the title rests with the idol, and the plaintiff would occupy at

1892 MAY 9. — APPELLATE CIVIL. — 19 C. 776.

most the position of trustee or shebait for the purpose of performing the duties and managing the affairs of the endowment. We have, therefore, after much consideration, come to the conclusion that the suit should be regulated by art. 120, sch. II of the Limitation Act, that is to say, that a suit to oust the plaintiff from his office would be a suit for which no period of limitation is specially provided. If, therefore, no suit could be brought to oust the plaintiff by reason of his having held the office for a period of ten years, that is, a period exceeding that provided by the law of limitation, he would acquire a complete title for the purposes of any litigation, or any thing connected with the affairs of the endowment. We think, therefore, that the suit has not been properly dismissed by the lower Courts, and we accordingly direct it to be tried on the merits, that is to say, whether the leases and alienations which the plaintiff seeks to set aside are void as against the endowment. The case will be remanded to the lower appellate Court and the costs will abide the result.

C. D. P. *Appeal allowed and case remanded.*

---

19 C. 780.

[780] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

MOTI SAHU AND ANOTHER (*Plaintiffs*) *v.* CHHATRIDAS AND OTHERS (*Defendants*).* [10th May, 1892.]

Limitation—Plaint insufficiently stamped—Practice—Date of institution of suit—Presentation of plaint insufficiently stamped—Court-fees, payment of requisite, on a date subsequent to that on which plaint was presented, effect of, on period of limitation.

The date of the institution of a suit should be reckoned from the date of the presentation of the plaint, and not from that on which the requisite Court-fees are subsequently put in, so as to make it admissible as a plaint.

Skinner v. *Orde* (1) and *Chennappa* v. *Raghunatha* (2) referred to. *Balkaran Rai* v. *Gobind Nath Tiwari* (3) not followed.

[**F.**, 27 C. 814 (818) = 4 C.W.N. 818; 28 C. 427 (433); 31 C. 75 (77); 22 M. 494 (504) = 9 M.L.J. 37; 2 Ind. Cas. 1; L.B.R. (1893—1900), 33; 74 P.R. 1903; 74 P.R. 1903 (*n*) = 173 P.L.R. 1903; 3 M L.T. 63 = 123 P.R 1907 = 82 P.W.R. 1907; **Appr.**, 32 M. 305 = 1 Ind. Cas. 507 = 6 M.L.T. 129 (**F.B.**); **R.**, 24 A. 218 (220); 22 B. 849 (855); 20 C. 41 (45); 1 O C. 272 (276); 4 O.C. 108 (112, 113) (B); **Cons.**, 15 A. 65 (70); 27 B. 330 = 5 Bom. L.R. 198; **D.**, 27 C. 376 (378).]

THE question raised in this appeal was, whether a suit had been properly dismissed as barred by limitation, on the ground that the plaint had not been properly stamped within the period prescribed by the Limitation Act.

The suit was instituted by the plaintiffs to set aside an order under s. 281 of the Civil Procedure Code passed on the 11th May 1889, disallowing their claim for declaration of their title and for possession. In the plaint the 11th May 1889 was fixed as the date when the plaintiffs' cause of action accrued. The plaint was presented on the 10th May 1890, and on the same date the following endorsement was recorded on

* Appeal from appellate Decree, No. 851 of 1891, against the decree of F. Taylor, Esq., District Judge of Purnea, dated the 11th of March 1891, affirming the decree of Baboo Srihuri Lahiri, Munsiff of Araria, dated the 7th of October 1890.

(1) 2 A. 241 = 6 I.A. 126. (2) 15 M. 29. (3) 12 A. 129.

it: "This day the plaint is presented, and it is found that it is presented on an insufficiently stamped paper. The plaintiffs are therefore ordered to pay the proper Court-fees within the 27th May." The proper Court-fees were paid on the 27th May.

1892 MAY 10.

APPELLATE CIVIL.

19 C. 780.

It was contended on behalf of the defendants that the suit was barred by limitation, because the deficiency in the Court-fee, payable on the plaint, had not been paid up within one year from the date of the order rejecting the plaintiffs' claim.

[781] Both the Lower Courts, relying on the ruling of the Full Bench of the Allahabad High Court in the case of *Balkaran Rai* v. *Gobind Nath Tiwari* (1) dismissed the suit as barred by limitation, on the grounds that, when the plaint was presented on the 10th May, it was not in a condition in which it could have been received, filed, or used as a plaint in the case; that the order of the 10th May endorsed on the plaint was not an order in accordance with the provisions of s. 28 of the Court-fees Act of 1870, and therefore the payment of the proper Court-fees on the 27th May could not have the retrospective effect of giving validity to the plaint on the 10th May, and that, therefore, the plaint had not been properly stamped within the period of one year, prescribed by the Limitation Act for suits of this description.

The plaintiffs appealed to the High Court.

Baboo *Kuroona Sindhu Mukerji*, for the appellants.

Moulvie *Syud Shamsul Huda*, for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This suit has been dismissed by both the lower Courts as barred by limitation, because the plaint was not properly stamped within the period prescribed by the law of limitation for presenting a suit of this description.

The lower Courts have followed the judgment of a Full Bench of the Allahabad High Court in the case of *Balkaran Rai* v. *Gobind Nath Tiwari* (1). That case, we may observe, is not on all fours with this case, as the document concerned was a memorandum of appeal presented, to the High Court itself, whereas in the case before us it is a plaint. However, several of the grounds upon which that case was decided are applicable to the present case. We may, at the outset, refer to the case of *Chennappa* v. *Raghunatha* (2), in which disapproval is expressed of that decision of the Allahabad Court, and a contrary rule of practice is laid down. We may also observe that, although the practice of this Court has varied, it has not been in accordance with the practice laid down by the Allahabad Court. We are of opinion that the decrees of the lower Courts in this case cannot be maintained.

[782] The plaint was received on the 10th May 1890, and an endorsement was recorded thereon to the following effect:—"This day the plaint is presented, and it is found that it is presented on an insufficiently stamped paper. The plaintiffs are therefore ordered to pay the proper Court-fees within the 27th May." Now, it so happened that, when the Court-fees were paid on the 27th May, it was found that the suit was then barred by limitation, and on this ground the suit has been dismissed. That the Courts are at liberty to extend the period for completing all formalities requisite to make a plaint a regular plaint, so as to be registered in the

(1) 12 A. 129.

(2) 15 M. 29.

1892 MAY 10. — APPELLATE CIVIL. — 19 C. 780.

Court to which it is presented when it is written on a paper insufficiently stamped, is shown by s. 54 of the Code of Civil Procedure. Clause (*b*) of that section enables a Court to fix a time within which the requisite stamped paper is to be furnished, and provision is made that, if this indulgence is not taken advantage of, the plaint shall be rejected. If the requisite stamped paper is put in, and the plaint is otherwise regular, it is admitted and registered. Section 4 of the Limitation Act requires that every suit shall be instituted within the period prescribed therefor by the second schedule to that Act, and the explanation sets out that (for purposes of limitation) a suit is instituted in ordinary cases when the plaint is presented to the proper officer. There is thus a distinction recognized between the presentation of a plaint within the terms of s. 48 of the Code of Civil Procedure, and its admission, after all requisite formalities, including the payment of the necessary Court-fees, shall have been completed. Section 6 of the Court-fees Act declares that no document of any of the kinds specified by the Act shall be filed, exhibited, or recorded in any Court of Justice, or shall be received by any public officer, unless, in respect of such document, there be paid a fee of an amount not less than that indicated by the first or the second schedule as the proper fee for such document; and s. 28 declares that no document which ought to bear a stamp under that Act shall be of any validity, unless and until it is properly stamped, that is to say, unless a plaint bears a proper stamp within the terms of the Court Fees Act, it shall not be admitted or registered, nor shall it form the subject of any proceeding against any of the parties. It also declares that if any such document is, through mistake or inadvertence, received, filed, or used in any Court or office without [783] being properly stamped, the presiding Judge or the head of the office may, if he thinks fit, order that such document be stamped as he may direct. In these terms we think the Court Fees Act gives effect to the object of s. 54 of the Code of Civil Procedure, and it further declares that, on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance. By this we understand that, if afterwards a document shall have been properly stamped, it is as valid as if it had been properly stamped in the first instance. We think that the terms of s. 4 of the Limitation Act and its explanation, and s. 28 of the Court Fees Act, show that this suit cannot be properly barred by limitation. We may further refer to the case of *Skinner* v. *Orde* (1) decided by their Lordships of the Privy Council, in which, in a somewhat analogous case, it was held that the date of the institution of a suit should be reckoned from the date of the presentation of the plaint, and not from that on which the requisite Court-fees were subsequently put in, so as to make it admissible as a plaint. Under such circumstances we feel ourselves unable to follow the judgment of the Full Bench of the Allahabad High Court, and we accordingly set aside the judgments of the lower Courts, and remand the case to be dealt with on the merits. The costs will abide the result.

C. D. P. *Appeal allowed and case remanded.*

---

(1) 2 A. 241=6 I.A. 126.

19 C. 783.

1892 MAY 10.

APPELLATE CIVIL.

19 C. 783.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

SHEKAAT HOSAIN AND ANOTHER (*Plaintiffs*) v. SASI KAR AND OTHERS (*Defendants*).* [10th May, 1892.]

Public Demands Recovery Act (Bengal Act VII of 1880)—*Cess Act (Bengal Act, IX of* 1880)—*Cesses—Personal Debt—Recovery of Cesses—Property belonging to a person not recorded as proprietor.*

An amount due on account of cesses under the Bengal Cess Act, 1880, is only a personal debt, and cannot properly be recovered under the Public [784] Demands Recovery Act, 1880, from the property on which it is assessed when such property belongs to a third person who may not have been recorded as proprietor under Act VII (B.C.) of 1876.

[F., 30 C. 778 (781)=8 C.W.N. 357; Appr., 36 C. 753=2 Ind. Cas. 152; 13 C.W.N. 750=10 C.L.J. 201=1 Ind. Cas. 197; R., 2 C.L.J. 311 (315); 14 C.L.J. 292=16 C.W.N. 351=11 Ind. Cas. 465; 6 C.W.N. 302 (306).]

THIS was a suit for declaration of title to, and confirmation of, possession of a share in certain immoveable property.

The plaintiffs alleged that Satkori Bibi (defendant No. 4) was the owner of a third share in mahal Talda Ram Mohan Chuck on the Collectorate roll of Midnapore, and that, on the 10th October 1885, by a hibanamah, she made a gift of the same to plaintiff No. 1 and his uterine brother Makbul Hosain in equal shares; that on the 15th May 1889 plaintiff No. 2 purchased the said share at a sale in execution of a decree against Satkori Bibi and Makbul Hosain; that thereupon plaintiff No. 1 preferred a claim under s. 335 of the Civil Procedure Code, and his right to a half share in the said third share was allowed; that Sasi Kar (Defendant No. 1) was owner of a share in the said mahal; that, with the object of acquiring the entire 16 annas of the said mahal, he defaulted in paying the Government cesses, and collusively and fraudulently had the said mahal sold at a certificate sale on the 16th March 1889, and purchased the same for an inadequate price, benami in the names of defendants Nos. 2 and 3. It was further alleged that in May 1889 the plaintiffs became aware of the certificate sale and were about to file objections to it, when defendants Nos. 1 and 3 dissuaded them, from doing so and promised to restore their share to them, and, having taken from them Rs. 83-5 on the 16th May 1889, filed an application to the Collector for cancellation of the sale; that the said application was rejected as being made out of time, and thereupon the defendants Nos. 1 and 3 agreed to execute a kobala in favour of the plaintiffs in respect of the said one-third share, but never executed it.

The plaintiffs accordingly prayed that the sale should be set aside, the plaintiffs' title to a one-third share declared, and their possession of it confirmed. They also prayed for a return of the Rs. 83-5. In the alternative, the plaintiffs prayed that, should the Court be of opinion that the sale could not be set aside, that the defendants should be directed to convey a third share to the plaintiffs.

[785] Defendants Nos. 2 and 3 contested the suit. They contended that, inasmuch as the names of the plaintiffs had not been registered under

* Appeal from Appellate Decree, No. 944 of 1891, against the decree of G. G. Dey, Esquire, District Judge, Midnapore, dated the 10th of April 1891, modifying the decree of Baboo Satkowri Haldar, Munsiff of Kontai, dated the 20th of September 1890.

1892 MAY 10. — APPELLATE CIVIL. — 19 C. 783.

Act VII of 1876 (B.C.) in respect of their alleged share in the said mahal, and plaintiff No. 2 had purchased a share at an execution sale subsequent to the certificate sale, and therefore could have acquired no title, the suit was not maintainable: that the hibanmah had not been executed *bona fide*, and that it was a purely benami transaction; that there was no fraud or irregularity in the certificate proceedings and sale; that they were *bona fide* purchasers and had paid a proper price for the property. They denied that they had taken any money from the plaintiffs.

The Munsiff found that the hibanamah was genuine, that at the time of the certificate sale plaintiff No. 1 and Makbul Hosain were the owners of the one-third share, and not defendant No. 4. He did not find fraud or irregularity in the certificate proceedings and sale, but held that only the right, title, and interest of the judgment-debtor Satkori Bibi had passed by the certificate sale, and as she had no interest in the property at that date, defendants Nos. 2 and 3 had acquired no title to the one-third share by their purchase, which would be binding on the plaintiffs. He further found that defendants Nos. 2 and 3 had taken Rs. 83-5 from the plaintiffs, promising to execute a kobala in their favour, and that the plaintiffs were entitled to recover that amount from them.

The Munsiff decreed the suit, declaring the plaintiffs entitled to a third share, confirming them in their possession, and declaring that the plaintiffs' title was not affected by the defendants' purchase at the certificate sale, and that they were entitled to recover the Rs. 83-5 claimed by them.

Defendants Nos. 2 and 3 appealed, and the District Judge upheld the findings of the Munsiff that the hibanamah was genuine, and that the plaintiffs had paid Rs. 83-5 to the defendants; but differed from him in holding that they had failed to prove the agreement to convey the property to them. He was of opinion that by s. 68 of Act VII of 1876 (B.C.) the defendant Satkori Bibi (as the recorded proprietor), and the plaintiffs, the transferees, (as persons who were required to apply for registration) were liable for the payment of cesses due on the property; that the certificate bound their property, and that the subsequent attachment and sale [786] were binding on them and passed their share in the property. He therefore held that the title of the plaintiffs passed by the certificate sale, and that they had made out no case for having it set aside.

The Judge accordingly modified the decree of the Munsiff and dismissed all the plaintiffs' claims except that for the Rs. 83-5, in which respect he upheld the decree of the lower Court.

The plaintiffs appealed to the High Court.

Baboo *Debendra Nath Ghose* and Baboo *Jogesh Chunder Dey*, for the appellants.

Baboo *Neel Madhub Bose* and Baboo *Sib Chunder Palit*, for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

JUDGMENT.

The plaintiffs claimed to be the proprietors of one-third share of a certain mahal, but not the recorded proprietors on the Collector's register. They alleged that, in execution of a decree under the certificate procedure issued by the Collector against their vendor and donor, their share had

1892 MAY 10. — APPELLATE CIVIL. — 19 C. 783.

been sold without any notice to them and in fraud of their title in consequence of the misconduct of defendant No. 1.

The suit has been dismissed by the Lower Appellate Court on the ground that the cesses were due from the particular property, and were properly realized by a decree, under the particular procedure known as the certificate procedure, against the recorded proprietor.

The only point laid before us in this appeal is whether such a sale would affect the rights of the plaintiffs who are admittedly not the recorded proprietors of this share. It is contended on the one hand that cesses are only personal debts, and on the other, that they constitute a charge on the particular property belonging to the recorded proprietor.

We have no doubt that cesses are only a personal obligation on those who profess to be the proprietors of particular properties and who have admitted their liability by submitting to certain terms required by the Act. Section 10 of the Public Demands Recovery Act of 1880, under which the sale was held, declares that, on the filing of the certificate by the Collector in the manner specified, [787] such certificate shall bind all immoveable property of the judgment-debtor situate within the jurisdiction of the said Collector in the same manner and with like effect as if such immoveable property had been attached under the provisions of s. 274 of the Code of Civil Procedure, and s. 19 declares that such certificate may be enforced and executed by all or any of the ways and means mentioned and provided in and by the Code of Civil Procedure for the enforcement and execution of decrees for money, so that any proceedings under the certificate procedure would be of the nature of proceedings in execution of decrees to recover personal debts. We would refer also to ss. 98 and 99 of Act IX (B.C.) of 1880, more particularly to s. 99, which relate to the course to be taken by the Collector if he fails to find any property belonging to the person from whom any sum on account of cesses is due. We think it unnecessary to refer to any further argument to show that the amount so due is only a personal debt and cannot properly be recovered from the property on which it is assessed, if it should so happen that that property belongs to a third person.

The order of the Lower Appellate Court is accordingly set aside, and the plaintiffs' claim decreed with costs in this and the Lower Appellate Court.

C. D. P. *Appeal allowed.*

1892
MAY 23.
APPELLATE
CIVIL.
19 C. 787.

19 C. 787.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Bannerjee.

KHANTOMONI DASI (*Plaintiff*) *v.* BIJOY CHAND MAHATAB BAHADUR, MAHARAJA DHIRAJ OF BURDWAN (MINOR), REPRESENTED BY HIS NEXT FRIEND AND MANAGER, LALA BUNBEHARI KAPUR AND OTHERS (*Defendants*).*
[23rd May, 1892.]

Adverse possession—Suit for possession—Limitation—Purchasers at a patni sale, under Regulation VIII of 1819, *not affected by adverse possession prior to date of sale.*

A person who has held possession of property adversely against a former proprietor cannot be allowed, in a suit for possession, to set up such adverse possession against a person who has purchased the property at a patni sale, held under Regulation VIII of 1819, within 12 years from the date of [788] the institution of the suit. The purchaser is entitled to the patni free from all incumbrances and in the condition in which it was created.

Womesh Chunder Goopto v. *Raj Narain Roy* (1) referred to.

[F., 25 C. 167 ; Appr., 22 C. 244 (251) ; R., 37 C. 322 (329) = 11 C.L.J. 209 = 14 C.W.N. 487 = 5 Ind. Cas. 243 ; 2 C.L.J. 87 = 9 C.W.N. 795 ; 14 C.L.J. 136 = 11 Ind. Cas. 453 (456).]

THIS suit was instituted by the plaintiff, on the 26th April 1889, to recover possession of certain property, on the grounds that it was her *lakhiraj* property, and that she and her vendor had been in adverse possession of it for more than 12 years, and that she had been dispossessed by the defendants.

The defendant No. 3 was a tenant of the disputed land, under defendant No. 2, who held under a patni lease from defendant No. 1.

The defence was that the disputed land was not the *lakhiraj* land of the plaintiff or of her vendors ; that it was the *mal* land of mahal Golpara, and that it had passed is the khas possession of defendant No. 1 when he purchased Goalpara in the year 1289 (1882-83) at a sale held under Reg. VIII of 1819, and that, supposing the plaintiff and her vendors had held possession for more than 12 years adversely to the former talukdar, such possession would not avail her against defendant No. 1, who was a purchaser under the Regulation.

The Munsiff gave the plaintiff a decree, on the ground that she had acquired a *lakhiraj* title by adverse possession for more than 12 years.

On appeal, the District Judge held, upon the authority of the cases of *Womesh Chunder Goopto* v. *Raj Narain Roy* (1) and *Krishna Gobind Dhur* v. *Hari Churn Dhur* (2) "that adverse possession did not begin to run as against defendant No. 1, till the date of his purchase of the patni tenure, and as that took place less than 12 years ago, the plaintiff has not acquired a right by adverse possession." Accordingly he decreed the appeal, dismissing the suit.

The plaintiff appealed to the High Court.

Baboo *Monmotho Nath Mitter*, for the appellant.

---

* Appeal from Appellate Decree No. 840 of 1891, against the decree of F. W. Badcock, Esq., Judge of Burdwan, dated the 18th of March 1891, reversing the decree of Baboo Bepin Behary Sen, Munsiff of Kalna, dated the 8th of March 1890.

(1) 10 W.R. 15. (2) 9 C. 367.

Baboo *Hem Chunder Banerjee*, Baboo *Ram Churn Mitter*, and Baboo *Joshoda Nundun Pramanic*, for the respondents.

1892 MAY 10. — APPELLATE CIVIL. — 19 C. 787.

The contention of the parties appears from the judgment of the High Court (PRINSEP and BANERJEE, JJ.) which was as follows:—

JUDGMENT.

The plaintiff sues to recover possession of $1\frac{1}{2}$ bighas of land as lakhiraj situate within the patni property bought by the defendant [789] at a patni sale. She claims title as being a valid lakhirajdar and also by reason of her having, together with her predecessor, held the land for upwards of 12 years adversely to the landlord.

The Munsiff gave the plaintiff a decree, on the ground that she had acquired a lakhiraj title by more than 12 years' adverse possession.

The District Judge, on appeal, has set aside this decree, and dismissed the suit, on the ground that no adverse title could be pleaded against defendant No. 1, who had purchased the property at a patni sale held within 12 years from the date of the institution of the suit, and who is entitled to it free of all incumbrances created subsequent to the original grant of the patni estate.

The decision of the Full Bench in the case of *Womesh Chunder Goopto* v. *Raj Narain Roy* (1) is to that effect, and there is no doubt that the plaintiff's case must fail on this ground. It is not denied that she has altogether failed to establish any direct lakhiraj title. It is, however, pleaded on her behalf in this appeal that inasmuch as it was found by the Court of First Instance, and that finding has not been displaced in the Lower appellate Court, that she has held this land without payment of rent for more than 30 years, a lakhiraj title should be presumed. That, however, was not the case set up by her in her plaint, nor was it made the subject of any finding in the Lower Courts. Such a plea, moreover, is one which would affect the title of the zemindar, and in order to establish any title against him, it would be necessary for her to show that she has held under a lakhiraj title adversely to the zemindar before the creation of this patni. This, too, is not a plea which she has raised in her plaint or in the course of the trial. We are consequently of opinion that her suit should be dismissed, and that there should be no further trial on any issue which has been raised for the first time in second appeal.

The appeal must be dismissed with costs.

C. D. P. *Appeal dismissed.*

---

(1) 10 W.R. 15.

1892
APRIL 1.

APPELLATE
CIVIL.

19 C. 790.

19 C. 790.

[790] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Hill.

PEARY MOHUN MOOKERJEE (*Plaintiff*) *v.* KUMARIS CHUNDER SIRKAR AND OTHERS (MINORS) REPRESENTED BY THEIR MOTHER AND NEXT FRIEND BINDOO BASHINI DABEA AND OTHERS (*Defendants*).*
[1st April, 1892.]

Occupancy raiyat—Intestacy—Liability of the heirs of a deceased occupancy raiyat to pay rent—Surrender of holding—Bengal Tenancy Act (VIII of 1885), *ss.* 5, 26, *and* 86.

The heirs of an occupancy raiyat, dying intestate, are liable to pay rent, whether they occupy the land or not, until they surrender the holding in the manner prescribed by s. 86 of the Bengal Tenancy Act, 1885.

[Diss., 16 C.P.L.R. 55 (56); R., 24 C. 207 (212); 12 C.L.J. 267 = 6 Ind. Cas. 570; 14 Ind. Cas. 49; 15 C. P.L.R. 89 (91).]

In this suit the plaintiff, Rajah Peary Mohun Mookorjee, sought to recover from the defendants Nos. 1 to 4, as the heirs of their father Jadu Nath Sarkar, arrears of rent of a holding entered in the plaintiff's serishta in the name of Jadu Nath Sarkar. Defendants Nos. 5 and 6 intervened, claiming to be the actual occupancy raiyats under a kobala executed by Jadu Nath, in their favour on the 24th Aughran 1294 (9th December 1887) and were made parties to the suit. The defence was that, as Jadu Nath had transferred the holding to the defendants Nos. 5 and 6, they were liable for the rent, and not the heirs of Jadu Nath, the defendants Nos. 1 to 4.

The Munsiff was satisfied from the kobala that the landlord's fee had been paid and that the transfer was valid, and also that rent had been paid by the defendants Nos. 5 and 6 to the plaintiff's gomashta. He decreed the suit against defendants Nos. 5 and 6, dismissing it against the other defendants.

The plaintiff appealed. The District Judge found that defendants Nos. 1 to 4 had never been in occupation of the land. He also found that the landlord's fee had not been paid; that no notice of the transfer had been given to the plaintiff in the manner prescribed by law, and that the plaintiff in the manner recognized the transfer; and he came to the conclusion that the plaintiff was not bound to recognize the defendants Nos. 5 and 6 as his tenants and take rent [791] from them unless he wished to do so. He held that, inasmuch as the defendants had not occupied the land, they were not liable for rent as the heirs of their deceased father.

On this point, he made the following observations:—

"The contract for the payment of rent made by their father with the plaintiff would seem to me to be a personal one, and to be put an end to by the death of the contracting party. The heirs of the contracting party are not bound by it, or liable for the rent, unless they occupy the land. On behalf of the appellant it is urged that under s. 5, cl. 2, of the Bengal Tenancy Act, the word "raiyat" includes also the successors in interest

---

* Appeal from Appellate Decree, No. 536 of 1891, against the decree of R. F. Rampini, Esq., District Judge of Burdwan, dated the 30th of December 1890, affirming the decree of Baboo Raj Narain Chuckerbutty, Munsiff of Cutwa, dated the 16th of April 1890.

of persons who have acquired such a right. This, of course, is very true, but this must be understood as meaning provided they occupy the land leased to their predecessor in interest. This point has been decided by the High Court in the case of *Kally Dass Misra* v. *Nadiar Chand Ghose* decided by the High Court (PETHERAM, C.J., and BANERJEE, J.) on the 1st of May 1890. As the case is unreported, I give the text of the judgment:—

"'This is a suit for rent. The plaintiff's case is that the land in question was in possession of the father of the defendant who was his raiyat, and that it has descended to the present defendant by descent from his father, and that he is occupying the land and is liable for the rent. The finding is that, so far as the present defendant is concerned, he never occupied the land and never paid anything for it, and that, whatever may have been the case in his father's time, all he knows about the matter is that he never was a raiyat of the plaintiff at all. The learned District Judge finds, as a fact, that the defendant never occupied the land and never paid the plaintiffs any rent for it. That finding disposes of the case, and this appeal must be dismissed with costs.'"

On these findings the District Judge dismissed the appeal against the defendants Nos. 1 to 4, but affirmed the Munsif's decree against defendants Nos. 5 and 6.

The plaintiff appealed to the High Court.

Baboo *Pran Nath Pandit*, for the appellant.

The respondents were not represented.

[792] The judgment of the Court (PRINSEP and HILL, JJ.) was as follows:—

JUDGMENT.

This is a suit for arrears of rent brought originally against the heirs of a deceased raiyat who had rights of occupancy. Certain persons intervened, and were made parties to the suit in the First Court, who claimed to be the actual occupancy raiyats by reason of a sale to them by the deceased tenant. In the First Court they obtained a decree, the Munsif being satisfied from the kobala that the landlord's fee was paid and that the transfer was valid. The heirs of the deceased tenant were exempted. The landlord then appealed to the District Judge, who found that the appellant was not bound to recognize defendants 5 and 6, that is, the transferees claiming title from the deceased occupancy tenant, or to receive rent from them unless he wished to do so.

The District Judge came to this conclusion on the evidence, finding that the landlord's fee had not been paid and that the change in the tenancy had not been recognized by the landlord. The District Judge, however, proceeded to hold on the authority of an unreported case of this Court (*Kally Dass Misra* v. *Nadiar Chand Ghose*) decided by Petheram, C. J. and Banerjee, J., on the 1st May 1890, that, inasmuch as the heirs of the deceased tenant did not occupy the lands, they were not liable for the rents. He, however, affirmed the decree of the First Court against defendants 5 and 6, the transferees from the deceased occupancy tenant.

In second appeal before us it is contended that, inasmuch as admittedly the deceased tenant had rights of occupancy, and it was found by the District Judge that there had been no valid transfer of those rights of occupancy to defendants 5 and 6, his heirs, defendants 1 to 4, were liable

1892 APRIL 1. — APPELLATE CIVIL. — 19 C. 790.

for the rents, since they had not surrendered their holding, which was heritable by law.

We have referred to the judgment on which the learned District Judge relied, and we do not find that it is in point. The nature of the tenancy in that case is not stated. Section 26 of the Bengal Tenancy Act declares that, if a raiyat dies intestate in respect of the right of occupancy, it shall, subject to any custom to the contrary, descend in the same manner, as other immoveable property. No custom is set up in the present case, nor is it stated that the raiyat [793] has left any will. The rights of defendants 1 to 4, as heirs of the deceased raiyat, having rights of occupancy, are admitted. Section 86 provides for the surrender of his holding by a raiyat not bound by a lease or other agreement for a fixed period, that is to say, as in the present case, by a raiyat having rights of occupancy, and we may observe that the term "raiyat" as defined by s. 5, cl. 2, includes the successors in interest of persons who have acquired such a right. Consequently, inasmuch as the heirs of a raiyat who may have died intestate having rights of occupancy succeed to his holding, and inasmuch as a raiyat, within which term is included such heirs as the defendants 1 to 4, is bound to pay rent unless he surrenders in the manner described by s. 86, the heirs are liable to pay rent whether they hold the lands or not. We may observe that the zemindar would not be at liberty to occupy the lands of such a tenant, unless he has obtained from the heirs something amounting to an actual surrender, and unless he himself has proceeded in the manner prescribed by s. 87. It seems to us, therefore, that the heirs of a deceased tenant, dying intestate, having rights of occupancy, are entitled to hold on until they have, expressly, or in any manner from which a surrender may be presumed, as is stated in s. 86, relieved themselves from such liability, and that, unless they have surrendered or done something from which a surrender in terms of s. 86 can be presumed, they are liable for the rent. Non-cultivation of the land would not necessarily amount to a surrender. This appears from s. 86. We are therefore of opinion that the plaintiffs are entitled to a decree against defendants 1 to 4 and that inasmuch as the lower appellate Court has found that defendants 5 and 6 are not entitled to hold these lands, they should be struck out of the decree. We therefore order that the decree in this case be amended accordingly. The appellant will be entitled to his costs from defendants 1 to 4.

C. D. P. *Appeal allowed and decree modified.*

GENERAL INDEX.

Absence of Proof. PAGE

See PLEDGE, 19 C. 322.

Acceleration of Estate.

See HINDU LAW (WIDOW), 19 C. 236.

Account.

(1) *Between debtor and creditor—Special directions as to sum borrowed by an agent in collusion with creditor—Restriction of the principal's liability to those debts only which were shown to have been just—Burden of proof.*—Fraud and undue influence having been found, with the result that a decree cancelled transfers executed in favour of a creditor by a talukdar whose manager had received in his name money forming the consideration for the transfers, an account was directed to be taken of the sums actually due and payable by the principal. Directions were given for the payment, not of all the money received from the creditor by the manager, but only of sums (*a*) shown to have been lent by the creditor to the principal himself personally, and of those (*b*) received by the manager on behalf of the principal in the course of a prudent management. The burden of proof lay on the creditor of showing that any particular advance fell within the class (*b*); and where the advance, having been received by the manager, had been partly used in payment of Government revenue, due on the estate managed by him, *held*, that the Court below had rightly presumed that the rents should have covered the revenue due; and this presumption having to be met, it was for the creditor to bring proof to overcome it. PARTAB BAHADUR SINGH v. CHITPAL SINGH, 19 C. 174 (P.C.)=19 I.A. 33=6 Sar. P.C.J. 93=Rafique & Jackson's P.C. No. 124 ... 561

(2) See HINDU LAW (ADOPTION), 19 C. 513.

(3) See PLEDGE, 19 C. 322.

Accused.

See CONFESSION, 18 C. 549.

Acquisition.

(1) See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 271.

(2) See APPEAL—GENERAL, 19 C. 485.

I.—Imperial Acts.

Act XXXII of 1839 (Interest).

See INTEREST, 19 C. 19.

Act X of 1844 (Sentences for Murder).

S. 3—See JURISDICTION, 18 C. 526.

Act XXXVII of 1855 (Sonthal Parganas).

See SONTHAL PERGUNNAHS, 18 C. 133, 247.

Act XV of 1856 (Hindu Widow's Re-Marriage).

Ss. 1, 2—See HINDU LAW—MARRIAGE, 19 C. 289.

Act XL of 1858 (Minors).

(1) See GUARDIANSHIP, 19 C. 301.

(2) S. 3—See HINDU LAW—MAINTENANCE, 19 C. 84.

Act X of 1859 (Rent, Bengal).

(1) Ss. 6 and 7—See RIGHT OF OCCUPANCY, 18 C. 349.

(2) S. 32—See LIMITATION ACT (XV OF 1877), 18 C. 368.

Act XI of 1859 (Land Revenue Sales, Bengal). PAGE

(1) Ss. 27, 28—See SALE, 18 C. 125.

(2) S. 31—See LIMITATION ACT (XV OF 1877), 18 C. 234.

Act XX of 1863 (Religious Endowments).

(1) Ss. 1—12, 14 & 18—See HINDU LAW—RELIGIOUS ENDOWMENT, 19 C. 275.

(2) S. 18—See APPEAL—GENERAL, 18 C. 382.

Act III of 1865 (Carriers).

See COMMON CARRIER, 18 C. 620.

Act XXI of 1866 (Native Converts' Marriage Dissolution).

Ss. 4, 5, 7, 10, 15, 16—See DISSOLUTION OF MARRIAGE, 18 C. 252.

Act IX of 1868 (Rent, Oudh).

S. 111—See RES JUDICATA, 19 C. 159.

Act I of 1869 (Oudh Estates).

(1) *Ss. 2, 13, 20, 22 (6)—Will of talukdar—Registration of will—Succession to talukdari—Son of deceased elder brother preferred to younger brother.*—A written statement by a talukdar made in 1860 in reply to inquiries by the Government, issued in the districts under circular orders regarding the succession of talukdars, may come within the definition of a talukdar's will in s. 2 of the Oudh Estates Act, 1 of 1869. The statement was described by the talukdar in a letter to the authorities, in 1877, as "the will which has been submitted to the Lucknow district, through the tahsil of Kursi, on 6th April 1860." *Held*, that this showed that he intended the statement of 1862 to be his will, and that the statement, as was held with regard to a similar one in *Hurpurshad* v. *Sheo Dyal*, was a will within the definition in the above section. The talukdar declared in a subsequent will, of 19th August 1879, that no document purporting to be a will, the context whereof was repugnant to the will of the latter year, should be admitted as a will. But the instrument of 1860 was not repugnant to the will of 1879. Also the latter document was not registered in accordance with s. 20 of the Oudh Estates Act, 1869, and being inoperative as to the talukdari estate, it could not revoke the will of 1860, which, also, was not rendered inoperative by any of the provisions of the Act. *Held*, that by the true construction of s. 22, sub s. 6, brothers take in the same manner as sons are directed to take by the preceding sub-sections; and that the defendants of a deceased elder brother are preferred as heirs to the younger surviving brother. HAIDAR ALI v. TASADDUK RASUL KHAN, 18 C. 1 (P.C.)=17 I.A. 82=5 Sar. P.C.J. 529 ... 1

(2) *Ss. 8 and 22, and sub-s. 11 of s. 22—Descent of taluk—Disqualification of insane person to inherit by Hindu law—Insanity not proved.*—A taluk, entered in the lists 1 and 2, prepared in conformity with s. 8 of the Oudh Estates Act, 1869, descends according to the rules pointed out in s. 22, as an impartible estate to the single heir determined by the Hindu law of inheritance, followed. Exclusion, under the Hindu law, of a claimant from the inheritance on the ground of insanity could not be inferred merely from his being described in the plaint as insane, or from his suing by a guardian certified under Act XXXV of 1858. Although he might be incompetent to commence the suit or to proceed with it except by a guardian, this did not establish that he was excluded when the succession opened. RAN BIJAI BAHADUR SINGH v. JAGATPAL SINGH; JAGATPAL SINGH v. RAN BIJAI BAHADUR SINGH; BISHESHAR BAKSH SINGH v RAN BIJAI BAHADUR SINGH, 18 C 111 (P.C.)=17 I.A. 173=5 Sar. P.C.J. 590=Rafique and Jackson's P.C. No. 120 ... 74

Act XXIV of 1870 (Oudh Talukdars Relief Act).

See HINDU LAW (GIFT), 18 C. 545.

Act VI of 1871 (Civil Courts, Bengal).

S. 18—See JURISDICTION, 18 C. 526.

Act XXIII of 1871 (Pensions).

S. 8—See JURISDICTION, 19 C. 8.

Act III of 1872 (Special Marriage). PAGE

S. 10—See HINDU LAW—MARRIAGE, 19 C. 289.

Act X of 1873 (Oaths).

Ss. 6, 13, 14—See FALSE EVIDENCE, 19 C. 355.

Act XVII of 1873 (Nawab Nazim's Debts).

(1) *Award of Commissioner conclusive—Construction of documents not establishing a charge on immoveable property.*—Commissioners appointed under Act XVII of 1873, by their award, found that an estate was in the possession of the Government for the purpose of upholding the dignity of the Nawab Nazim for the time being, a finding within their competence to make, of which the effect was that the Government held the property freed and discharged from all claims. In a suit against the Government it was alleged that the estate, when in the hands of the Nawab, had been charged with payment of an annuity and arrears in favour of the plaintiff's father on his abandoning the title which he had set up to the property. *Held*, that the above award, under the Act, would have been a sufficient answer to the claim even if the charge had originally attached to the estate. But in equity no charge could be created unless there was an intent to charge. Here the documents showed that this payment had not been legally charged upon property, neither party having contemplated this result, and there having been only a mandate by the Nawab for payment of the annuity out of his treasury. OMRAO BEGUM v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 19 C. 584 (P.C.)=19 I.A. 95=6 Sar. P.C J. 192 ... 832

(2) See REGISTRATION, 19 C. 742.

Act IV of 1879 (Railways).

(1) See COMMON CARRIER, 18 C. 620.

(2) S. 10—See CARRIER, 18 C. 427.

(3) *S. 11—Railway Company liability of—Carriage of gold and silver, &c.—Insurance, increase, charge for.*—Plaintiffs delivered a box of coins for carriage to the servants of a railway and declared the nature of the contents at the time of delivery. No demand was made on the part of the railway for any increased payment for insurance. The box having miscarried—*Held*, on the authority of the *Great Northern Railway Company* v. *Behrens*, 7 H. & N. 690, that the Railway were liable for the loss. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. BUDHU NATH PODDAR, 19 C. 538 ... 802

Act V of 1881 (Probate and Administration).

(1) S. 19—See PRACTICE, 19 C. 582.

(2) S. 50—See PROBATE, 18 C. 45.

(3) Ss. 73, 83—See HINDU LAW—WILL, 19 C. 65.

(4) Ss. 90, 114—See ADMINISTRATOR, 19 C. 26.

Act XV of 1882 (Presidency Small Cause Courts).

(1) Ss. 1, 18—See SMALL CAUSE COURT, 18 C. 372.

(2) Ss. 9, 23, 37—See ATTACHMENT, 18 C. 296.

(3) S. 18—See SMALL CAUSE COURT, 18 C. 144.

(4) Ss. 38, 71—See SMALL CAUSE COURT, 18 C. 445.

Act VIII of 1885 (Tenancy, Bengal).

(1) Ss. 3, 4, 5—See LEASE, 19 C. 489.

(2) Ss. 5, 26, 86—See OCCUPANCY RAIYAT, 19 C. 790.

(3) S. 12—See LANDLORD AND TENANT, 19 C. 774.

(4) S. 12—See TRANSFER, 19 C. 17.

(5) *Ss. 13, 195, cl. (e)—Sale in execution of decree for arrears of rent—Durputni tenures.*—S. 13 of the Bengal Tenancy Act applies to sales of *durputni* tenures in execution of decrees. MAHOMED ABBAS MONDUL v. BROJO SUNDARI DEBIA, 18 C. 360 (F.B.) ... 240

Act VIII of 1885 (Tenancy, Bengal)—(*Continued*). PAGE

(6) *Ss.* 15, 16, *Putni tenures —Rent Suit*—Ss. 15 and 16 of Bengal Tenancy Act of 1885 apply to putni tenures. DURGA PROSAD BUNDOPADHYA v. BRINDABUN ROY, 19 C. 504 ... 780

(7) S. 22—See RIGHT OF OCCUPANCY, 18 C. 121.

(8) *S.* 29, *cl.* (*b*)—*Enhancement of rent by contract—Agreement not within the section.*—An agreement embodied in a kabuliyat to pay a certain amount of rent agreed upon by the parties in settlement of differences between them as to what had been the amount and character of the rent, and to avoid further litigation, is not an agreement to enhance within the meaning of s. 29, cl. (*b*) of the Bengal Tenancy Act. SHEO SAHOY PANDAY v. RAM RACHIA ROY, 18 C. 333 ... 223

(9) *S.* 40, *cl.* 5—*Order commuting bhowli rent to nagdi rent—Omission to state time when order is to take effect.*—The provisions of cl. 5, s. 40 of the Bengal Tenancy Act, are imperative, and should be strictly complied with. Where, therefore, an order under that clause omitted to state the time from which it was to take effect, it was held to be inoperative. CHOWDHRY RAGHU NATH SARAN SING v. DHODHA ROY, 18 C. 467 ... 311

(10) *Ss.* 52, 188—*Co-sharers—Suit by one co-sharer, entitled to collect rent separately, for additional rent for land brought under cultivation payable in terms of lease—Joint proprietor—Rent suit—Collection of rent separately.*—A tenant held 19½ bighas of land under a kabuliat granted by three joint landlords, which provided, *inter alia*, that rent was to be paid at the rate of Re. 1-8 per bigha in respect of 8 bighas only and that the remaining 11½ bighas, which were then unculturable, should, when they became fit for cultivation, be assessed with rent at the same rate. One of the co-sharers, who was admittedly entitled under arrangement to collect his share of the rent separately, instituted a suit against the tenant, joining his co sharers as defendants, to recover arrears of his share of the rent for a specific period, and claimed to be entitled to recover rent in respect of the whole 19½ bighas, on the allegation that the 11½ bighas had then become fit for cultivation, and were therefore liable to be assessed with rent at the rate mentioned in the kabuliat. The tenant objected that, having regard to the provisions of s. 188 of the Bengal Tenancy Act, the suit would not lie at the instance of the plaintiff alone. *Held*, that the suit did lie. It was clearly not one for enhancement of rent in the sense in which that term is used in the Bengal Tenancy Act, nor was it one for additional rent for excess land within the meaning of s. 52 of that Act, and as the plaintiff was entitled to collect his share of the rent separately, there was no reason why he should not be entitled to claim separately the rent payable, not upon any fresh adjustment of the rent inconsistent with the continuance of the old tenancy, but upon an ascertainment of the rent payable in accordance with the terms of the original letting. RAM CHUNDER CHUCKRABUTTY v. GRIDHUR DUTT, 19 C. 755 ...

(11) Ss. 69, 89—See PENAL CODE (ACT XLV OF 1860), 18 C. 518.

(12) *S.* 84—*Construction of—Acquisition of land by landlord—Reasonable and sufficient purpose—Certificate of Collector—Functions of the Civil Court.*—The proprietors of a taluk who had constructed an indigo factory and employed a European manager applied to the Civil Court, under s. 84 of the Tenancy Act, to acquire by compulsory sale a small piece of land made up of several raiyati holdings within the estate. The application was opposed by the proprietors of another indigo factory who had taken under-leases from the raiyats the greater part of the lands of the village, including the holdings within which the plot in question was comprised. The Collector of the district had certified, under s. 84, that the purpose for which the land was required was reasonable and sufficient. The Munsiff tried the matter as a disputed question of fact, and held that the purpose alleged was not reasonable and sufficient, and declined to authorise the purchase. The District Judge on appeal reversed the Munsiff's finding and authorised the compulsory acquisition of the land. *Held*, that there is no appeal against an order passed by a Civil Court, under s. 84 of the

Act VIII of 1885 (Tenancy, Bengal)—(*Continued*). PAGE

Bengal Tenancy Act, and that the order of the District Judge was without jurisdiction and must be set aside. *Held by Prinsep and Ameer Ali, JJ.*, (*Petheram, C.J.*, dissenting) :—That the Collector's certificate under s. 84 is not conclusive as to the reasonableness and sufficiency of the purpose for which the land is sought to be acquired. That the jurisdiction of the Civil Court is not confined to giving effect to the Collector's certificate, but the Court is to hold a judicial enquiry to determine the reasonableness and sufficiency of the purpose and all matters coming within the section, and is competent to consider the grounds upon which the certificate was granted. That the appointment of a European manager and the necessity for erecting buildings for his comfort and convenience are insufficient grounds for authorising the compulsory acquisition of land under s. 84. The purpose for which the land is sought to be acquired must have a direct relation to the good of the holding, and objects which might have a remote or speculative bearing upon the good of the holding are foreign to the scope of the Act. *Held by Petheram, C.J.*—The section gives to the Collector jurisdiction to decide whether the alleged purpose is reasonable and sufficient, leaving to the Civil Court to settle the amount to be paid for the land and the decision of the question whether the land is *bona fide* required for the alleged purpose. The words "satisfied on the certificate" mean that the Civil Court is to be satisfied on the certificate alone, and has no jurisdiction to take other evidence on that question, but is to accept the decision of the Collector as final. GOGHUN MOLLAH v. RAMESHUR NARAIN MAHTA AND RAMESHUR NARAIN MAHTA v. GOGHUN MOLLAH, 18 C. 271 ... 181

(13) S. 84 – See APPEAL—GENERAL, 19 C. 485.

(14) Ss. 102, 103, 106, 108—*Powers of Settlement Officers—Record of rights—Disputed lands—Appeal—Powers of supervision of High Court.*—A Settlement Officer has no power, under the provisions of the Bengal Tenancy Act, to entertain any dispute between the persons interested in neighbouring estates as to the title to any land. NORENDRA NATH ROY CHOWDHRY v. SRINATH SANDAL, 19 C. 641 ... 870

(15) S. 103—*Record of rights—Dispute as to boundaries—Powers of an executive officer.*—An executive officer, acting under the provisions of s. 103 of the Bengal Tenancy Act, has no power to determine the boundaries between conterminous estates as to which a *bona fide* controversy exists between the owners of such estates. BIDU MUKHI DABI v. BHUGWAN CHUNDER ROY CHOWDHRY, 19 C. 643 ... 871

(16) Ss. 103, 106, 108 (*cl.* 3)—*Court Fees Act* VII *of* 1870, *sch.* II, *art.* 17, *cl.* VI—*Record and settlement of rents—Practice—Appeal from decision of Revenue Officers.*—The Court-fee payable on a memorandum of appeal presented to the High Court under s. 108 (cl. 3) of the Bengal Tenancy Act of 1885 is that prescribed by art. 17 (cl. 6) of sch. II of the Court Fees Act. PETU GHORAI v. RAM KHELAWAN LAL, 18 C. 667 ... 444

(17) S. 158—*Incidents of tenancy application to determine—Admission of tenancy, effect of.*—An application made nominally for the determination of the incidents of a tenancy, but substantially for the purpose of setting aside the lease under which the tenant came into possession, does not come within the scope of s. 158 of the Bengal Tenancy Act. *Per Petheram, C.J., Prinsep, Pigot and Ghose, JJ.*—An admission of a tenancy in order to give jurisdiction under s. 158 does not bring the case within the meaning of the section, the object of the section being to enable the Court to ascertain what are the incidents of the existing arrangements between a landlord and his tenant and not to enable the Court, in effect, to make a new contract for parties between whom no contract was in existence at and before the date of the application. *Per Norris, J.*—The true construction of the application was a question for the determination of the Division Bench DEBENDRO KUMAR BUNDOPHADHAYA v. BHUPENDRO NARAIN DUTT, 19 C. 182 (**F.B.**) ... 567

(18) S. 174—*Amount payable incorrectly calculated by an officer of the Court—Sale for arrears of rent.*—The judgment-debtor within 30 days from the date of sale deposited in Court, under s. 174 of the Bengal Tenancy Act,

Act VIII of 1885 (Tenancy, Bengal)—(*Concluded*). PAGE

the amount which had been calculated in the office of the Munsif as the amount payable under the section. Subsequently on its being discovered that the amount was short by a small sum, the calculation being incorrect, the Munsif held that the provisions of the section had not been complied with, and passed an order confirming the sale. *Held*, that when the amount payable by the judgment debtor under s. 174 has been calculated and settled by an officer of the Court, and when that amount has been paid into Court, an order setting aside the sale must be made by the Court as a matter of right. The order of the Munsif confirming the sale was therefore without jurisdiction and must be set aside. UGRAH LALL v. RADHA PERSHAD SINGH, 18 C. 255 ... 170

(19) *S. 174—Jurisdiction—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 11—*Sale for arrears of rent—Deposit in Court.*—No suit is maintainable to set aside a sale under the provisions of s. 174 of the Bengal Tenancy Act. The right under the section to have a sale set aside is not an abstract right which can be enforced by suit against any particular person, but is a right to call upon a Judge to set aside a sale, and on his refusal, to proceed in revision. KABILASO KOER v. ROGHU NATH SARAN SINGH, 18 C. 481 ... 321

(20) S. 174—See LIMITATION, 18 C. 231.

(21) *S.* 184, *sch.* III, *part*, 2 (*b*)—*Suits on registered contracts—Limitation* (*Act* XV *of* 1877), *sch.* II, *art.* 116—Suits for rent, founded on registered contracts in respect of lands subject to the provisions of the Bengal Tenancy Act, are governed by the limitation provided in that Act. MACKENZIE v. MAHOMED ALI KHAN, 19 C. 1 (F.B.) ... 447

(22) *S.* 188—*Ejectment—Joint owners.*—S. 188 of the Bengal Tenancy Act of 1885 is no bar to a suit for ejectment by one or two joint owners when the suit is brought under the contract law on a breach of the conditions of a lease by the tenant. HARIPRIA DEBI v. RAM CHURN MYTI, 19 C. 541 ... 804

(23) *S.* 188—*Joint landlords—Tenure, enhancement of rent of—Fractional co-sharers.*—Suit for enhancement of rent of a tenure by some only of several joint landlords. The provisions of s. 188 of the Bengal Tenancy Act apply to a suit by some only of several joint landlords to enhance the rent of a tenure, whether such tenure was in existence at the date of the permanent settlement or not, and preclude such a suit being brought. The plaintiffs, who were some only of the co-sharers in a zemindari, instituted a suit to enhance the rent of a tenure within the zemindari and to recover their share of the rent at the enhanced rate for a specified period. Of the tenure-holders, some were co-sharers of the plaintiffs in the zemindari and the remainder were not interested therein. It was admitted that the plaintiffs collected their share of the rent of the tenure separately from their co-sharers, who were sharers in the tenure. The plaintiffs alleged that they had requested the latter to join them in instituting the suit, but that they had declined to do so, and they accordingly made them defendants in the suit. *Held*, that the plaintiffs could not maintain the suit, having regard to the provisions of s. 188 of the Act. The term "joint landlords" in that section must be taken as including all co-sharers under whom tenant holds, whether such co-sharers collect their *quota* of rent from the tenants jointly or separately. HALADHAR SAHA *v.* RHIDHOY SUNDERI, 19 C. 593. ... 838

(24) *S.* 188—*Joint proprietors—Arrangement with fractional co-sharers, effect of—Separate tenancy, creation of.*—Where a tenant has agreed to allow one of several co-sharer landlords to deal with him as if he were his own tenant without any regard to the interests of the other co-sharers, the effect is to create a separate tenancy under such fractional co-sharers, and s. 188 of the Bengal Tenancy Act is inapplicable to such a case. PANCHANAN BANERJI v. RAJ KUMAR GUHA, 19 C. 610 ... 849

Act IX of 1887 (Provincial Small Cause Courts).

(1) S. 17—See SMALL CAUSE COURT, 18 C. 83.

(2) Sch. II, art 31—See APPEAL (SECOND APPEAL), 18 C. 316.

Act XII of 1887 (Bengal, Agra, and Assam Civil Courts). PAGE

(1) See SONTHAL PERGUNNAHS, 18 C. 133.

(2) S. 20—See HINDU LAW—RELIGIOUS ENDOWMENTS, 19 C. 275.

Act X of 1888 (The Presidency Small Cause Courts Law Amendment).

S. 2—See ATTACHMENT, 18 C. 296.

Act VI of 1889 (Probate and Administration).

S. 19—See ADMINISTRATOR, 19 C. 26.

Act XI of 1889 (Lower Burma Courts).

Ss. 50, 69, cls. (*b*) and (*c*)—See INSOLVENT ACT (11 AND 12 VIC., C. 21.), 19 C. 605.

Act VIII of 1890 (Guardian and Wards).

(1) See GUARDIANSHIP, 19 C. 301.

(2) S. 47—See APPEAL-GENERAL, 19 C. 487.

Act IX of 1890 (Railways).

See COMMON CARRIER, 18 C. 620.

II.—Bengal Acts.

Act VII of 1868 (Land Revenue Sales, Bengal).

Ss. 5, 8, 11—See SALE, 18 C. 125.

Act II of 1869 (The Chota Nagpur Tenures, Bengal).

S. 26—See EVIDENCE, 19 C. 91.

Act VIII of 1869 (Rent, Bengal).

Ss. 6 and 7—See RIGHT OF OCCUPANCY, 18 C. 349.

Act IV of 1876 (Calcutta Municipal Consolidation, Bengal).

S. 357—*Limitation—Accrual of right to sue—Notice in writing—Continuing damage.*—The plaintiff in April 1888 sued the defendants for damages for injuries caused by the defendants' works to his house. On the case coming on for hearing it appeared that the notice of action served upon the defendants was defective in form, and the suit was on the 11th December 1888 dismissed with liberty to the plaintiff to bring a fresh suit for the same cause of action. On the 15th December 1888 the plaintiff served the defendants with a fresh notice, and on the 15th March 1889 instituted the present suit. It appeared from the plaintiff's evidence that in the begining of December 1888 the house had been reduced to such a condition that it was incapable of sustaining further damage. *Held*, that the right to sue accrued to the plaintiff upon the happening of damage by reason of the subsidence arising from the defendants' act; that the plaintiff had not shown that a right to sue upon which the suit could be maintained had accrued within three months before the institution of the suit as required by s. 357 of the Municipal Act (IV of 1876), and within the terms of the notice of the 15th December; and that the suit was therefore barred. *Per Pigot, J—Semble* that, as to whether, under s. 357, damage arising out of a subsidence referred to in the notice, could be recovered without fresh notice and fresh suit, a liberal construction should be placed upon s. 357 as to the requirements of the notice. DWARKA NATH GUPTA v. THE CORPORATION OF CALCUTTA, 18 C. 91 ... 61

Act VII of 1876 (Land Registration, Bengal).

(1) See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 19 C. 783.

(2) S. 78—See MERGER, 19 C. 760.

Act IX of 1879 (Court of Wards, Bengal).

Ss. 20, 51-55—"*Suit*"—*Application for execution by Collector on behalf of ward when, manager of Ward's Estate has been appointed.*—The word "suit" as used in ss. 51 to 55 of Bengal Act IX of 1879 is not limited to what is usually called a "regular suit," but covers miscellaneous proceedings in a suit, such as an application for execution of a decree in which the ward for the first time seeks to have the carriage of litigation instituted by his predecessor in title. When it appeared that a manager of a minor's pro-

Act IX of 1879 (Court of Wards, Bengal)—(*Concluded*). PAGE

perty had been appointed by the Court of Wards under the provisions of s. 20 of Bengal Act IX of 1879, and during the absence of such manager on leave, an application was made on behalf of the minor by the Collector of the district for execution of a decree, *held*, that the office of manager did not become vacant because the manager obtained leave, and that if it were not vacant, s. 51 of the Act did not enable the Collector to appear on behalf of the minor. BHOOPENDRA NARAIN DUTT v. BARODA PROSAD ROY CHOWDHRY, 18 C. 500 ... 333

Act VII of 1880 (Public Demands Recovery, Bengal).

(1) *Cess Act* (*Bengal Act* IX *of* 1880)—*Cesses—Personal debt—Recovery of cesses —Property belonging to a person not recorded as proprietor.*—An amount due on account of cesses under the Bengal Cess Act, 1880, is only a personal debt, and cannot properly be recovered under the Public Demands Recovery Act, 1880, from the property on which it is assessed, when such property belongs to a third person, who may not have been recorded as proprietor under Bengal Act VII of 1876. SHEKAAT HOSAIN v. SASI KAR, 19 C. 783 ... 965

(2) Ss. 2, 4, 7, 8, 10, 19—See SALE, 18 C. 125.

Act IX of 1880 (Cess, Bengal).

See ACT VII OF 1880, (PUBLIC DEMANDS RECOVERY), 19 C. 783.

Act II of 1888 (The Calcutta Municipal Consolidation).

Ss. 14, 24, 31—See ELECTION, 19 C. 192.

Act of God.

See CARRIER, 18 C. 427.

Actionable Claim.

See TRANSFR OF PROPERTY ACT (IV OF 1882), 18 C. 510.

Administrator.

Not so described, sale by—Sale by administrators not qua *administrators, but as heirs—Government securities.*—Certain persons who were heirs of a deceased lady, and had also taken out administration to her estate, limited to certain Government securities, sold such Government securities to a *bona fide* purchaser under a written instrument, in which the vendors were not described as administrators. *Held*, that the failure to so describe themselves did not affect the sale, inasmuch as they were entitled to sell either as heirs or administrators, and although as heirs they could sell no more than their own shares in such securities, yet the entire purchase-money having come to their hand, they, as administrators, were bound to administer the same as part of the assets of the estate, the question whether they did so or not not being one which would affect the title of the purchaser. PREONATH KARAR v. SURJA COOMAR GOSWAMI, 19 C. 26 ... 464

Admission.

See EVIDENCE, 18 C. 224.

Adverse Possession.

Suit for possession—Limitation—Purchaser at a patni sale under Reg. VIII *of* 1819 *not affected by adverse possession prior to date of sale.*—A person who has held possession of property adversely against a former proprietor cannot be allowed, in a suit for possession, to set up such adverse possession against a person who has purchased the property at a patni sale, held under Reg. VIII of 1819, within 12 years from the date of the institution of the suit. The purchaser is entitled to the patni free from all incumbrances and in the condition in which it was created. KHANTOMANI DASI v. BIJOY CHAND MAHATAB BAHADUR, 19 C. 787 ... 968

Agent.

(1) Authority, extent of—See PROMISSORY NOTE, 19 C. 242.

(2) *Authority to sue on behalf of his principal—Dismissal of suit brought by agent in his principal's name—Amendment.*—A Court in which a suit is brought

Agent—(*Concluded*). PAGE

on behalf of one person, through the agency of another, is entitled to enquire as to the agent's authority. A suit for arrears of rent was brought by an agent, professing to act under authority from his principal. The plaintiff, after instituting the suit in his own name as agent, obtained an order from the Court granting him leave to amend the plaint by substituting the name of his principal as plaintiff, suing through him, an amendment which the defendant resisted, disputing the authority of the agent. *Held*, that the Court in allowing it did not decide that the agent had authority : that remained to be proved ; and, as it was not proved, the suit failed. NAM NARAIN SINGH v. RAHGU NATH SAHAI, 19 C. 678 (P.C.) =19 I.A. 135=6 Sar P.C.J. 202 894

(3) Colluding with creditor, special directions for account—See ACCOUNT, 19 C. 174.

Agreement.

See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 333.

Ameen.

See PENAL CODE (ACT XIV OF 1860), 18 C. 518.

Amendment.

See AGENT, 19 C. 678.

Appeal.

1.—GENERAL.

2.—SECOND APPEAL.

3.—TO PRIVY COUNCIL.

———1—**General.**

(1) *Act* XX *of* 1863, *s.* 18—*Order refusing leave to sue—Decree—Civ. Pro. Code*, 1882, *s.* 2.—An order refusing leave to institute a suit under s. 18 of Act XX of 1863 is not a "decree" within the meaning of s. 2 of the Civ. Pro. Code, and is not appealable. KAZEM ALI v. AZEM ALI KHAN, 18 C. 382 ... 256

(2) *Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 2, 244, *cl.* (*c*)—*Order—Decree.*—An order merely determining a point of law arising incidentally or otherwise in the course of a proceeding for determining the rights of parties seeking relief, is not a decree within the meaning of s. 2 of the Civ. Pro. Code, and is not appealable. Where the judgment-creditor after satisfaction entered upon a compromise, applied for execution, on the ground of the compromise having been obtained from him by fraud, and the Court below, being of opinion that the remedy of the judgment-creditor was by a proceeding in execution, and not by a regular suit, ordered the case to be tried on its merits, *held*, that no appeal lay from such an order. BEHARY LAL PANDIT v. KEDAR NATH MULLICK, 18 C. 469 ... 313

(3) *From order—Bengal Tenancy Act* (VIII *of* 1885), *s.* 84—*Order made under, not appealable—Acquisition of land by landlord—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 2, 588.—An order made by a Civil Court under s. 84 of the Bengal Tenancy Act is not appealable not being a decree within the meaning of s. 2 of the Code of Civil Procedure and no appeal being allowed by s. 588 of the Code or by any special provision of the Bengal Tenancy Act. MOHUN MUKERJI v. BARODA CHURAN CHUCKERBUTTI, 19 C. 485 ... 767

(4) *Guardians and Wards Act* (VIII *of* 1890), *s.* 47—*Removal of guardian—Order refusing to remove a guardian.*—No appeal lies under the Guardians and Wards Act (VIII of 1890) from an order of a District Judge refusing to remove a guardian. MOHIMA CHUNDER BISWAS v. TARINI SONKER GHOSE, 19 C. 487 ... 769

(5) *Letters Patent, cl.* 15—*Appeal from order of Judge in Privy Council Department refusing to extend time for furnishing security for costs—"Judgment" meaning of—Rule* 33, *Rules of 1st September* 1877—*Code of Civil Procedure* (*Act* XIV *of* 1882), *s.* 602.—No appeal will lie from an order of a Judge in the Privy Council Department refusing to extend the time prescribed by law within which an appellant is required to furnish security for the costs of the respondent, and directing the appeal to be struck off by reason of such security not having been given within the prescribed time. Such

Appeal—1.—General—(*Concluded*). PAGE

an order is not a "judgment" within the meaning of cl. 15 of the Letters Patent of 1865. *Held*, upon a review of the authorities, that where an order decides finally any question at issue in the case or the rights of any of the parties to the suit, it is a "judgment" under cl. 15 of the Letters Patent and is appealable, but not otherwise. KISHEN PERSHAD PANDAY v. TILUCKDHARI LALL, 18 C. 182 ... 122

(6) *Order declaring the rights of parties to a partition in certain specific shares appealable before actual partition made—Civ Pro. Code* (*Act* XIV *of* 1882), *ss.* 2, 396—*Partition suit.*—*Held* by the *Full Bench* (*Prinsep, J.*, doubting):—That an order in a suit for partition, which declares the specific rights of the parties and the property to be partitioned, decides that the suit must be decreed, as after such an order the suit could not be dismissed by the Court by which it was made, and is therefore an order which adjudicates upon the rights claimed and the defence set up in the suit, and which, as far as the Court expressing it is concerned, decides the suit within the definition of a decree in s. 2 of the Civ. Pro. Code, and is therefore appealable as a decree. DULHIN GOLAB KOER v. RADHA DULARI KOERI, 19 C. 463 (**F.B.**) ... 753

(7) *Withdrawal of suit—Appeal from order permitting withdrawal—Decree—Civ. Pro. Code* (*Act* XIV *of* 1882) *ss.* 2, 373 *and* 588.—An order made by an appellate Court under s. 373 of the Civ. Pro. Code, giving permission to withdraw a suit with liberty to bring a fresh one, is not a decree within the meaning of s. 2, and is not appealable. JOGODINDRO NATH v. SARUT SUNDURI DEBI, 18 C. 322 ... 215

(8) See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 667 ; 19 C. 641.

(9) See COURT FEE, 19 C. 272.

(10) See GUARDIAN AND WARD, 19 C. 507.

(11) See LIMITATION ACT XV OF 1877, 19 C. 750.

(12) See SALE, 18 C. 188; 18 C. 496.

———**2.—Second Appeal.**

(1) *Civ. Pro. Code, s.* 584—*Grounds of second appeal.*—Under the Code no second appeal will lie, except on the grounds specified in s. 584. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. DURGA CHOWDRANI v. JEWAHIR SINGH CHOWDHRI, 18 C. 23 (**P.C.**) = 17 I.A. 122 = 5 Sar. P.C.J. 560 ... 16

(2) *Civ. Pro. Code*, 1882, *s.* 584.—*Questions of fact.*—An appeal from an appellate Court to the Chief Court is not limited, as such appeals are under the Civ. Pro. Code, 1882, s. 584 ; but evidence may be dealt with and questions of fact are open for decision. BUDHA MAL v. BHAGWAN DAS, 18 C. 302 (**P.C.**) = 5 Sar. P.C.J. 632 ... 201

(3) *Not Allowable on facts—Civ. Pro. Code—Act* XIV *of* 1882, *ss*, 584, 585—Onus Probandi—*Hindu widow, execution of bond by—Appellate jurisdiction.*—No Court of second appeal can entertain an appeal upon any question as to the soundness of findings of fact by the Court of first appeal ; and if there is evidence to be considered, the decision of that Court, however unsatisfactory it might be, if examined, must stand final. The plaintiff, to make good his claim against the estate of his deceased debtor, relied upon a document purporting to have been signed by the latter's widow since then also deceased. The Court of first appeal, however, found that there had been no actual execution of the instrument by the widow, and dismissed the suit. The burden of proving due execution by the widow lay upon the plaintiff, who relied upon it as binding the estate which she represented (a matter commented on in 8 C. 843). After the decision of the second Court no further appeal on the question of fact was allowable. RAMRATAN SUKAL v. NANDU, 19 C. 249 (**P.C.**) = 19 I.A. 1 = 6 Sar. P.C.J. 119 ... 611

Appeal—2.—Second Appeal—(*Concluded*). PAGE

(4) *Order of appellate Court confirming a sale—Civ. Pro. Code*, 1882, *s.* 312.—An order of an appellate Court under s. 312 confirming a sale cannot be the subject of a second appeal. NANA KUMAR ROY v. GOLAP CHUNDER DEY, 18 C. 422 (**F.B.**). ... 282

(5) *Small Cause Court cases—Suit for mesne profits—Provincial Small Cause Court Act* (IX *of* 1887), *sch.* II, *art.* 31.—Where the plaintiff, after obtaining a decree in a suit for possession of certain land of which he had been dispossessed by the defendants, brought a suit in the Munsif's Court for mesne profits for the period during which he had been kept out of possession, and the suit, though partly decreed by the Munsif, was dismissed by the District Judge, *held*, that such a suit was not cognizable by a Small Cause Court, and therefore a second appeal in the suit would lie to the High Court. SRIRAM SAMANTA *v.* KALIDAS DEY, 18 C. 316 ... 210

(6) See JOINT OWNERSHIP, 19 C. 253.

————3.—To Privy Council.

Appealable value—Suit for restitution of conjugal rights—Valuation of suit—Suit conducted up to appeal as if properly valued—Jurisdiction—Consent of parties.—A suit for restitution of conjugal rights is not one to which any special money value can be attached for the purposes of jurisdiction. *Held*, therefore, that no appeal lay as of right to Her Majesty in Council in such a suit, although the suit had been valued at Rs.25,000, and that valuation had been relied on by the defendant, who had appealed to the High Court from the decision of the first Court which had gone against him. MOWLA NEWAZ *v.* SAJIDUNNISSA BIBI, 18 C. 378 ... 253

Appealable Order.

See HINDU LAW—RELIGIOUS ENDOWMENT, 19 C. 275.

Appealable Value.

See APPEAL TO PRIVY COUNCIL, 18 C. 378.

Appellant.

Duty of—See LIMITATION, 19 C. 660.

Appellate Court.

(1) *Power of—Power to refer to arbitration a case on appeal—Civ. Pro. Code*, 1882, *s* 582.—Under s. 582 of the Civ. Pro. Code, an appellate Court has power to refer a case before it to arbitration if the parties wish it to be referred. SRESH CHUNDER BANERJEE v. AMBICA CHARN MOOKERJEE, 18 C. 507 ... 339

(2) See APPEAL (SECOND APPEAL), 18 C. 422.

Appellate Jurisdiction.

See APPEAL (SECOND APPEAL), 19 C. 249.

Application.

(1) For execution by legal representative without certificate—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 C. 482.

(2) To make decree absolute, notice of—See PRACTICE, 18 C. 443.

Apportionment.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 18 C. 320.

Arbitration.

(1) *Award—Refusal to file award—Civ. Pro. Code*, 1892, *ss.* 13 *and* 525—Res judicata.—The refusal of an application for the filing of an award under s. 525, Civ. Pro. Code, merely leaves the award to have its own ordinary legal effect; and it cannot be contended that an award is not to be relied on as a defence in a suit relating to the subject-matter dealt with by it, only because such an application has not been granted. Separable claims, *viz.*, (*a*) to share property by right of inheritance and (*b*) for the office of lumberdar, had been disposed of, on the reference of the present parties, without the intervention of a Court by an arbitrator's award between them. An application under s. 525 had been rejected for the reason,

Arbitration—(*Concluded*). PAGE

among others, that (*b*) was not a matter of civil jurisdiction. *Held*, however, that the present suit, which was grounded on (*a*), was barred by the award made. MUHAMMAD NEWAZ KHAN v. ALAM KHAN, 18 C. 414 (P.C.) = 18 I.A. 73 = 15 Ind. Jur. 284 = 6 Sar. P.C.J. 26 = 70 P.R. 1891 ... 276

(2) *Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 510—*Power of Court to appoint new arbitrators.*—The Court has power, under s. 510 of the Code of Civil Procedure to appoint a new arbitrator in the place of another, only when the latter had consented to act as arbitrator. BEPIN BEHARI CHOWDHRY v. ANNODA PROSAD MULLICK, 18 C. 324 ... 216

(3) *Submission to arbitration by guardian on behalf of minor—Civ. Pro. Code—Act* XIV *of* 1882, *s.* 525—*Infant—Award—Practice.*—Case in which a natural guardian had on behalf of her minor son submitted certain matters to arbitration, and in which the Court referred the case to the Registrar to enquire and report whether the submission and the award thereon were for the benefit of the minors. ROMON KISSEN SETT v. HURROLOLL SETT, 19 C. 334 ... 667

(4) See APPELLATE COURT, 18 C. 507.

Arbitrators.

See ARBITRATION, 18 C. 324.

Army Act 1881 (44 and 55 Vic , C. 58).

S. 151—See SMALL CAUSE COURT, 18 C. 372.

Army (Annual) Act 1888, 51 Vic., C. 7.

S. 7—See SMALL CAUSE COURT, 18 C. 144.

Arrangement.

See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 610.

Arrears of rent.

Rent suit—Suit for arrears of patni *rent for period during which zemindar had been in possession as purchaser at a sale which was subsequently set aside—Trespasser.*—In a suit by a zemindar against his *patnidars* for arrears of *patni* rent for the years 1294, 1295, and part of 1296 it appeared that the *patnidars* had been out of possession during a portion of that period when the zemindar himself had been in possession, having purchased the tenure at a sale held in proceedings instituted by him under the Regulation. It appeared, however, that the sale had been set aside owing to the proceedings having been instituted against the predecessor of the *patnidars* who was then dead, and thereupon the zemindar gave notice to the *patnidars* to retake possession which they accordingly did. During the time he was in possession the zemindar himself collected some of the rent. The lower Court dismissed the claim for rent for the period during which the plaintiff was so in possession on the ground that he was a wrongdoer and trespasser, and that consequently the defendants could not be held liable for rent during that period. *Held*, that this was no reason for refusing the plaintiff a decree for such arrears, as upon the authority of the decision in 12 M. I.A. 244, the plaintiff could not be treated as a trespasser, and that he was entitled to recover the actual arrears outstanding for the period in question, but not the interest thereon. DHUNPUT SINGH v. SARASWATI MISRAIN, 19 C. 267 ... 623

Assent.

Of the wife to marriage after puberty—See BIGAMY, 19 C. 79.

Assets.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 18 C. 242.

(2) See COMPANY, 18 C. 31.

Attachment.

(1) *Civ. Pro. Code*, 1882, *s.* 266, *sub-s.* (*g*)—*Political pension—Payments due under the Oudh loans of* 1838 *and* 1842—*Exemption from liability to attachment for debt.*—Although it is probable that the enactments of s. 266,

Attachment—(*Continued*). PAGE

Civ. Pro. Code, 1882, were not meant to cover pensions payable by a foreign State when remitted for payment to their pensioner in India, they certainly include all pensions of a political nature payable directly by the Government of India. A pension guaranteed payable by the latter by a treaty obligation contracted with another sovereign power is in the strictest sense a political pension. An allowance, payable by the Government of India under an arrangement made between the King of Oudh and the Governor-General in 1842 for the benefit of members of the King's family and house-hold, and their respective heirs in perpetuity, and payable to one of such heir, who has inherited it, as his share in the interest in the Oudh loan of 1842, is a political pension within the meaning of s. 266, sub-s. (*g*), Civ. Pro. Code, 1882. The arrangement of 1842 cannot be treated as merely a provision out of King's private estate for the maintenance of members of his family, there having been in a State like that of Oudh no distinction between State property and private property vested in the sovereign BISHAMBAR NATH v. IMDAD ALI KHAN, 18 C. 216, P.C. =17 I.A. 181=5 Sar. P.C.J. 619=Rafique and Jackson's P.C. No. 122 ... 144

(2) *Claim—Property attached in possession of some person in trust for judgment debtor—Code of Civil Procedure (Act* XIV *of* 1882), *ss.* 278, 279, 280, 281. —Certain property was attached in the hands of the petitioner (who had preferred a claim under s 278 of the Code of Civil Procedure), on the ground that he had become a trustee for the judgment-debtor by virtue of an alleged agreement on his part to discharge the decree-holder's debt contained in a hibanama by which the judgment-debtor had transferred the property to him. The petitioner having obtained a rule under s. 622 of the Code, *held*, that the property having been transferred to the petitioner and being now admittedly his property, the lower Court had acted without jurisdiction in directing execution to issue against the property. *Per Ameer Ali, J.*—When a claim is preferred under s. 278, what the Court has to see is whether the property, though standing in the name of the claimant or of some other person is in the possession of the judgment debtor or not. The mere fact that the judgment-debtor has some beneficial interest in the income would not render the property liable under s. 281. If the claimant satisfies the Court that he has some interest in or is possessed of, the property attached, and it does not appear that the possession of the claimant was in reality that of the judgment-debtor, the claim must be allowed. *In the matter of* SHEORAJ NANDAN SINGH v. GOPAL SURAN NARAIN SINGH, 18 C. 290 ... 193

(3) *Claim to attached property in Calcutta Court of Small Causes—Suit in High Court by unsuccessful claimant*—Res judicata—*Code of Civil Procedure* (XIV *of* 1882), *ss.* 278, 283—*Presidency Small Cause Courts' Act* (XV *of* 1882), *ss* 9, 23 *and* 37—*Act* X *of* 1888, *s.* 2—An order made upon a claim to attached property filed in the Small Cause Court of Calcutta under s. 278 of the Civ. Pro. Code, 1882, is an order in the suit within the meaning of the Presidency Small Cause Courts' Act, 1882, s. 37, and is final subject only to the right to apply for a new trial. Where such a claim has been disallowed. a suit brought under s. 283 of the Civ. Pro. Code, by the person against whom that order has been passed to establish the right which he claims to the property in dispute is not maintainable in any Court. The exclusion by the Small Cause Court, under the powers conferred on it by s. 23 of the Presidency Small Cause Courts' Act, 1882, of s. 283 of the Civ. Pro. Code, has not been affected by Act X of 1888. ISMAIL SOLOMON BHAMJI v. MAHOMED KHAN, 18 C. 296 ... 197

(4) *Priority—Title to property in custody of a Court—Code of Civil Procedure—Act* XIV *of* 1882, *ss.* 272 *and* 278-283—*Suit to set aside order under proviso to s.* 272, *Code of Civil Procedure—Attachment of property deposited in, or in the custody of, a Court.*—A suit will lie to set aside an order such as is contemplated by the proviso to s. 272 of the Code of Civil Procedure, that is, an order determining any question of title or priority as between the decree-holder and any other person in respect of money in deposit in a Court of justice. The mode of investigation and the nature of the order to be made under s. 272, and the extent to which such an order is final, are provided for in ss. 278—283 of the Code of Civil Procedure. TIKUM SINGH v. SHEO RAM SINGH, 19 C. 286 ... 636

Attachment—(*Concluded*). PAGE

(5) See EXECUTION OF DECREE, 19 C. 651.

(6) See MORTGAGE (REDEMPTION), 18 C. 164.

(7) See SALE, 18 C. 188.

Attorney.

Lien—Cost—Change of attorneys during a pending suit—Costs of both attorneys realised by the second attorney— Lien, Attorney's.—Case in which, upon a change of attorney during the pendency of a suit, there being no express agreement as to the first attorney's costs, it was *held* that the second attorney, on recovering the cost of both attorneys from the client after notice that the costs of the first attorney were unpaid, did so on behalf of the first attorney to the extent of his share of the costs. ORR v. NORENDRO NATH SEN, 19 C. 368 ... 689

Award.

(1) See ACT XVII OF 1873 (NAWAB NAZIM'S DEBTS), 19 C. 584.

(2) See ARBITRATION, 18 C. 414 ; 19 C. 334.

Banian.

Of firm, rights of—Sale and consignment of goods—Right of the consignor, as against the Banian to merchandise consigned to a Calcutta Firm—Denial of Banian's claim to a lien on a general account with the firm—Banian's non-liability to account for past sales already brought into account with consignee—Contract Act, 1872, *ss.* 103 *and* 178—*Lien.*—There is no rule of law giving a lien to the banian as against his employer, nor is there any custom to that effect. If the banian claims a lien, he must prove its existence, either by showing some express agreement giving to him the lien, or by showing some course of dealing from which it is to be implied. On the other hand, where merchandise consigned has been sold in good faith, and in accordance with the purpose for which the consignment was made, and the proceeds have been brought into account between the consignee and the banian, he is not liable to account to the consignor. The principal of the agent cannot disturb the account with the sub-agent except on the ground of bad faith. A banian, not setting up a written agreement, nor asserting that he had advanced to the firm on the security of specific quantities claimed a lien as against the consignor on merchandise consigned to the firm, whether arrived or in transit. The lien alleged was for the general balance of account, in virtue of an agreement extending to the whole of the merchandise consigned, whatever might have been the terms of the consignment between the consignor and consignee. The banian had made advances, but for them the consideration was the profit to be made by sales. There was no pledge nor any agreement, express or implied, giving the banian a lien on the goods consigned. It was, therefore, unnecessary to determine whether the banian had notice of the terms of the consignments. Nor was it necessary to consider the effect of s. 178 of the Contract Act, IX of 1872, there having been no pawn. The banian, having no lien against the consignee, had none against the consignor, and could not question the right of the latter to stop *in transitu*. PEACOCK v. BAIJNATH and GRAHAM v. BAIJNATH, 18 C. 573, (P.C.) 18 I.A. 78=5 Sar. P.C.J. 651 ... 383

Benami Purchase.

Suit against a purchaser from the benamidar—Civ. Pro. Code, s. 317.—At a sale in execution of a decree, in February 1875, the plaintiff purchased certain property in the name of *M*, who was recorded as the purchaser. In 1886, eleven years after the execution sale, *M* sold the property to *H*, whose name was subsequently registered as owner, notwithstanding the plaintiff's objections. The plaintiff thereupon, in 1888, brought a suit against *H* for a declaration of his title to the property, on the grounds that it had originally been purchased on his behalf at the execution sale, and that he had been in possession for more than 12 years. *Held* that the suit did not fall within s. 317 of the Civ. Pro. Code. KARAMUDDIN HOSAIN v. NIAMUT FATEHMA, 19 C. 199 ... 578

Bengal School of Law. PAGE

See HINDU LAW—INHERITANCE, 18 C. 327.

Bhowli Rent.

See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 467.

Bhuinhar Register.

Under Bengal Act II of 1869—See EVIDENCE, 19 C. 91.

Bigamy.

(1) *Mahomedan Law—Marriage of minor—Repudiation of marriage by minor on attaining puberty—Assent of the wife, after puberty—Penal Code (Act* XLV *of* 1860), s. 494 —*B*, a Mahomedan girl whose father was dead, was alleged to have been given in marriage by her mother to *J* some years before she attained puberty. Prior to her attaining puberty *J* was sentenced to a term of imprisonment for theft. While he was in jail *B*, after she had attained puberty, contracted a marriage with *P*. The marriage with *J* was never consummated. On *J* being released from jail, he proceeded to prosecute *B* and *P* for bigamy and abetment of bigamy, and also charged *P* with adultery. It appeared that before taking proceedings *J* requested *B* to return to him, but she refused to do so. The marriage between *B* and *J* was sought to be proved by the evidence of *J* and *B*'s mother and two witnesses who were said to have been present. *B* and *P* were both convicted. *Held*, on appeal that the evidence of the marriage between *B* and *J* was insufficient to justify a conviction in the absence of proof that a Mollah was present at the ceremony, or that the *sigha* required to be recited at the marriage of minors was recited, or the *akd* performed. *Held* further, that assuming *B* to have been given in marriage to *J* when a mere child by her mother, she had the option of either ratifying or repudiating such marriage on attaining puberty. Under the *Shia* law, such a marriage is of no effect until it has been ratified by the minor, and under the *Sunni* law it is effective till cancelled by the minor. Under both schools of law the minor has the absolute power, on attainting puberty, to ratify or cancel unauthorized marriage, though under the *Sunni* law, ratification is presumed if the girl remains silent after attaining puberty and allows the marriage to be consummated. *Held*, on the facts of the case, that the circumstances afforded sufficient indication, even assuming the girl to be governed by the *Sunni* law, that she never ratified the marriage. *Held*, also that a judicial order was not necessary to effect the cancellation of the marriage. BADAL AYRAT v. QUEEN-EMPRESS, 19 C. 79. 498

(2) *Marriage—Conversion of Hindu wife to Mahomedanism—Marriage with Mahomedan—Penal Code, s.* 494.—The petitioner, originally a Hindu woman, and the illegitimate offspring of Chattri parents, was duly married according to Hindu rites to *D*, who was also by caste a Chattri. Subsequent to the marriage the petitioner became a convert to Mahomedanism and then married a Mahomedan. She was charged with and convicted of an offence under s. 494 of Penal Code. It was contended on her behalf that—(1) the marriage between her and *D* was invalid under Hindu law by reason of her illegitimacy and the subsequent difference of caste between the contracting parties ; (2) the marriage between her and *D* became dissolved under the Hindu law on her conversion to Mahomedanism ; and (3) the second marriage was not void under the Mahomedan law by reason of its taking place in the lifetime of *D*, and that the conviction was therefore erroneous. There was no evidence of any notice having been given to *D* previous to the second marriage calling on him to become a Mahomedan. *Held*, that illegitimacy under Hindu law is no absolute disqualification for marriage, and that when one or both contracting parties to a marriage are illegitimate, the marriage must be regarded as valid, if they are recognised by their caste people as belonging to the same caste. *Held* also, that there is no authority in Hindu law for the proposition that an apostate is absolved from all civil obligations and that, so far as the matrimonial bond is concerned. such a view would be contrary to the spirit of that law, which regards it as indissoluble, and that accordingly the marriage between the petitioner and *D* was not, under the Hindu law, dissolved by her conversion to Mahomedanism. *Held*, further, that as the validity of the second marriage depended on the Mahomedan law, and as that law does not

Bigamy—(*Concluded*). PAGE

allow a plurality of husbands, it would be void or valid according as the first marriage was or was not subsisting at the time it took place. That no notice having been given to *D* as required by Mahomedan law previous to the second marriage, and no recourse having been had to the Courts for the purpose of obtaining a declaration that the former marriage was dissolved, and as British India cannot be held to be a foreign country for the purpose of rendering such notice unnecessary, the previous marriage was not dissolved under Mahomedan law, and the subsequent marriage was therefore void. *Held* accordingly, that the conviction was right. *In the matter of the petition of* RAM KUMARI, 18 C. 264 ... 176

(3) Sagai *or* nikha *marriage—Relinquishment of wife—Penal Code*, s. 494.—A conviction under s. 494 of the Indian Penal Code cannot be supported where there is evidence to show that by the custom of the caste, *sagai* and *nikka* marriage was admissible, and that the husband had relinquished his wife. JUKNI v. QUEEN-EMPRESS, 19 C. 627 ... 860

Bill of Exchange.

See MUTUAL CREDIT, 19 C. 146.

Bond.

See INTEREST, 19 C. 392.

Boundaries.

See LIMITATION, 19 C. 660.

Breaches of Contract.

See CIV. PRO. CODE (ACT XIV OF 1882), 19 C. 372.

Buddhist Law (Divorce).

See DIVORCE, 19 C. 469.

Building Lease.

Not within purview of Bengal Tenancy Act—See LEASE, 19 C. 489.

Burden of Proof.

(1) See ACCOUNT, 19 C. 174.

(2) See APPEAL (SECOND APPEAL), 19 C. 249.

(3) See EVIDENCE, 201.

(4) See HINDU LAW (GIFT), 18 C. 545.

(5) See LIMITATION, 19 C. 660.

(6) See MAHOMEDAN LAW—WILL, 19 C. 444.

(7) See PUTNI TALUK, 19 C. 699.

Burman Buddhists.

See DIVORCE, 19 C. 469.

Carriage.

Of gold and silver etc.—See ACT IV OF 1879 (RAILWAYS), 19 C. 538.

Carrier.

(1) *Carriers by Railway, liability of—Railway Act* (IV *of* 1879), *s.* 10.—*Loss by negligence—Common carriers—Insurer—Act of God.*—A carrier by Railway is, under Act IV of 1879, liable as an insurer of goods entrusted to him, and not merely for loss occasioned by negligence. CHOGEMUL v. THE COMMISSIONERS FOR THE IMPROVEMENT OF THE PORT OF CALCUTTA, 18 C. 427 ... 285

(2) See COMMON CARRIERS, 18 C. 620.

Cause of Action.

See CIV. PRO. CODE (ACT XIV OF 1882), 19 C. 372.

Certificate.

(1) Of Collector—See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 271.

(2) Of unpaid demand—See SALE, 18 C. 125.

(3) *To collect debts—Act* VII of 1889, *s.* 4—*Mortgage decree—Suit by assignee of mortgagee for sale.*—The assignee of a property mortgaged is not a debtor

Certificate—*(Concluded)*. PAGE

within the meaning of s. 4, Act VII of 1889; and a mortgagee praying for the sale of the property, and asking for no relief personally against the mortgagor, is not bound to take out a certificate under that Act before he can obtain a decree. KANCHAN MODI v. BAIJ NATH SINGH, 19 C. 336. ... 668

(4) To title—See SALE, 18 C. 125.

Cesses.

See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 19 C. 783.

Charter Act (24 and 25, Vic. C. 104).

S. 15—See CRIM. PRO. CODE (ACT X OF 1882), 19 C. 127.

Cheating.

See FORGERY, 19 C. 380.

Child.

Custody of—See DIVORCE, 18 C. 473.

Child-wife.

Culpable homicide not amounting to murder—Causing death by a rash and negligent act—Rashness and negligence—Penal Code, ss. 304, 304-A, 325 and 338.—The prisoner, a fully developed adult man was charged with causing the death of his wife, a girl aged about 11 years and 3 months, who had not attained puberty. The death was caused by hæmorrhage from a rupture of the vagina caused by the prisoner having sexual intercourse with the girl. For the defence it was alleged that he had had sexual intercourse with the girl on several previous occasions without injury to her, and there were circumstances in the case which showed that this was possible, and even not improbable, though the medical evidence was to the effect that, if such intercourse had previously taken place, the penetration was probably not so complete or with so much sexual vigour as on the occasion when the injury was caused The medical evidence was further to the effect that the girl had not attained puberty and was immature and wholly unfit for sexual intercourse: that under such circumstances sexual intercourse between the prisoner and the girl was likely to be dangerous to her, and to cause injuries more or less serious according to the decree of penetration effected. The prisoner was charged with (*a*) culpable homicide, not amounting to murder under s. 304 of the Penal Code; (*b*) causing death by doing a rash and negligent act under s. 304A; (*c*) voluntarily causing grievous hurt under s. 325; & (*d*) causing grievous hurt by doing an act so rashly or negligently as to endanger human life or the personal safety of others under s. 338. *Held*, that, in such a case, when the girl is a wife and above the age of 10 years, and when therefore the law of rape does not apply, it by no means follows that the law regards the wife as a thing made over to be the absolute property of her husband, or as a person outside the protection of the criminal law; that no hard-and-fast rule can be laid down that sexual intercourse with a girl under a certain age must be regarded as dangerous and punishable, or over that age as safe and right, but that each case must be judged according to its own individual circumstances; that in such a case the jury have to consider and say, whether under the particular circumstances of the case having regard to the physical condition of the girl and to the intention, the knowledge, the decree of rashness or negligence with which the accused is shown to have acted on the occasion in question, he has brought himself within any of the provisions of the criminal law. *Held*, further, that if the jury were of opinion (*a*) that the act of the prisoner caused the death of the girl, that is to say, that, the act of cohabitation on the part of the prisoner had the effect of rupturing the vagina and so causing the hæmorrhage which led to her death; (*b*) that the act of cohabitation between a fully developed man like the prisoner and an immature girl like his wife was itself a thing likely to lead to dangerous consequences; (*c*) that that act was one of such a character as to indicate a reckless indifference to the welfare of the girl or a want of reasonable consideration about what the prisoner was doing, one which the husband of the

Child-wife—(*Concluded*). PAGE

girl, if he had had a reasonable regards to her welfare, and had exercised reasonable thought as to the act he contemplated doing, would have abstained from doing, they would be justified as finding that the prisoner caused the death of the girl by a rash and negligent act. Under no system of law with which Courts have to do in this country, whether Hindu or Mahomedan, or that framed under British rule, has it ever been the law that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her. QUEEN EMPRESS v. HURREE MOHUN MYTHEE, 18 C. 49 ... 33

Civil Court.

See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 271.

Civ. Pro. Code, (Act XIV of 1882).

(1) S. 2—See APPEAL—GENERAL, 18 C. 382.

(2) Ss. 2, 244, cl. (*c*)—See APPEAL—GENERAL, 18 C. 469.

(3) Ss. 2, 373 and 578—See APPEAL—GENERAL, 18 C. 322.

(4) Ss. 2, 396—See APPEAL—GENERAL, 19 C. 463.

(5) Ss. 2, 588—See APPEAL, 19 C. 485.

(6) S. 11—See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 481.

(7) S. 13—See RES JUDICATA, 18 C. 647.

(8) Ss. 13, 42, 43—See RES JUDICATA, 19 C. 159.

(9) Ss. 13 and 224—See RES JUDICATA, 19 C. 312.

(10) Ss. 13, 525—See ARBITRATION, 18 C. 414.

(11) S. 16—See JURISDICTION, 19 C. 8.

(12) Ss. 19, 223, cl. (*c*)—See JURISDICTION, 19 C. 13.

(13) S. 32—See PARTNERSHIP SHARES, 18 C. 616.

(14) *S. 43—Breaches of the same contract how sued upon—Cause of action—Contract.*—Where a contract for the sale and purchase of goods is broken by the purchaser, in part by refusal to take delivery, and in part by refusal to pay for goods delivered, both breaches having occurred before any suit is brought, the vendor is debarred by s. 43 of the Code of Civil Procedure from bringing two suits against such purchaser, his claim being one arising out of one cause of action and based on one and the same contract. *Petheram, C.J.*—"The whole of the claim which the plaintiff is entitled to make in respect of the cause of action" in s. 43 means, in the above case, the entire claim which the plaintiff has against the defendant at the time the action is brought in respect of any failures or failure to accept and pay for goods purchased of him by the defendant under one contract, and the whole of such claim must be included in one action. *Prinsep. J.*—The expression "cause of action" is to be construed with reference to the substance rather than the form of the action. The claim in both the above cases being for damages on account of breaches of the same contract, s. 43 read with the illustration debars the plaintiff from bringing two suits. DUNCAN BROTHERS & CO. v. JEETMULL GREEDHAREE LALL, 19 C. 372 ... 692

(15) Ss. 43, 44—See CLAIM, 19 C. 615.

(16) Ss. 43, 373, 374—See EXECUTION OF DECREE, 18 C. 515.

(17) *S. 80—Practice—Writ of summons, service of.*—An affidavit in support of service of a writ of summons under s. 80 of the Civ. Pro. Code should show that proper efforts have been made to find out when and where the defendant is likely to be found. COHEN v. NURSING DASS AUDDY, 19 C. 201 ... 579

(18) Ss. 121, 127, 136—See INTERROGATORIES, 18 C. 420.

(19) Ss. 141, 142, 568—See EVIDENCE, 18 C. 201.

(20) Ss. 211, 212—See MESNE PROFITS, 19 C. 132.

(21) S. 212—See RES JUDICATA, 19 C. 159.

(22) Ss. 223, 230—See EXECUTION OF DECREE, 18 C. 631.

Civ. Pro. Code (Act XIV of 1882)—(*Concluded*). PAGE

(23) Ss. 230 (*b*), 255—See HINDU LAW—MAINTENANCE, 19 C. 139.
(24) S. 232—See EXECUTION OF DECREE, 18 C. 639.
(25) S. 243—See EXECUTION OF DECREE, 19 C. 683.
(26) Ss. 244, 311—See SALE, 19 C. 341.
(27) Ss. 244, 311, 312—See SALE, 18 C. 139.
(28) S. 266—See ATTACHMENT, 18 C. 216.
(29) S. 266—See MORTGAGE. (REDEMPTION), 18 C. 164.
(30) Ss. 272, 278-283—See ATTACHMENT, 19 C. 286.
(31) Ss. 278, 281—See ATTACHMENT, 18 C. 290.
(32) Ss. 278, 283—See ATTACHMENT, 18 C. 296.
(33) S. 285—See EXECUTION OF DECREE, 19 C. 651.
(34) Ss. 289, 311, 312—See SALE, 18 C. 422.
(35) Ss. 289, 314—See SALE, 18 C. 125.
(36) Ss. 290, 291—See SALE, 18 C. 496.
(37) S. 294—See MORTGAGEE, 19 C. 4.
(38) *S. 295—"Whenever assets are realized," meaning of—Sale in execution of a decree—Deposit of twenty-five per cent. of purchase-money—Assets.*—The words "whenever assets are realized" in s. 295 of the Code of Civil Procedure really mean "whenever assets are so realized as to be available for distribution among the decree-holders." The twenty-five per cent. of the purchase-money deposited at a sale in execution of a decree is not "assets" within the meaning of s. 295, but a mere deposit, and therefore not immediately available for payment to the decree-holder. HAFEZ MAHOMED ALI KHAN v. DAMODAR PRAMANICK, 18 C. 242 ... 161
(39) S. 312—See APPEAL (SECOND APPEAL), 18 C. 422.
(40) S. 317—See BENAMI PURCHASE, 19 C. 199.
(41) Ss. 344, 360, Ch. XX—See INSOLVENCY, 19 C. 730.
(42) S. 373—See LIMITATION, 18 C. 462.
(43) Ss. 373, 647—See EXECUTION OF DECREE, 18 C. 635.
(44) S. 510—See ARBITRATION, 18 C. 324.
(45) S. 525—See ARBITRATION, 19 C. 334.
(46) S. 582—See APPELLATE COURT, 18 C. 507.
(47) S. 584—See APPEAL (SECOND APPEAL), 18 C. 23; 18 C. 302.
(48) Ss. 584, 585—See APPEAL (SECOND APPEAL), 19 C. 249.
(49) S. 602—See APPEAL—GENERAL, 18 C. 182.

Civ. Pro. Code Amendment Act (VII of 1888).

See SALE, 18 C. 496.

Claim.

(1) *For possession and mesne profits—Distinct claims—Separate suit—Joinder of causes of action—Civ. Pro. Code (Act XIV of 1882), ss. 43, 44.*—Claims for the recovery of possession of immoveable property and for mesne profits are distinct claims, and separate suits will lie in respect of each claim. S. 44 of the Code of Civil Procedure merely *permits* the joinder in one suit of a claim for recovery of immoveable property with one for mesne profits in regard to the same property. LALESSOR BABUI v. JANKI BIBI, 19 C. 615 ... 882
(2) In part included in former dismissed suit—See RES JUDICATA, 19 C. 159.
(3) To attached property—See ATTACHMENT, 18 C. 290.
(4) To attached property in Calcutta Small Cause Court—See ATTACHMENT, 18 C. 296.

Coal Depot.

Lease for, not agricultural or horticultural within meaning of Bengal Tenancy Act—See LEASE, 19 C. 489.

Collection. PAGE

See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 755.

Collector.

(1) Application for execution of decree by, when Manager of Ward's Estate has been appointed—See ACT IX OF 1879 (COURT OF WARDS, BENGAL), 18 C. 500.

(2) Certificate of—See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 271.

(3) Of the District—See SALE, 18 C. 125.

Commission.

(1) *Crim. Pro. Code* (*Act* X *of* 1882), *ss.* 503, 507—*Evidence Act* (I *of* 1872), *s.* 33 — *Practice.*—Evidence taken under Commission issuing from the Court of the Chief Presidency Magistrate during the course of an enquiry before him, cannot be used in evidence at the trial before the High Court under s. 507 of the Crim. Pro. Code. *Held*, further, that on the facts before the High Court it was also inadmissible under s. 33 of the Evidence ACT. QUEEN-EMPRESS v. JACOB, 19 C. 113 ... 521

(2) See EVIDENCE, 19 C. 618.

Common Carrier.

Liability for non-delivery not affected by ss. 148 151, *and* 152 *of the Contract Act* IX *of* 1872—*Carriers Act* III *of* 1865—*Construction—The Railways Acts*, IV *of* 1879 *and* IX *of* 1890 *as to the liability of carriers by railway.*—That the duties and liabilities of a common carrier are governed in India by the principles of the English Common Law on that subject, however introduced, has been recognized, in the Carriers Act, III of 1865. His responsibility to the owner does not originate in contract, but is cast upon him by reason of his exercising this public employment for reward. His liability as an incident of the contract between him and the owner not inconsistent with the provisions of the Contract Act; and the law of carriers, partly written and partly unwritten, remained as before that Act. The Railways Acts of 1878 and 1890 reduced the responsibility of carriers by railway to that of bailees under the Contract Act, but this does not affect the construction of the law relating to common carriers and the Act of 1865. Notwithstanding some general expressions in the chapter on bailments, a common carrier's responsibility is not within the Contract Act, 1872. IRRAWADDY FLOTILLA CO. v. BUGWANDAS, 18 C. 620, P.C.=18 I.A. 121=15 Ind. Jur. 403 & 542=6 Sar. P.C.J. 40 ... 413

Company.

Voluntary liquidation — Liquidator, borrowing powers of—Assets — Principal and Agent—Election—Subrogation—Indian Companies Act (VI *of* 1882), ss.144 (*f*), 177 (*g*).—Case in which it was held that a liquidator of a company being voluntarily wound up had power to borrow for the purposes of the winding up, including the working of steamers and docks, on the credit of the assets of the company without security written or otherwise and that the loan in question was within his powers and was in fact made to the company though the liquidator also made himself personally liable. *Per Petheram, C.J.—Held*, that a person, contracting with an agent may look directly to the principal unless by the terms of the contract he has agreed not to do so, whether he was or was not aware when he made the contract that the person with whom he was dealing was an agent only. *Per Wilson and Pigott, JJ.—Held*, that the realized assets of a company divided among the shareholders in pursuance of a resolution are assets within the meaning of s. 144 (*e*) of the Indian Companies Act. *Per Piggot, J.—Held*, that if it were necessary to hold so, the principle of *Baroness Wenlock* v. *River Dee Company*, L.R. 19 Q.B.D. 155, would apply to the case. *In the matter of the* INDIAN COMPANIES ACT, 1882 and *In the matter of the* GANGES STEAM TUG COMPANY EX PARTE THE DELHI AND LONDON BANK, 18 C. 31 ... 21

Companies Act (VI of 1882).

Ss. 144 (*f*), 177 (*g*)—See COMPANY, 18 C. 31.

Compensation. PAGE

(1) See CO-SHARERS, 18 C. 10.

(2) See INTEREST, 19 C. 19.

(3) See MINOR, 18 C. 99.

Compromise.

See SALE, 18 C. 188.

Computation of period of Limitation.

See LIMITATION ACT (XV OF 1877), 18 C. 368.

Conduct.

See HINDU LAW—INHERITANCE, 18 C. 341.

Confession.

Crim. Pro. Code (*Act* X *of* 1882), *ss.* 164, 364 *and* 533—*Examination of accused—Defect in confession—Confession not recorded in language in which it is given, admissibility of.*—Where a confession given in Hindustani was taken before a Sub-divisional Magistrate, and was recorded by the Court Officer in Bengali that being the language of the Court, and where it appeared that the Magistrate himself, was a Mahomedan, and it was contended that he must be taken to have been able to record the confession in the language in which it was given, there being no evidence of such evidence, the Court should presume that the proceedings of the Sub-divisional Magistrate was conducted in accordance with law, and that in the absence of anything to show that it was practicable for the officers of his Court to record the statement in Urdu, it could fairly be held that the Sub-divisional Magistrate found that was impracticable and adopted the alternative allowed by law of having the confession recorded in the Court language. LALCHAND v. QUEEN-EMPRESS, 18 C. 549 ... 367

Consent.

(1) See APPEAL—TO PRIVY COUNCIL, 18 C. 378.

(2) See HINDU LAW—JOINT FAMILY, 19 C. 401.

Consideration.

See LIMITATION, 19 C. 123.

Consignor.

See BANIAN, 18 C. 573.

Construction.

(1) Of Carriers Act of 1865—See COMMON CARRIER, 18 C. 620.

(2) Of Contract Act of 1872, ss. 148, 151 and 152—See COMMON CARRIER, 18 C. 620.

(3) Of documents not establishing a charge on immoveable property—See ACT XVII OF 1873 (NAWAB NAZIM'S DEBTS), 19 C. 584.

(4) Of statute—See FISHERY, 19 C. 544.

Continuing Damage.

See ACT IV OF 1876 (CALCUTTA MUNICIPAL CONSOLIDATION ACT), 18 C. 91.

Contract.

(1) *By a minor—Voidable.*—A contract entered into with a minor is only voidable at the option of the minor. MAHAMED ARIF v. SARASWATI DEBYA, 18 C. 259 ... 173

(2) *In restraint of trade—Contract Act* (IX *of* 1872), *s.* 27.—S. 27 of the Contract Act does away with the distinction observed in the English cases between partial and total restraint of trade, and makes all contracts falling within its terms void unless they fall within its exceptions. The section was intended to prevent a partial as well as a total restraint of trade. A and B, two ghat serangs entered into a contract with X and five others who carried on the business of dubashes at Chittagong for the purpose of carrying on their respective businesses in unanimity and not injuring one

Contract—(*Concluded*). PAGE

another's trade. The contract, which was to last for three years, provided, *inter alia*, that A and B were to act as ghat serangs only and do no service to ships in any other capacity; that X and the other dubashes were to give A five vessels, secured by them, every year for him to act as ghat serang to; and that A was only to act as Ghat serang to the said five ships and, with the exception of ships for which he had previously acted as ghat serang, he should not act as ghat serang or do any other services for ships belonging to any one else. The contract also contained provisions as to the appointment of the five ships so to be given to A amongst the various dubashes, and amongst such, an agreement by X to give A the third ship he should secure. It also contained a provision for the payment of Rs. 1,000 as damages by any one breaking the contract to the person who should suffer by the breach. In a suit by A against X alleging a breach of the contract by the latter in not giving him the third ship as agreed, and claiming Rs. 1,060 by way of damages, X pleaded that the contract was void, under s. 27 of the Contract Act, as being in restraint of trade. *Held*, that the contention was sound, and that the suit must be dismissed. The consideration for the promise by X to give the ship to A was the agreement by A not to carry on any other business than that of a ghat serang, and that only in respect of his old ships and the five agreed to be so furnished to him by the dubashes. The effect of this agreement was absolutely to restrain A from carrying on the business of a dubash and to create a partial restraint on his power to carry on the business of a ghat serang and whether or not (even had the latter stipulation not been illegal), the contract would have been void under the provisions of s. 24 of the Act, by reason of part of the consideration being the undertaking by A absolutely to refrain from carrying on the business of a dubash, it was void for both reasons under the provisions of s. 27, and A was not entitled to recover any damages under it. NUR ALI DUBASH v. ABDUL ALI, 19 C. 765 ... 952

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 19 C. 372.

(4) See HINDU LAW—ADOPTION, 19 C. 513.

(5) See INTEREST, 19 C. 19.

(6) See LANDLORD AND TENANT, 18 C. 774.

(7) See LIMITATION ACT (XV OF 1877), 18 C. 506.

Contract Act (IX of 1872).

(1) Ss. 24, 27—See CONTRACT, 19 C. 765.

(2) S. 45—See PARTIES, 18 C. 86.

(3) S. 74—See INTEREST, 19 C. 392.

(4) Ss. 103, 178—See BANIAN, 18 C. 573.

(5) Ss. 148, 151, 152—See COMMON CARRIER, 18 C. 620.

Conversion.

(1) From Hinduism to Mahomedanism—See BIGAMY, 18 C. 264.

(2) To Christianity—See DISSOLUTION OF MARRIAGE, 18 C. 252.

Co-sharers.

(1) *Suits concerning the joint property as between tenants in common, refusal of decree for possession, for damages or for an injunction—Resistance of one co-sharer to another's entering, not in denial of his title, but to prevent his interfering with cultivation by the former—Money compensation.*—Land being held by two persons in common, one of whom was in actual occupation of part, cultivating it as if it had been his separate property, the other attempted to enter upon the same land, in order to carry on operations thereon inconsistent with the work already being carried on by the former who resisted and prevented this attempted entry. *Held*, that the resistance being made by the co-sharer in occupation simply with the object of protecting himself in the profitable use of the land, in good husbandry, and not in denial of the other's title, such resistance was no ground for proceedings on the part of the other, to obtain a decree for joint possession, or for damages: nor would granting an injunction be the proper remedy. As the Courts in Bengal, in cases

Co-sharers—(*Concluded*). PAGE

where no specific rule exists, are to act according to "justice, equity, and good conscience," so, on its being found that, where land was held in common between the parties, one of them was in the act of cultivating a part of the land which was not actually used by the other, it would not have been consistent with this rule to restrain the former from proceeding with his proper cultivation; but money compensation, at a proper rate, in respect of the exclusive use by, and benefit to, the one who, though possessing in common, was carrying on cultivation for himself, not unsuitable in itself, was awarded between the parties. Title made by her transfer of her inheritance, through the daughter and heiress of a deceased member of a joint family of brothers, under the Dayabhaga, although her father had executed deeds dedicating his share of the family property to trustees, for the worship of the family deity; this dedication having been inoperative, because it was neither his nor his brothers' intention that the deeds should be acted upon, and he had never divested himself of his share. WATSON AND Co. v. RAMCHAND DUTT, 18 C. 10 (P.C.) = 17 I.A. 110 = 5 Sar. P.C.J. 535 ... 7

(2) See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 755.

(3) See MERGER, 19 C. 760.

(4) See RENT SUIT, 19 C. 735.

Costs.

(1) See ATTORNEYS, 19 C. 368.

(2) See MUTUAL CREDIT, 19 C. 146.

(3) See PRACTICE, 18 C. 199.

Court Fee.

(1) *Act VII of* 1870, *s.* 16, *sch.* I, *art.* 1—*Court fee payable where partial relief granted—Appeal against decree by instalments, how valued—Valuation of Appeal.*—The Court fees which an appellant has to pay on a memorandum of appeal from a decree which gives him only partial relief are to be calculated upon the difference between the value of the relief which he claims and the relief granted by the decree appealed against. Where a decree was made payable by three instalments, and the plaintiff appealed on the ground that it should not have been made so payable, *held*, that the Court fee should be calculated upon the difference between the amount claimed in the Court below and the sum of the present values of the three instalments payable on the dates mentioned on the decree. LUKHUN CHUNDER ASH v. KHODA BUKSH MONDUL, 19 C. 272 ... 627

(2) *Memorandum of appeal insufficiently stamped—Deficiency in stamp on memorandum of appeal made good after period of limitation—Court Fees Act* (*VII of* 1870, *s.* 28).—A memorandum of appeal, insufficiently stamped, was presented in the Court of the District Judge on the 24th May, the last day allowed for it by limitation, and was received and a memorandum endorsed on it. "Appeal within time; stamp duty insufficient, Rs. 204 odd." On the 27th May an order was passed by the District Judge, and endorsed on the memorandum, allowing the appellant one week within which to supply the deficiency, and this period was, on the 5th June, further extended by another fortnight being allowed. On the 13th June the full stamp duty was paid by the applicant. *Held*, that the facts of the case did not bring it within either the spirit of the letter of s. 28 of the Court Fees Act, and that these proceedings were not such as were contemplated by that section, or to put the appeal in order when the stamp duty was received on the 13th June, and that the appeal had been properly dismissed as being out of time. YAKUTUN-NISSA BIBEE v. KISHOREE MOHUN ROY, 19 C. 747 ... 940

(3) See LIMITATION, 19 C. 780.

Court Fees Act (VII of 1870).

(1) S. 16, and sch. I, art. 1—See COURT FEE, 19 C. 272.

(2) S. 28—See COURT FEE, 19 C. 747.

(3) Sch. II, art. 17, cl. VI—See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 667.

Criminal Case. PAGE

See INSOLVENT ACT (11 AND 12 VIC., C. 21), 19 C. 605.

Criminal Force.

See UNLAWFUL COMPULSORY LABOUR, 19 C. 572.

Crim. Pro. Code (Act X of 1872).

S. 530—See LIMITATION, 19 C. 646.

Crim. Pro. Code (Act X of 1882).

(1) S. 94—*Summons to produce document or thing.*—A complaint having been preferred against an accused for criminal breach of trust with reference (amongst other items) to a sum of Rs. 1,77, 131-1-2, which sum was, in an enquiry held by the Chief Presidency Magistrate, proved to have been paid to the accused in seventeen notes of rupees ten thousand each (the numbers of which were identified) and the remainder in small notes and cash: the accused in cross-examination, for his own purposes, proved that fifteen of these notes were still in his possession: whereupon an application was made, under s. 94 of the Code, for a summons on the accused directing the production of these notes. This application was refused. Subsequently the accused, through a third person, cashed five of these notes, whereupon a second application was made, under s. 94, by the prosecution for the production of the notes or their proceeds as against accused and such third person. The Magistrate granted summonses on the accused and on such third person for the production of ten notes, but decline to grant a summons for such third person for the proceeds of the five notes cashed. The accused produced five of these notes which were in his possession or power; the third person, however, stating that he had in his power five of the notes mentioned in the summons claimed a lien on the same, and the Magistrate thereupon refused to make any order on him. The Magistrate (a rule having been obtained against him, calling on him to show cause why his order should not be set aside, and why the notes or the proceeds thereof in the hands of the third person should not be produced) stated in his explanatory letter that he entertained doubts as to his power to compel such third person to produce the five notes, inasmuch as a lien had been claimed on them, and that he was of opinion that the proceeds of the notes cashed, not being specific objects, did not come within the purview of s. 94. *Held*, the Magistrate's order, must be set aside. *In the matter of the complaint of* HIS HIGHNESS THE NIZAM OF HYDRABAD v. JACOB, 19 C. 52. 481

(2) Ss. 144, 435, 439—*Charter Act* (24 *and* 25 *Vict, c.* 104), s. 15—*Order prohibiting collection of rents—Temporary orders in urgent cases of nuisance—Powers of revision and Superintendence of the High Court.*—An order, forbidding a person who claimed an interest in certain properties, from collecting any rent from the raiyats on the properties, does not fall within s. 141 of the Code of Criminal Procedure. Such an order is therefore made without jurisdiction, and may be set aside under the High Court's powers of revision and superintendence conferred by s. 439 of the Crim. Pro. Code, and s. 15 of the Charter Act. Chap. XI of the Code of Criminal Procedure refers to interference or dealing of some kind with the land itself or with something erected or standing upon it, and is directed to the prevention or direction by prompt order of some definite act on the part of an individual, so that injury or nuisance may not be caused. ANANDA CHANDRA BHUTACHARJEE v. CARE STEPHEN, 19 C. 127 ... 530

(3) S. 145—See LIMITATION, 19 C. 646.

(4) Ss. 164, 364, 533—See CONFESSION, 18 C. 549.

(5) Ss. 195, 476—See SANCTION TO PROSECUTE, 19 C. 345.

(6) S. 432—See RIGHT TO BEGIN, 19 C. 380.

(7) Ss. 436, 437—See MAGISTRATE, 18 C. 75.

(8) S. 438—See PRACTICE, 18 C. 186.

(9) Ss. 503, 507—See COMMISSION, 19 C. 113.

(10) S. 509—See EVIDENCE, 18 C. 129.

Crim. Pro. Code (Act X of 1882)—(*Concluded*). PAGE

(11) *S.* 517—*Quære.*—Whether a proceeding under this section is wholly independent of or unconnected with the enquiry referred to in s. 94. *In the matter of the compliant of* H. H. THE NIZAM OF HYDERABAD v. A. M. JACOB, 19 C. 52 ... 481

(12) S. 526—See SONTHAL PERGUNNAHS, 18 C, 247.

Crown Grant.

See FERRIES, 18 C. 652

Cruelty.

See HINDU LAW—MAINTENANCE, 19 C. 84.

Culpable Homicide not amounting to Murder.

See CHILD-WIFE, 18 C. 49.

Cultivation.

See CO-SHARERS, 18 C. 10.

Cumulative Sentences.

Rioting—Distinct offences—Separate conviction for rioting and causing hurt and grievous hurt—Penal Code (Act XLV *of* 1860), *ss.* 71. 148, 152, 332 *and* 333.—Eight persons, who were charged with a number of others, were tried on various charges, consisting of rioting armed with deadly weapons (s. 148, Penal Code), assaulting or obstructing a public servant when suppressing a riot (s. 152), and voluntarily causing hurt and grievous hurt to deter a public servant from his duty (ss. 332 and 333). The common object set out in the charge was "to resist the execution of a decree obtained by Suresh Chunder Deb against Shaik Ali Yar in the Court of the Second Subordinate Judge of Alipore, dated 30th April, 1891, and also by means of criminal force, or show of criminal force to overawe the members of the police force, in the execution of their lawful powers as police officers," and it was held that resistance to the police was one of the component parts of the offence of rioting charged. At the trial in the Court of Sessions all eight accused were convicted of the offence charged under s. 148, and each was sentenced to the maximum punishment allowed under that section, *viz.*, three years' rigorous imprisonment. Seven out of the eight were convicted of offences under s. 152 and sentenced each to an additional term of two years' rigorous imprisonment for those offences. Two out of the seven accused were further convicted of offences under s. 332 of the Penal Code, the hurt therein charged being caused to police officers engaged in suppressing the riot, and each sentenced to a further additional term of two years' rigorous imprisonment for that offence. The eighth accused, who was not convicted of an offence under s. 152, was convicted of an offence under s. 333, the grievous hurt being similarly caused to a police officer, and for that offence was sentenced to five years' rigorous imprisonment in addition to the sentence of three years passed on him under s. 148. It was contended on appeal—(1) That the sentences passed under s. 152 in addition to those under s. 148 were illegal. (2) That separate sentences under s. 152 and ss. 332 and 333 were illegal. (3) That the cumulative sentences under s. 148 and ss. 332 and 333 were illegal, in so far as they exceeded the maximum sentence provided for either of the offences. *Held*, as regards (1), that as resistance to the police was one of the component parts of the offence of rioting of which the accused were convicted and sentenced to the maximum punishment provided by s. 148, and having regard to the provisions of s. 71, the additional sentences under s. 152 were illegal. *Held* further, that s. 152 contemplates an assault or obstruction to some particular public servant, and, that as the charge against the accused as framed was merely to the effect that they assaulted and obstructed *members of the police force* in the discharge of their duties, etc., the conviction under that section could not be upheld. *Held*, as regards (2), that separate sentences under s. 152 and ss. 332 and 333 were illegal, as the hurt inflicted on the police officers was violence used towards them, which constituted the essence of the offence under s. 152. *Held*, as regards (3), that the separate sentences passed

Cumulative Sentences—(*Concluded*). PAGE

under s. 148 and ss. 332 and 333 were not illegal, there being nothing in s. 71 of the Penal Code which limits the amount of punishment that may be imposed for these offences. FARASAT v. QUEEN-EMPRESS, 19 C. 105 ... 516

Custody of Child.

See DIVORCE, 18 C. 473.

Damages.

(1) See ACT IV OF 1876 (CALCUTTA MUNICIPAL CONSOLIDATION ACT, BENGAL), 18 C. 91.

(2) See CO-SHARERS, 18 C. 10.

(3) See PLEDGE, 19 C. 322.

Date of Institution.

See LIMITATION, 19 C. 780.

Daughter's Son.

See HINDU LAW—INHERITANCE, 18 C. 327.

Dayabagha School.

See HINDU LAW—INHERITANCE, 19 C. 91.

Death.

Causing death by rash and negligent act—See CHILD-WIFE, 18 C. 49.

Decree.

(1) As to rent payable for former years—See RES JUDICATA, 19 C. 656.

(2) *Construction of decree—Construction in execution of an order in Council.*—An order of Her Majesty in Council was that a decree-holder should recover what was demarcated by "the thakbust map and proceedings of 1839." *Held*, on the construction of the order, that the latter words meant the proceedings relating to the thakbust map, and did not include a survey map which differed from it. RADHA PERSHAD SINGH v. TORAB ALI, 18 C. 108 (**P.C.**) = 5 Sar. P.C.J. 582 ... 72

(3) Explanation of—By reference to pleading and judgment—See RES JUDICATA, 19 C. 159.

(4) For land, not effectively defining the boundaries, effect of —See RES JUDICATA, 19 C. 312.

(5) Giving different reliefs—See EXECUTION OF DECREE, 18 C. 515.

(6) On admission of defendant—See RES JUDICATA, 19 C. 656.

(7) See APPEAL—GENERAL, 18 C. 322, 18 C 382, 18 C. 469.

(8) See HINDU LAW—GIFT, 18 C. 545.

(9) See MESNE PROFITS, 18 C. 540.

Decree (absolute).

See PRACTICE, 18 C. 443, 18 C. 539.

Decree-holder.

Mortgagee is only bound to give credit to mortgagor for actual amount of his bid. GUNGA PERSHAD v. JAWAHIR SINGH, 19 C. 4 ... 449

Decree-nisi.

(1) See PRACTICE, 18 C. 539.

(2) See SALE, 18 C. 139.

Dedication.

See MAHOMEDAN LAW—WAKF, 18 C. 399.

Defamation.

See DISAFFECTION, 19 C. 35.

Defects.

See SALE, 18 C. 125.

PAGE

Deficiency of Stamp.

(1) See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), 18 C. 445.
(2) See COURT FEE, 19 C. 747.

Demonstrative Legacy.

See MAHOMEDAN LAW—WILL, 18 C. 414.

Deposit.

(1) See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 481.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 18 C. 242.
(3) See SMALL CAUSE COURT, 18 C. 83.

Deposition.

See EVIDENCE, 18 C. 129.

Description.

See REGISTRATION, 18 C. 556.

Desertion

See DIVORCE, 19 C. 469.

Dhammathats.

Authority of the—See DIVORCE, 19 C. 469.

Disaffection.

Disapprobation—Penal Code (Act XLV *of* 1860), ss. 124-A, 500.—"Disaffection" and "disapprobation" explained, and s. 124-A referred to and explained to the Jury. QUEEN-EMPRESS v. JOGENDRA CHUNDER BOSE, 19 C. 35 ... 470

Discharge.

(1) See INSOLVENCY, 19 C. 730.
(2) See MAGISTRATE, 18 C. 75.

Dishonour.

See MUTUAL CREDIT, 19 C. 146.

Dismissal.

(1) See AGENT, 19 C. 678.
(2) See LIMITATION, 18 C. 462.

Dispute.

See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 641, 19 C. 643.

Disqualification.

See HINDU LAW, 18 C. 341.

Dissolution of Marriage.

Non-Christian marriage—Conversion to Christianity—Divorce Act (IV *of* 1869), ss. 2, 17—*Native Converts' Marriage Dissolution Act* (XXI *of* 1866), ss. 4, 5, 7, 8, 9, 10, 15, 16.—The petitioner and the respondent were married while professing the Hindu faith and afterwards became converts to Christianity. The petitioner subsequently applied for dissolution of the marriage on the ground of his wife's adultery. *Held* that, being a person professing Christianity at the time of presenting the petition, he was entitled to a dissolution of the marriage under the provisions of the Indian Divorce Act (IV of 1869). It is clear from the provisions of the Native Converts' Marriage Dissolution Act (XXI of 1866) that a non-Christian marriage is not dissolved by the mere fact of the conversion of one or both of the parties to Christianity, and may therefore be dissolved in accordance with the provisions of Act IV of 1869. GOBARDHAN DASS v. JASADAMONI DASSI, 18 C. 252 ... 168

Distinct Claims.

See CLAIMS, 19 C. 615.

District Magistrate. PAGE

See MAGISTRATE, 18 C. 75.

See PRACTICE, 18 C. 186.

Divesting of Estate once vested.

(1) See HINDU LAW—ADOPTION, 18 C. 385.

(2) See HINDU LAW—INHERITANCE, 18 C. 69.

Divorce.

(1) *Burman Buddhists, Law as to Divorce among—Buddhist Law—Dhammathats, Authority of the—Menu Kyay, Authority of the Desertion—Procedure.*—In a suit for divorce instituted by a Burman husband on the ground that his wife had deserted him for no reason whatever, and had been living separate for the past eight months, refusing to resume cohabitation with him (there being no charge against the wife of misconduct affecting morality or of any bad habits), the wife pleaded in defence that the above ground for a divorce, and further pleaded the conduct of the petitioner as a justification for her refusal to cohabit with him. No division of property had taken place between husband and wife. *Held*, upon a reference to the High Court—That upon the law as administered among Buddhists, the petitioner was not entitled to a divorce. If the plaintiff in a suit for divorce governed by the above law establishes any of the grounds which the Dhammathats recognize as good grounds for a divorce, he will be entitled to a divorce. The Dhammathats contemplate grounds justifying a divorce other than those mentioned in the judgment of the Special Court in *Nga New* v. *Mi Su Ma, viz.*, other than matricide, parricide, killing, stealing, shedding the blood of a Buddha, rahan, heresy, and adultery. A desertion, properly so-called, by the wife is a good ground for divorce by the husband, provided that during the period of one year prescribed by the Menu Kyay (Bk. v, ch. 17) the husband has not supplied anything to the wife. Suits for divorce between Burman Buddhists, being suits of a Civil nature not governed by the Indian Divorce Act, should be commenced by a plaint and not by a petition. The decision of the Special Court in *Nga New* v. *Mi Su Ma* observed upon Passages in the Menu Kyay Dhammathat cited and commented upon. MOUNG TSO MIN v. MAH HTAH, 19 C. 469 ... 757

(2) *Practice—Custody of child, application for—Notice of application—Act IV of 1869, s. 42.*—A petition for judicial separation by a wife contained a statement in the body thereof to the effect that the petitioner was desirous of having the custody of a child born of the marriage, but contained no prayer to that effect. The respondent appeared and filed an answer to the petition, in which he expressly noticed that portion of the petition. Pending the hearing of the petition, an application was made by the petitioner for the custody of the child *pendente lite*, which was opposed by the respondent and refused. After decree made for judicial separation the respondent not appearing at the hearing, an application was made by the petitioner under the provisions of s. 42 of the Act, for the custody of the child. No notice of such application was given to the respondent. *Held*, that it was the mere correct procedure, having regard to the provisions of s. 42, not to include a prayer for the custody in the original petition, and that following the decision in *Horne* v. *Horne* 30 L.J. (P. and M), 200, and *Wilkinson* v. *Wilkinson*, 30 L.J. (P and M) 200 note, it was unnecessary under the circumstances to give further notice of the application to the respondent. *Held* further on the merits, that the petitioner was entitled to the order asked for. LEDLIE v. LEDLIE, 18 C. 473 ... 315

(3) See PRACTICE, 18 C. 443, 18 C. 539.

Divorce Act (IV of 1869).

(1) Ss. 2, 17—See DISSOLUTION OF MARRIAGE, 18 C. 252.

(2) S. 42—See DIVORCE, 18 C. 473.

Document.

(1) Evidence of, execution of—See EVIDENCE, 18 C. 201.

(2) Proof of, loss of—See EVIDENCE, 18 C. 201.

Dumbness. PAGE

See HINDU LAW (INHERITANCE), 18 C. 327.

Durputni Tenures.

See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 360.

Ejectment.

(1) See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 541.

(2) See LIMITATION, 19 C. 646.

(3) See RECEIVER, 18 C. 477.

(4) See RES JUDICATA, 18 C. 647.

Election Law.

(1) *Specific Relief Act* (I *of* 1877), *s.* 45—*Municipal election—Bengal Act* II *of* 1888, *ss.* 14, 24, 31—*Joint family representative for voting purposes—Franchise.*—S. 31 of Bengal Act II of 1888 does not impose on the Chairman of Municipality the duty of exercising any judicial discretion or taking any judicial action with regard to the list of candidates prepared under that section. *In the matter of* MUTTY LAL GHOSE, 19 C. 192 ... 574

(2) See COMPANY, 18 C. 31.

Endorser.

See PROMISSORY NOTE, 19 C. 242.

Enhancement.

(1) See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 333.

(2) See INTEREST, 19 C. 392.

Enquiry.

See SANCTION TO PROSECUTE, 19 C. 345.

Entry.

See MAHOMEDAN LAW—DOWER, 19 C. 689.

Equity.

See HINDU LAW (GIFT), 18 C. 545.

Estoppel.

(1) See HINDU LAW (INHERITANCE), 18 C. 341.

(2) See SALE, 18 C. 188.

European British Subject.

See SONTHAL PERGUNNAHS, 18 C. 247.

Evidence.

(1) *Admission in a mortgage as to amount of land excepted from its operation—Evidence Act* (I *of* 1872), *s.* 83—*Takbast survey map—Statements recorded on such map.*—Debutter land within the limits of a revenue-paying mouzah which had been mortgaged by the defendants to a predecessor in title of the plaintiff, was exempted from the mortgage, the deed specifying the number of bighas making the area of the debutter. Against a plaintiff who made title to the mortgaged mouzah, and claimed possession of all of it that had passed by the mortgage, the mortgagors set up that there was more debutter in the mouzah than the deed had specified, the intention of the parties to the deed having been to exempt whatever debutter there actually was. *Held*, that the statement in the deed as to the quantity of the debutter was a deliberate admission imposing upon the mortgagors who had made it, the burden of proving that it was untrue, or that they were not bound by it, also that the Subordinate Judge's finding that the defendants had not given proof sufficient to discharge themselves of this, was correct. Among other evidence, adduced to counteract the effect of this admission, was a takbast map made at a revenue survey. The amin who made it had no authority to determine what lands were debutter, but only to lay down, and to map, boundaries.

Evidence—(*Continued*). PAGE

Held, that this map could not be treated as raising a presumption of correctness within s. 83 of the Indian Evidence Act, 1872, on the question as to the amount of debutter land in one of the villages mapped. Statements, also, as to what lands were debutter appeared on the face of the map to have been made according to the pointing out of the agents of the proprietors of the mouzah, and the principal tenants in the presence of the agents of the holders of estates in the neighbouring mouzahs. *Held*, that these statements were not evidence on the issue now raised. JARAO KUMARI v. LALONMONI, 18 C. 224 (**P.C.**) = 17 I.A. 145 = 5 Sar. P.C.J 628. 168

(2) *Bengal Act*, II *of* 1869, *s.* 26.—A bhuinhari register prepared under Bengal Act II of 1869 is not conclusive evidence of the title of the person recorded therein. KIRPAL NARAIN TEWARI v. SUKURMONI, 19 C. 91 ... 507

(3) *Burden of proof—Right to begin—Proof of loss, and admission of secondary evidence of a document alleged to have been executed—Evidence for execution of documents—Civ. Pro. Code, ss.* 141, 142, *and* 568.—A suit for possession by right of inheritance was brought by a claimant, alleging himself to be the heir, against the alleged adopted son of the last male owner denying that an adoption purporting to be made by the widow had been duly authorized by the deceased. The Court of first instance called upon the defendant to prove his title as a son by adoption, notwithstanding that the plaintiff was out of possession, and could not have succeeded, in the event of the defendant's failure to prove it, without first proving his own title as collateral heir by descent thus, in effect, proposing to make the establishment of the plaintiff's title depend, upon the failure or success of the defendant in proving the adoption. The High Court pointed out the error of this proceeding, and the Judicial Committee affirmed its judgment, concurring also in its finding that the adoption had been proved. It was found also that the loss of the *anumati-patra* had been established; so that secondary evidence of it was receivable KALI KISHOREE DUTT GUPTA MOZUMDAR v. BHUSAN CHUNDER *alias* BEPIN CHUNDER DUTT GUPTA, 18 C. 201 (**P.C.**) = 17 I.A. 159 = 5 Sar. P.C.J. 607 ... 134

(4) *Deposition of medical witness—Crim. Pro. Code* (X *of* 1882), *s* 509—*Deposition wrongly admitted in evidence—Evidence Act* (I *of* 1872), *ss.* 80 *and* 114, *ill.* (*e*).—Before the deposition of a medical witness taken by a committing Magistrate can, under s. 509 of the Code of Criminal Procedure, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record, or be proved by the evidence of witnesses, to have been taken and attested by the Magistrate in the presence of the accused. The Court is neither bound to presume under s. 80, nor ought it to presume under either s. 80 or s. 114, ill, (*e*) of the Evidence Act (I of 1872), that the deposition was so taken and attested. KACHALI HARI v. QUEEN-EMPRESS, 18 C. 129 ... 87

(5) *Evidence Act*, I *of* 1872, *ss.* 35, 74 — *Public document* — *Reg.* XII *of* 1817, *s.* 16—*Rent, Suit for.*—A *teis-khana* register prepared by a patwari under rules framed by the Board of Revenue under s. 16 of Reg. XII of 1817 is not a public document, nor is the patwari preparing the same a public servant. BAIJ NATH SING v. SUKHU MAHTON, 18 C. 534... 357

(6) *Of title—Commission of partition.*—Under a commission of partition issued by the Supreme Court land in Calcutta was apportioned among the members of a family, and the allotments were confirmed by final decree in 1825. In this suit, brought in 1884, the plaintiff claimed, through one of the family, a parcel of land, by reference, to one of the allotments so made. The defence, which was made by setting up a title through the widow of him who received the allotment, was not proved; but the correctness of the area allotted was also in dispute, and the appellate Court excluded part from the decree, made by the first Court for the whole. It appeared to the Judicial Committee that there was no ground for assuming that the members of the family, who were parties to the partition suit, were under any mistake as to the family property, or that there was any error, or want of due care, on the part of the Commissioners of partition, whose proceedings had been regular: nor had there been any adverse claim to

Evidence—(*Concluded*). PAGE

any part of the allotted land. The first Court's decree was restored. SARODA PROSUNNO PAL v. SHAM LAL PAL, 19 C. 618 (P.C.)=19 I.A. 75=6 Sar. P.C.J. 189 ... 854

(7) See MAHOMEDAN LAW, WILL, 19 C. 444.

(8) See PENAL CODE, (ACT XLV OF 1860), 19 C. 190.

(9) See SANCTION TO PROSECUTE, 19 C. 345.

Evidence (Secondary).

Of the contents of a document—Evidence Act (I *of* 1872), *s.* 65—*Necessity of accounting for non-production of original document.*—Whether or not sufficient proof of search for, or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a clear case of miscarriage. In a suit alleging want of authority to adopt, the defence rested on the case that an *anumati patro* had been given by the defendant's deceased husband, but failed to show that there had been a sufficient search, for and to establish, the loss of, the original document so as to render secondary evidence of its contents admissible. HARRIKRIA DEBI v. RUKMINO DEBI, 19 C. 438 (P.C.)=19 I.A. 79=6 Sar. P.C.J. 177 ... 736

Evidence Act (I of 1872).

(1) S. 11—See HINDU LAW (GIFT), 18 C. 545.

(2) S. 32, Cl. (2)—See MAHOMEDAN LAW—DOWER, 19 C. 689.

(3) S. 33—See COMMISSION, 19 C. 113.

(4) Ss. 35, 74—See EVIDENCE, 18 C. 534.

(5) S. 65—See EVIDENCE, SECONDARY, 19 C. 438.

(6) Ss. 80 and 114—See EVIDENCE, 18 C. 129.

(7) S. 83—See EVIDENCE, 18 C. 224.

Execution.

See PRACTICE, 18 C. 199.

Execution of Decree.

(1) *Attachment of immoveable property in execution of decrees of two Courts of same grade—Sale by one Court pending prior attachment by other Court—Validity of sale—Title of Purchaser—Civ. Pro. Code, Act* XIV *of* 1882, *s.* 285.—X, on the 3rd November 1884, obtained a decree in the Court of the Second Munsif of Bagirhat against A, and on the 6th August, 1887 sold such decree to the plaintiff, who on the 8th August 1887, applied in that Court for execution, and on the 5th September 1887, attached the share of A in a certain jama. The share was subsequently sold in execution of the plaintiff's decree on the 20th October 1887, and purchased by the plaintiff himself. Y, having obtained another decree against A in the Court of the First Munsif of Bagirhat on the 6th May 1875 sold his decree in the month of January or February 1887 to the defendant, who, on the 10th February 1887, commenced execution proceedings in the First Munsif's Court against A, and on the 16th July applied for attachment of A's share in the jama. A filed an objection, which was disallowed, and the share was attached at the defendant's instance on the 28th July 1887, and on the attachment was confirmed on appeal on the 26th November 1887. The plaintiff, on the strength of his purchase of the 20th October, 1887, put in a claim in the month of April 1888 in the defendant's execution proceedings in the Court of the First Munsif, which was, however, disallowed. He then filed a suit to set aside the order disallowing his claim, and for a declaration that the right, title, and interest of A passed to him under the sale of the 20th October 1887. *Held*, that though the property had been first attached in the Court of the First Munsif, that Court was not a Court of a higher grade than that of the Second Munsif within the meaning of s. 285 of the Code of Civil Procedure, and that the sale to the plaintiff was valid, and that he was entitled to the decree he prayed for. DWARKA NATH DASS v. RUNKU BEHARI BOSE, 19 C. 651 ... 877

Execution of Decree—(*Concluded*). PAGE

(2) *By recorded decree-holder—Civ. Pro. Code* (*Act* XIV *of* 1882) *s.* 232.—The person appearing on the face of the decree as the decree-holder is entitled to execution unless it be shown by some other person, under s. 232 of the Civ. Pro. Code that he has taken the decree-holder's place. JASODA DEYE v. KIRTIBASH DAS, 18 C. 639 ... 426

(3) *Civ. Pro. Code* (*Act* XIV *of* 1882), ss. 43, 373, 374—*Separate applications to execute relief of a different character—Limitation.*—The Code of Civil Procedure does not prevent a person from making separate and successive applications for execution of a decree, giving reliefs of different characters, in respect to each such relief, ss. 43, 373 and 374 do not apply to proceedings for execution of decree. RADHA KISHEN LALL v. RADHA PERSHAD SING, 18 C. 515 ... 344

(4) *Execution proceeding struck of — Civ. Pro. Code* (*Act* XIV *of* 1882), ss. 373, 647—"*Suit.*"—S. 647 of the Code of Civil Procedure does not operate to extend the rule laid down in respect of a suit in s. 373 to an application for execution. BUNKO BEHARY GANGOPADHYA v. NIL MADHUB CHUTTOPADHYA, 18 C. 635 ... 423

(5) *Suit to have an execution sale of land set aside—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 244—*Parties to the suit—Fraud, allegation of.*—Where questions are raised between the parties to a decree relating to its execution, discharge or satisfaction, the fact that the purchaser at a judicial sale, who is no party to the decree of which the execution is in question, is interested and concerned in the result has never been held to prevent the application of s. 244 of the Civ. Pro. Code, limiting the disposal of these matters to the Court executing the decree. The plaintiffs in a suit to have the judicial sale of a zamindari set aside alleged that the decree-holder, in part satisfaction of his decree, had received from them and other co-sharers in the zamindari their proportionate amounts of the debt decreed and had agreed that their shares should be exempt from the execution sale about to take place; that the sale took place, subject to that exemption; that the decree-holder, however, with whom some of the co-sharers and the purchasers colluded, fraudulently had the sale set aside, revived the attachment and caused a second sale, at which all the shares in the zamindari were sold. *Held*, that the question, besides that the charge of fraud was not sufficiently specific was determinable, in virtue of s. 244 of the Civ. Pro. Code only by orders of the Court executing the decree. PROSUNNO KUMMAR SANYAL v. KALI DASS SANYAL, 19 C. 683, P.C. = 19 I.A. 166 = 6 Sar. P.C.J. 209 ... 898

(6) *Transfer of decree for execution — Civ. Pro. Code* (*Act* XIV *of* (1882), *ss.* 223, 230—*Limitation Act* (XV *of* 1877), *ss.* 5, 6—*Extension of time when the Court is closed.*—Where parties are prevented from doing a thing in Court on a particular day or not by any act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity. Where, therefore, after previous attempt to execute a decree dated the 7th September 1877, an application for transfer of the decree under s. 223 of the Code was made and granted on the 2nd September 1889, and on the 9th September (the Court having been closed from the 3rd to the 8th inclusive on account of the Mohurrum) the decree-holder applied for execution under s. 230 of the Code; *held* that he was entitled to the benefit of the rule laid down in s. 5 of the Limitation Act upon the broad principle above stated. PEARY MOHUN AICH v. ANUNDA CHARAN BISWAS, 18 C. 631 ... 421

(7) See ACT IX OF 1879 (THE COURT OF WARDS, BENGAL), 18 C. 500.

(8) See HINDU LAW—MAINTENANCE, 19 C. 139.

(9) See JURISDICTION, 19 C. 13.

(10) See LIMITATION, 18 C. 462.

(11) See LIMITATION ACT (XV OF 1877), 19 C. 750.

(12) See MORTGAGE (REDEMPTION), 18 C. 164.

(13) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 C. 482.

Execution Proceedings. PAGE

See EXECUTION OF DECREE, 18 C. 635.

Extension of Time.

(1) See EXECUTION OF DECREE, 18 C. 631.

(2) See LIMITATION, 18 C. 231.

Fac Simile.

See HINDU LAW—WILL, 19 C. 65.

Failure to Pay.

See INTEREST, 19 C. 392.

False Evidence.

Omission to prove that accused was sworn or affirmed before giving his evidence—Penal Code (Act XLV *of* 1860), *ss.* 191-193—*Oaths Act* (X *of* 1873), ss. 6, 13 *and* 14.—The offence of intentionally giving false evidence, referred to in s. 193 of the Penal Code, may be committed, although the person giving evidence has neither been sworn nor affirmed. GOVINDA CHANDRA SEAL v. QUEEN-EMPRESS, 19 C. 355 ... 681

Ferries.

(1) *Ferry rights, infringement of—Right to restrain party starting a second ferry—User for twenty years—Crown grant—Limitation Act* (XV *of* 1877), *Part* IV, *and s.* 23.—In a suit brought to establish the right to a ferry franchise and to restrain the working of a rival ferry, *held*, there is nothing in the law of Bengal as it was before the acquisition by the British Government, or in the Regulations before or after 1793, to show that any person is entitled to claim a monopoly of a right of ferry by prescription or by any other means than a grant from the Crown. To such a monopoly Part IV of the Limitation Act of 1877, relating to the acquisition of ownership by prescription, is not applicable. The franchise of a ferry is not necessarily appurtenant to land, but when a right of ferry was claimed as appurtenant to certain villages. *Held*, that the grant of such right by the Crown would not be destroyed by mere *non-user* without waiver, nor by the running of an opposition ferry. The franchise would continue as long as the grant continued, and until the person who set up an opposition ferry could show a Crown grant or give evidence from which a Crown grant could be presumed, the cause of action would remain. The disturbance of a right of a ferry is in the nature of a nuisance (*Yard* v. *Ford*), and the cause of action in the case of the violation of this right is a continuing wrong within s. 23 of the Limitation Act (XV of 1877). NITYAHARI ROY v. DUNNE, 18 C. 652 ... 435

(2) See JOINT-OWNERSHIP, 19 C. 253.

Fight with deadly weapons.

See PENAL CODE (ACT XLV OF 1860), 18 C. 484.

Fishery.

(1) *Immoveable property—Right of fishery—Possession—Specific Relief Act* (I *of* 1877), *s.* 9—*Construction of Statute—"Objects and Reasons," of Bill, reference to.—Held*, by the Full Bench (PRINSEP and PIGOT, JJ., dissenting).—A suit for the possession of a right to fish in a khal, the soil of which does not belong to the plaintiff, does not come within the provisions of s. 9 of the Specific Relief Act. The right to refer to the "Objects and Reasons" of a bill discussed. FADU JHALA v. GOUR MOHUN JHALA, 19 C. 544. (F.B.) ... 806

(2) See SPECIFIC RELIEF ACT (I OF 1877), 18 C. 80.

Forgery.

Cheating—Using a forged document—"Fraudulently"—"Dishonestly"—Penal Code (*Act* XLV *of* 1860), *ss.* 24, 25, 415, *&* 471.—In construing ss. 24 and 25 of the Penal Code, the primary and not the more remote intention of the accused must be looked at. Under the rules of the Calcutta University a private student desiring to appear at the Entrance examination is required to forward to the Registrar, with his application for permission to appear, a certificate to the effect, *inter alia*, that he is of good moral

Forgery—(*Concluded*). PAGE

character, and has submitted himself to a test examination by, and furnished exercises to, the person signing the certificate, sufficient in that person's opinion to show that his qualifications give a reasonable probability of his passing the examination. Such certificate has to be signed by one or other of the persons mentioned in the rules, amongst them being the Head Master of a high school under public management. On such certificate being sent to the Registrar, and the prescribed fee paid, that officer forwards receipt to the candidate, with his roll number thereon, which is also an authority for him to appear at the examination and enter the examination hall. A private student forwarded to the Registrar, with his application for permission to appear, a certificate in the prescribed form, purporting to be signed by the Head Master of a high school, such signature, however, being, as the applicant well knew, a forgery. The Registrar, knowing at the time that the signature of the Head Master was not genuine, sent to the applicant the receipt for his fee, and the necessary authority allowing him to appear at the examination, and in due course the applicant appeared, took his seat in the hall at the desk allotted to him, and commenced the examination. Upon charges being preferred against the applicant of using as genuine a forged document (s. 471), and attempting to cheat (ss. 415 and 511)—*Held*, that his primary object or intention was by falsely inducing the Registrar to believe that the certificate was signed by the Head Master of a Government school under public management to be permitted to sit for the Entrance examination, and that such intention could not be held to be "fraudulent" or "dishonest" within the meaning of ss. 25 and 24 of the Penal Code. *Held*, consequently, that the use of the forged document, though with the knowledge or belief that it was forged, was not fraudulent or dishonest, and that, as these are essential elements to offences under ss. 471 and 415 of the Penal Code, the accused had not committed either of the offences charged. *Held*, further, that the accused had not committed any offence under the Penal Code. QUEEN-EMPRESS v. HARADHAN *alias* RAKHAL DASS GHOSH, 19 C. 380 ... 698

Fractional Co-sharers.

See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 593.

Franchise.

See ELECTION, 19 C. 193.

Fraud.

(1) See EXECUTION OF DECREE, 19 C. 683.

(2) See SALE, 18 C. 139 ; 19 C. 341.

Further Enquiry.

See MAGISTRATE, 18 C. 75.

Future Earning.

Of insolvent—See INSOLVENCY, 19 C. 730.

Future Maintenance.

See HINDU LAW—MAINTENANCE, 19 C. 139.

Government Securities.

See ADMINISTRATOR, 19 C. 26.

Grant.

See MORTGAGE—REDEMPTION, 18 C. 164.

Grounds of Appeal.

See APPEAL—SECOND APPEAL, 18 C. 23.

Guardian and Ward.

(1) *Minor not bound by his guardian's contract—Appeal, complete change of case to that in issue in lower Courts not allowable.*—Upon the death of an ijaradar, his mother and widow, as managers under his will, remained in possession of the land leased. Subsequently a son was adopted to him by the

Guardian and Ward—(*Concluded*). PAGE

widow, and succeeded to his estate. The leave having expired, renewal for five years was taken by the managers but was surrendered before that period elapsed, during the minority of the son, against whom, on his attaining full age, this suit was brought by the lessor to recover three years rent of the renewal ijara. The contract of the adoptive mother and guardian was not personally binding upon the adopted son, and had not been ratified by him after attaining full age. It did not purport to deal with the estate to which he afterwards succeeded, but was entered into by the managers in their own names. *Held*, that the case, as originally made in the plaint and raised by the issues framed in the Court of first instance, which covered a wider ground, *viz.*, that the son was personally bound by the contract as being beneficial to him and on the ground that he had ratified it after attaining full age, could not be altered in appeal into what would be a wholly different claim, and raise entirely new issues, *viz.*, that the managers having power under the will had charged the estate with the rent of the ijara, and that such charge remained upon it in the possession of the heir, who was liable to the extent of the assets received by him. The latter would have been in fact a new suit. INDUR CHUNDER SINGH v. RADHA KISHORE GHOSE, 19 C. 507 (P.C.) = 19 I.A. 90 = 6 Sar. P.C.J. 185. ... 782

(2) See MINOR, 18 C. 99.

Guardianship.

Hindu Law —Mitakshara —Minor—The Guardian and Wards Act (VIII of 1890) —*Act* XL *of* 1858.—Under the Guardians and Wards Act, 1890, a guardian cannot be appointed of the property of a minor, who is a member of a joint Hindu family governed by the Mitakshara law, and possessed of no separate estate. Difference between the Guardian and Wards Act, 1890, and Act XL of 1858 stated. SHAM KUAR v. MOHANUNDA SAHOY, 19 C. 301. 646

High Court.

See SONTHAL PERGANNAHS, 18 C. 247.

Hindu Law.

1.—ADOPTION.
2.—ALIENATION.
3.—EXCLUSION FROM INHERITANCE.
4.—GIFT.
5.—IMPARTIBLE ESTATE.
6.—INHERITANCE.
7.—JOINT FAMILY.
8.—MAINTENANCE.
9.—MARRIAGE.
10.—MINORITY AND GUARDIANSHIP.
11.—PARTITION.
12.—RELIGIOUS ENDOWMENT.
13.—RE-UNION.
14.—REVERSIONER.
15.—STRIDHAN.
16.—SUCCESSION.
17.—WIDOW.
18.—WILL.

———1.—**Adoption.**

(1) *By each of two widows ineffectual where simultaneously made to one father—Ikrarnama between widows in favour of the boys whose adoption failed, effect of—Bequest to a family Thakur—Office of Shebait—Account—Contract — Rights of persons interested in a contract, though not formal parties.*—By Hindu law there cannot be simultaneous adoptions by two widows of two sons to one father. A testator bequeathed all his property to a family thakur; and, to secure the *debsheba*, directed that his two widows should each adopt a son to him, the sons to become *shebaits* of the property dedicated, of which the widows, during the sons' minority, were to have control. When the two sons should have attained the majority, the widows were, by the will, to make over to them, as *shebaits* all the property

Hindu Law—I.—Adoption—(*Continued*). **PAGE**

dedicated ; and out of the surplus income, after payment of the expenses of the *debsheba*, the two sons were to receive a fixed allowance, the residue being undisposed of. The widows having purported to adopt according to the will, then bound themselves by an *ikrarnama*, each to the other, to bring up the sons as their mothers and guardians ; and, after payment of the expenses of the *debsheba*, to divide the surplus income into two equal shares, making accumulations, which should be handed over by each to the son adopted by her on his attaining majority. In a suit by the son purported to have been adopted by the elder widow, who was then dead, against the younger widow, and the son purported to have been adopted by her, in effect for the administration of the testator's estate, with a claim for relief based on acts of the widows, including the *ikrarnama* executed by them : *held—First*, that it being settled law that such an adoption was not valid, the plaintiff could take nothing under the will because there was no gift to him, except in the character of *shebait* ; there having been no intention on the part of the testator, who apparently had no doubt as to the legality of his scheme to bring in a stranger as *shebait*. *Secondly*, that, by the law of inheritance, the widows, as heirs, took the office of *shebait*, and became entitled to the beneficial interest in the surplus income for their estates for life ; so that each of them could contract to bind her own interest. *Thirdly*, that there was no trust imposed upon the surviving widow independently of the contract which she had made ; but that the *ikrarnama*, taken as part of the series of acts, gave to the boys, so far as the widows' interests extended, the same benefit that they would have taken had they been heirs ; and although they were not, and could not have been at their age, parties to the *ikrarnama*, yet that they could insist on the performance of the contract by which each widow bound herself to the other to deal with the estate in their favour. *Fourthly*, that each boy was entitled on attaining majority to half of the surplus income during the life of the surviving widow, and to the accumulations thereon ; and accounts were accordingly directed against her. This widow, however, having died pending the appeal, after it had been argued, the testator's heir was added to the record, it resting with the plaintiff to apply to the Court below to add necessary parties. SURRENDRO KESHUB ROY v. DOORGASOONDERY DOSSEE, 19 C. 513 (**P.C.**) = 19 I.A. 108 = 6 Sar. P.C.J. 150 ... 786

(2) *Necessity of there being gift and acceptance of the adopted child.*—Construction of Will as to there being a designation as legatee of a child whose adoption failed. The Court of first instance and the appellate Court, after observing fully upon the evidence, found that, although a ceremony of adoption had taken place, there had not, in fact, been a giving and taking of the child. There being no reason for departing from the ordinary course, where two Courts have concurred, the above finding was accepted ; and it was thereupon, *held*, that there had been no adoption. Where in a will there was a clear indication of the testator's intention before making an adoption to give the greater part of his property to the boy whom he was about to adopt, and the bequest was by name to the latter, who was not selected as being the adopted son, but for reasons which, though likely to lead to the adoption, were independent of it,—*held*, that the bequest was effectual, notwithstanding that there had been no adoption. BIRESWAR MUKERJI v. ARDHA CHUNDER ROY, 19 C. 452 (**P.C.**) = 19 I.A. 101 = 6 Sar. P.C.J. 171 ... 746

(3) *Validity of adoption—Effect of adoption—Divesting of estate already vested—Mitakshara law.*—The will of *B*, a Hindu, appointed one *K* manager of all his property, and gave his widow *S* power to adopt a son, and went on to state that *S* "shall manage all the affairs with the consent of the said manager" (*K*) "and she will not be able to do any wrongful act or alienate and waste property uselessly and without his consent. If she do so, it will be cancelled by the said manager or the adopted son ; and she will adopt a son with the good advice and opinion of the manager." *S*, wishing to adopt the plaintiff, sent a registered letter to *K*, who had refused to give *S* any advice or assistance, intimating her intention and asking him to come and see the ceremony performed, but he declined to receive the letter, which was returned to *S* by the postal authorities, and the plaintiff was eventually adopted without the consent of *K*. *Held*, that

Hindu Law—1.—Adoption—(*Concluded*). PAGE

the consent of *K* was not a condition precedent to the validity of the adoption, and it was not invalid by reason of its having been made without *K's* advice and consent. *B* and *R* were living as a joint-family subject to the Mitakshara law. *B* died on the 28th February 1884, leaving him surviving a widow *S*, to whom he gave power to adopt a son to him, and *R*, who succeeded by survivorship to *B's* share in the joint-family property. *S* adopted the plaintiff on the 27th October 1885. *Held*, that on her adoption the plaintiff became entitled to the share of his father *B*, notwithstanding that such share had already vested in *R*. SURENDRA NANDEN *alias* GYANENDRA NANDAN DAS v. SAILAJA KANT DAS MAHAPATRA, 18 C. 385 ... 258

(4) See HINDU LAW—INHERITANCE, 18 C. 69.

————2.—Alienation.

(1) See HINDU LAW—JOINT FAMILY, 18 C. 157.

(2) See HINDU LAW—WIDOW, 18 C. 311.

————3.—Exclusion from Inheritance.

(1) See ACT I OF 1869 (OUDH ESTATES), 18 C. 111.

(2) See HINDU LAW—INHERITANCE, 18 C. 327; 18 C. 341.

————4.—Gift.

Equity as to gifts to persons in a fiduciary relation—Burden of proving absence of undue influence—Gift attempted by widow.—An instrument executed by a widow, after setting apart the rental of villages, belonging to her as her patrimony, to defray the expenses of her and her deceased husband's tombs, gave to her managing agent, who was her sole adviser, the management of the endowment in perpetuity, with the residue, after the above expenditure should have been met, for himself; so that a large surplus would have remained each year in his hands, and he would have been the person substantially interested. *Held*, that this transaction was within the well recognised principle that every onus is thrown upon a person filling a fiduciary character towards another of showing conclusively that he has acted honestly, and *bona fide*, without influencing the donor, who has acted independently of him. In a suit brought by the agent's representative to have the gift enforced against the widow's successor in the estate, this burden had not, in the opinion of the Courts below, with which their Lordships concurred, been sustained; and it was *held* that the gift had been rightly set aside. WAJID KHAN v. EWAZ ALI KHAN, 18 C. 545 (P.C.) = 18 I. A. 144 = 6 Sar. P.C.J. 46 = Rafique and Jackson's P.C. No. 123 ... 364

————5.—Impartible Estates.

See HINDU LAW—INHERITANCE, 18 C. 151.

————6.—Inheritance.

(1) *Bengal School—Kept-woman.*—According to the Bengal School of Hindu law, the son of a Sudra by a kept-woman or continuous concubine does not inherit his father's estate. KIRPAL NARAIN TEWARI v. SUKURMONI, 19 C. 91. 507

(2) *Impartible estate—Mitakshara law—Right of illegitimate son among Sudras—Survivorship.*—For determining who is to be heir to an impartible estate, the same rules apply which also govern the succession to partible estates, though the estate can be held by only one member of the family at a time. Under the Mitakshara, among Sudras, where a father left a son by a wedded wife and an illegitimate son, the ordinary rule of survivorship incidental to a family co-parcenary was held to apply; and the illegitimate son having survived the legitimate, was held entitled by survivorship to succeed to the family estate, which was impartible and appertained to a Raj, on the death of his brother without male issue. JOGENDRA BHUPATI HURROCHUNDRA MAHAPATRA v. NITYANAND MAN SING, 18 C. 151 (P.C.) = 17 I. A. 128 = 5 Sar. P.C.J. 596 ... 101

(3) *Inheritance of adopted son—Divesting estate—Effect of adoption by one of two widows—Power of minor to adopt.*—A son adopted to the last male proprietor, who was the full owner of an estate, is entitled to take the whole of that estate and to divest the interest of any person in that estate, whose

Hindu Law—6.—Inheritance—(*Concluded*). PAGE

title by inheritance is inferior to his, and who could not have inherited if the adoption had taken place before the death of the last full owner; but such adopted son is not entitled to claim as preferential heir the estate of any other person besides his adoptive father, when such estate has vested before his adoption in some heir other than the widow who adopts him. Where a man died leaving two widows and having given either of them the power to adopt a son, and the younger widow, on the refusal of the elder one to adopt, adopted a son, *held*, that the estate which was in the elder widow was divested by the adoption, and that the adopted son took all the estate of his adoptive father. A widow, although a minor, is competent to adopt a son. MONDAKINI DASI v. ADINATH DEY, 18 C. 69 ... 47

(4) *Mitakshara—Disqualification of a brother to share—Intention as evidenced by conduct—Waiver of rights—Estoppel—Limitation.*—Between the two surviving brothers of a Mitakshara family, the action of the elder to the younger, who had been born deaf and dumb, was such as to recognise for some years that the latter had a joint interest in the family property. The proper inference to be drawn from this was that the elder treated his brother as a member of the family, and entitled to equal rights until it had become clear that his disqualification would never be removed by his being cured. Their Lordships would not infer that there was an intention shown by the acts of the elder to waive the rights accruing to him in consequence of this disqualification, nor would they hold that his acts operated to create a new title in the younger. This branch of the family became extinct, the brothers having died, and also the elder brother's daughter, she having been the only descendant. This daughter had an only son, who died before her, after taking, however, the whole family estate under a gift made to him with his mother's assent by his maternal grandfather in 1876. In 1882, the plaintiff, a collateral relation, sued the widow of the donee to obtain the estate of the younger of the brothers. The widow made title under the gift to her deceased husband, followed by his possession, and hers afterwards, since the date of the gift. Upon the facts found, the suit was held to be barred by limitation. LALA MUDDUN GOPAL LAL v. KHIKHINDA KOER, 18 C. 341 **(P.C.)**=18 I.A. 9=15 Ind. Jur. 93=5 Sar. P.C.J. 676 ... 228

(5) *Stridhan—Bengal School of law—Widowed daughter with dumb son—Daughter's son.*—Under the Bengal school of the Hindu law a widowed daughter having a son who is dumb at the time the succession opens out (but is not shown to be incurably dumb) is entitled to succeed to her mother's *stridhan* in preference to a daughter's son. CHARU CHUNDER PAL v. NOBO SUNDERI DASI, 18 C. 327 ... 219

(6) See HINDU LAW—RE-UNION, 19 C. 634.

———7.—Joint Family.

(1) *Ancestral estate held jointly by family under the Mitakshara—Sale attempted by one member of his share—Effect of partition—On death of vendor, right by survivorship of other members—Equity of purchaser to have a lien against survivor.*—As to ancestral estate under the Mitakshara, so long as the estate is undivided and the share of a member of the family is indefinite, he cannot dispose of it without the consent of his co-parceners. *Held*, that, in a joint family, a nephew, having taken by survivorship the undivided share of an uncle, deceased, was entitled to recover that share from a purchaser, to whom the uncle in his lifetime had sold it without the consent of his co-parceners, and without necessity; *held* also, that the purchaser could have no lien on the share for return of the purchase-money. As soon as partition is made;—actual partition not being in all cases essential, as for instance where the family has agreed to hold their estate in definite shares, or a member's undivided share, in execution of his creditor's decree, has been attached—that will be regarded as sufficient to support the alienation of a member's interest, as if it had been his acquired property. As regards members of a family living at the time when their alienation was set aside at the instance of another member, the Court in 12 B.L.R. 90. justly ordered that the property should be thenceforth possessed in defined shares, and that the shares of the members who had joined in the sale should be subject to a lien for the return of the purchase-money. But that case must be distinguished

Hindu Law—7.—Joint Family—(*Concluded*). PAGE

from the present. Here, the accrued right of survivorship precluded any such course. The nephew not being responsible for the personal debts and obligations of his uncle, what might have been an enforceable equity against the interest of the latter, while it existed, could not affect the interest which had passed to a surviving co-parcener. MADHO PARSHAD v. MEHRBAN SINGH, 18 C. 157 **P.C** =17 I.A. 194=5 Sar. P.C.J. 586= Rafique and Jackson's P.C. No. 121 ... 105

(2) *Mitakshara Law—Mortgage of undivided shares in joint family property—Consent of co-sharer.*—*A,B* and *C* together formed a joint Mitakshara family. On the 27th June 1872 *A* and *B*, without the consent of *C* for their own benefit and without legal necessity, executed a bond in favour of *J* and *I* defendants, 2nd party) mortgaging to them certain joint properties. On the 14th August 1882, *J* and *I* obtained an *ex parte* decree on their bond against *A*, *B* and *C*, and in execution mauzas Pipra and Bangra were put up to sale on the 16th March 1888, and purchased by *H* (defendant, 1st party). Prior to the institution by *J* and *I* of their suit, *A,B* and *C* on the 24th August 1881 together mortgaged mauzas Pipra and Bangra to *N*. On the 13th March 1884 *N* obtained an *ex parte* decree on his mortgage, and in execution thereof mauza Pipra was sold on the 21st November 1884. The plaintiffs purchased the property, and duly obtained possession from the Court. In a suit by the plaintiffs for a declaration that the mortgage of the 27th June 1872 was invalid, and the decree and execution sale upon the basis thereof ineffectual as against them, and for confirmation of possession, and in the alternative that if the mortgage bond were valid that the amount due thereunder and chargeable on mauza Pipra might be determined, and the plaintiffs declared entitled to redeem upon payment of such amount: *Held*, that although *A* and *B* had no authority, without the consent of their co-sharer *C* to mortgage their undivided sharers to *J* and *I*, yet, as the plaintiffs derived their title from those mortgagors, they were not entitled to recover such shares without paying to *H*, who by his auction purchase had acquired the rights of the mortgagees, the money advanced on the mortgage bond of 1872 with interest, and that the same was a charge on such shares. JAMUNA PARSHAD v. GANGA PERSHAD SINGH, 19 C. 401. ... 712

(3) *Partition—Evidence of partition—Distribution of family estate, followed by separate possession, equivalent to informal partition.*—The Courts below found that a distribution of ancestral estate among the members of a family had taken place in former years, and had been followed by continuous possession, without their having any intention to re-adjust or to hold on behalf of the family. The right of an individual member to claim another partition was therefore negatived The parties, who had long discontinued joint residence, were members of a family consisting at the time of the distribution of four sons left by a Sikh Dewan, deceased. The son of one brother now claimed from the son of another, joining a third who still survived, partition of the property which had descended from the grandfather with the increment since his time. That an actual partition had been effected, although probably no formal document of partition had been executed, appeared to their Lordships to be a just inference from the evidence. BUDHA MAL v. BHAGWAN DAS, 18 C. 302 (**P.C.**)=5 Sar P.C.J. 632 ... 201

(4) See ELECTION LAW, 19 C. 192.

————8.—**Maintenance.**

(1) *Decree declaring right to, in future.*—Future maintenance awarded by a decree when falling due can be recovered in execution of that decree without further suit. ASHUTOSH BANNERJEE v. LUKHIMONI DEBYA, 19 C. 139 (**F.B.**) ... 538

(2) *Husband and wife—Cruelty—Maintenance.*—A Hindu wife is justified in leaving her husband's protection, and is entitled to a separate maintenance from his income when he habitually treats her with cruelty and such violence as to create the most serious apprehension for her personal safety. MATANGINI DASI v. JOGENDRA CHUNDER MULLICK, 19 C. 84. ... 502

Hindu Law—9.—Marriage. PAGE

Hindu widow, re-marriage of—Marriage of Hindu widow—Property inherited by Hindu widow from her first husband, forfeiture of—Hindu widow's Marriage Act (XV *of* 1856), *ss.* 1. 2—*Act* III *of* 1872, *s.* 10.—A Hindu widow inherited the property of her husband, taking therein the estate of a Hindu widow. She afterwards married a second husband, not a Hindu, in the form provided by Act III of 1872, having first made a declaration, as required by s. 10 of that Act that she was not Hindu. *Held*, by the majority of the Full Bench (*Prinsep, J.*, dissenting) that by her second marriage she forfeited her interest in her first husband's estate in favour of the next heir, all rights which any widow may have in her deceased husband's property by inheritance to her husband being expressly determined by s. 2 of the Hindu widow's Marriage Act (XV of 1856) upon her re-marriage. *Prinsep, J.*—S. 2 of Act XV of 1856 does not apply to all Hindu widows re-marrying, but only to Hindu widows re-marrying as Hindus under Hindu law as provided by the Act. MATUNGINI GUPTA *v.* RAM RUTTON ROY, 19 C. 289 (F.B.) ... 638

———10.—Minority and Guardianship.

See GUARDIANSHIP, 19 C. 301.

———11.—Partition.

(1) See APPEAL—GENERAL, 19 C. 463.

(2) See HINDU LAW—PARTITION, 18 C. 302.

———12.—Religious Endowments.

Religious trust—Shebaits, removal from office of—Arbitration—Order—Giving leave to sue under s. 18, *Act* XX *of* 1863—*Appealable order—Reg.* XIX *of* 1810—*Act* XX *of* 1863, *ss.* 1—12, 14 *and* 18—*Act* XII *of* 1887, *s.* 20.—Act XX of 1863 does not apply to an endowment which is not a public one, but which is made for the benefit of an ancestral family idol. An order passed under s. 18 of that Act, granting leave to institute a suit, is not an appealable order. Two plaintiffs, members of a Hindu family, applied for and (in the presence of the defendants) obtained leave to institute a suit against the defendants, who were the *shebaits* of a certain idol, for the purpose of having them removed from their office, on the ground of misconduct. In their plaint they alleged that the endowment was a public one, all Hindus having a common right of worshipping the idol. This was denied by the defendants. After issues had been framed, the Court of first instance made an order, under s. 16 of the Act, referring certain of them to arbitration, although the defendant contended that as the endowment was not a public one, the Act had no application, and objected to the reference. The arbitrators made an award finding, *inter alia*, that the idol was the ancestral family idol of the parties to the suit, and that the endowment was not made for the benefit of the public. They further in their award laid down certain definite rules according to which the *sheba* ought to be conducted and repairs to the temple made. The Court of first instance passed a decree on that award, declaring that the idol was the ancestral idol of both parties, and directing that the defendants should perform the worship in a certain manner, and should execute certain repairs to the temple within six months, and declaring that if the parties did not act as directed, any member of the family should be able to bring a suit for the appointment of a manager. Against the decree the defendants appealed, and contended that the Act did not apply to the case of the finding of fact as to the endowment not being a public one; that the compulsory reference to arbitration was illegal and void, and that the decree was not one authorized by the terms of s. 14 of the Act. On behalf of the plaintiffs, it was contended that the defendants were precluded from raising these questions on appeal, as the order passed under s. 18 of the Act was made in their presence and was not appealed against, and that, having regard to the provisions of s. 20 of Act XII of 1887, and appeal to the High Court lay from the order. *Held*, that on the facts as found by the arbitrators, Act XX of 1863 did not apply to the case, and that the compulsory reference to arbitration and the decree made thereon were illegal and void. *Held*, further that the decree itself was bad, on the ground that it was not one coming within the scope of s. 14 of the Act. *Held*, also that s. 20 of Act XII of 1887, was intended

Hindu Law—12.—Religious Endowments—(*Concluded*). PAGE

only to define the Court to which an appeal lies from a decree or order of a District Judge, and was not intended to define the right of appeal or the class of decrees or orders from which appeals shall lie, and that no appeal lay from the order passed under s. 18 of Act XX of 1863 granting the plaintiffs leave to institute the suit. PROTAB CHANDRA MISSER v. BROJONATH MISSER, 19 C. 275 ... 629

———**13.—Re-union.**

Succession.—Where there has been a re-union between persons expressly enumerated in the text of Brihashpati, *viz.*, father, brother, and paternal uncle, and where their descendants continue to be members of the re-united Hindu family, the law of inheritance applicable to the latter is the same as in the case of the death of any of those between whom the re-union took place. ABHAI CHURN JANA v. MANGAL JANA, 19 C. 634 ... 865

———**14.—Reversioner.**

See HINDU WIDOW, 19 C.236.

———**15.—Stridhan.**

See HINDU LAW (INHERITANCE), 18 C. 327.

———**16.— Succession.**

(1) See HINDU LAW—RE-UNION, 19 C. 634.

(2) See HINDU LAW—WIDOW, 19 C. 236.

———**17.—Widow.**

(1) *Life estate of, surrender of—Acceleration of estate of heir requires absolute conveyance by —Ikrarnama by, in favour of heir, when she retains possession of estate, effect of—Hindu Widow's Estate—Reversioners, rights of.*—A Hindu widow can accelerate the succession of the heir by conveying absolutely her life estate to him, but it is essential that she should surrender her estate, so that the whole estate should become at once vested. A Hindu widow executed an ikrarnama in favour of her daughter's son, then apparently the heir who would ultimately succeed, but adding that she would retain possession for her own life. *Held*, that this could not operate to exclude the daughter, nor after her the son of another (deceased) daughter, not born at the date. BEHARI LAL v. MADHO LALL AHIR GAYAWAL, 19 C. 236 (P.C.) = 19 I.A. 30 = 6 Sar. P.C J. 88 ... 603

(2) *Power of Hindu widow to alienate—Qualified title to alienate in contracting debt by manager of estate charging it in the hands of heir—Responsibility of lender —Rate of interest, as regards necessity, distinguishable.*—A suit was brought by a creditor who had advanced money for the payment of Government revenue upon an estate under the management of a Hindu widow. The plaintiff's agent had received rents to a certain amount from part of the estate. *Held*, that the plaintiff ought to have taken care that this sum was applied in part reduction of the debt to him, and that it must be deducted from the amount chargeable to the estate in the hands of the reversionary heir. The widow was borrowing in a case where it was for the plaintiff to see whether there was actually a ground of necessity, for the loan. Though the loan was necessary, for her to borrow at the high rate of interest charged, considering the security which she gave, was not necessary. The rate of interest had therefore been rightly reduced to 12 per cent. HURRO NATH RAI CHOWDHRI v. RANDHIR SINGH, 18 C. 311 (P.C.) = 18 I.A. 15 Ind. Jur. 34 = 5 Sar. P.C.J. 642 ... 207

(3) See APPEAL (SECOND APPEAL), 19 C. 249.

(4) See HINDU LAW (GIFT), 18 C. 545.

(5) See HINDU LAW (INHERITANCE), 18 C. 69.

(6) See HINDU LAW—MARRIAGE, 19 C. 289.

———**18.—Will.**

(1) *Probate—Act V of 1881—Genuineness of, notwithstanding appearance of signatures on.*—The High Court, considering it to have been proved by the evidence that the alleged testator was incapable, by reason of illness, of signing the will as firmly as it purported to be signed, found that the

Hindu Law—18.—Will—(*Concluded*). PAGE

signatures were not genuine, and reversed the decree of the first Court which had granted probate. On appeal there was no view of the signatures, neither party having applied to have the originals transmitted or to have photographs taken of them. But their Lordships found that the evidence did not warrant the conclusion that, on the day on which the will purported to have been executed, the testator, physically and mentally, was unable to execute it; but that there was sufficient evidence to establish the genuineness of the will and the capacity of the testator to make it, and that the evidence for the defence was not sufficient to destroy the petitioner's case on either of these points. BAMASUNDARI DEBI v. TARASUNDARI DEBI, 19 C. 65 (P.C.) = 18 I.A. 132 = 15 Ind. Jur. 471 & 617 = 6 Sar. P.C.J. 66. ... 489

(2) See HINDU LAW—ADOPTION, 19 C. 453; 19 C. 513.

(3) See PRACTICE, 19 C. 582.

Husband and Wife.

See HINDU LAW—MAINTENANCE, 19 C. 84.

Ijmali Land.

See JOINT-OWNERSHIP, 19 C. 253.

Ikrarnama.

(1) See HINDU LAW—ADOPTION, 19 C. 513.

(2) See HINDU LAW—WIDOW, 19 C. 236.

Immoveable Property.

(1) See FISHERY, 19 C. 544.

(2) See LIMITATION, 19 C. 629.

(3) See TRANSFER OF PROPERTY ACT IV OF 1882), 19 C. 623.

Inam.

See MAHOMEDAN LAW (CUSTOM), 18 C. 448.

Infant.

See ARBITRATION, 19 C. 334.

Injunction.

(1) See CO-SHARERS, 18 C. 10.

(2) See FERRIES, 18 C. 652.

(3) See MAHOMEDAN LAW (CUSTOM), 18 C. 448.

Insanity.

See ACT I OF 1869 (OUDH ESTATES), 18 C. 111.

Insolvency.

(1) *Civil Procedure Code* (*Act* XIV *of* 1882), *ch.* XX—*Discharge of insolvent—Future earnings of insolvent, power of Court to compel payments out of, towards liquidation of debts.*—The function of the Court, acting under ch. XX of the Civ. Pro. Code, is to compel insolvent-debtors to pay their debts if it can, either by its compulsory process, or, where that cannot be used, by withholding from them, when it has the power of doing so, the relief to which they might otherwise be considered entitled. The granting of an order of discharge under that chapter is to a certain extent discretionary with the Court, and if the Court be of opinion that an insolvent may reasonably be expected to possess an income accruing during the time of his insolvency and likely to continue, even if such income be from sources such that it could not be attached, it ought very seriously to consider whether under such circumstances it ought to exercise its power to discharge the insolvent, and not rather stay its hands and require him as a condition of such discharge to satisfy it, by payments on account of his debts, that he really desires, so far as he can, honestly to discharge the debt that he owes. A Gyawal who was in receipt of a very considerable income derived from offerings made by pilgrims, applied to be declared an insolvent under the provisions of ch. XX of the Code of Civil Procedure.

Insolvency—(Concluded). **PAGE**

He was opposed by a judgment-creditor, who, *inter alia*, contended that the insolvent should be compelled to contribute out of his income towards the payment of his debts. The Court finding that there were no assets, and holding that such income was not property capable of being attached, and that it had no power to order an insolvent to pay anything out of future earnings towards the discharge of his debts, declared the applicant an insolvent and granted him his discharge. *Held*, that the Court had power to withhold the discharge until the insolvent had satisfied it, by payments on account of his debts, that he really desired to discharge his debts, and that under the circumstances of the case, both having regard to the fact that the enquiry into the estate of the insolvent had been insufficient, and to the fact that he was in a position to contribute out of his income towards the payment of his debts, the order was wrong and should be set aside. POONA LAL v. KANHAYA LALL BHAIA, 19 C. 730. 929

(2) *Of trading partnership—Mortgage by trading partnership of all its assets, when solvent, for advances, present and future—Change of partners with continuance of mortgage liability—Validity of mortgage security.*—If a trader assigns all his property, except on some substantial contemporaneous payment, or substantial undertaking to make a subsequent payment, that is an act of insolvency, simply because nothing is left wherewith to carry on the business; whereas, if he receives such assistance, something is left to carry on the business. A trading partnership, before its insolvency, assigned by mortgage all its assets to a creditor, who simultaneously made a substantial advance to the firm, agreeing to make future advances. *Held*, that the mortgage would have covered such assets of the then firm as were in existence at the time of the insolvency, and would not have been void, as against the other creditors, and the Official Assignee, because the assistance was substantial, and the then solvent firm was not left by the assignment without means. Another question was raised upon the facts that, after the mortgage and before the insolvency, new partners entered the firm, and new stock-in-trade was brought in. The new partners were to be under the same liability to the secured creditors, the security continuing with respect to the new firm and the after-acquired stock as it stood with respect to the old. *Held*, that this arrangement did not invalidate the prior security amounting, as it did, to a mere substitution of persons and goods at the time of the change. Also the incoming partners received substantial consideration, for although the obligation, under the former agreement with the old firm, for the rest of the advances not then made, was remitted, a new obligation was entered into, that a sum of money should be provided, which was afterwards supplied. The incoming partners got the benefit of a suretyship which the mortgagees had entered into for the former firm. These were the considerations to the incoming partners at the time. As the original contract would have been, the new one was valid against the Official Assignee. KHOO KWAT SIEW v. WOOI TAIK HWAT, 19 C. 223 (P.C.) = 19 I.A. 15 = 15 Ind. Jur. 750 = 6 Sar. P.C.J. 98 ... 594

Insolvent Act (11 and 12 Vict., C. 21).

(1) See PARTIES, 18 C. 43.

(2) S. 39—See MUTUAL CREDIT, 19 C. 146.

(3) *S. 50—Lower Burma Courts Act* (XI *of* 1889), *ss.* 50 *and* 69, *cls.* (*b*) *and* (*c*) *—Criminal Case—Reference to the High Court.*—A petition presented to the Special Court under s. 50, cl. (5) of the Lower Burma Courts Act, by a person considering himself aggrieved by an order of the Recorder sitting as Insolvency Commissioner, made under s. 50 of the Insolvent Act, comes before the Special Court as a criminal case, and is therefore to be dealt with in case of difference of opinion between the members of the Special Court, under s. 69, cl. (*c*) of the Lower Burma Courts Act. The punishment which can be awarded under s. 50 of the Insolvent Act is a punishment for something which the person to be punished has done, and is not inflicted in order to compel him to do something in the future, and the case in which it is inflicted is therefore a criminal case. YEO SWE CHOON v. THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, 19 C. 605 ... 846

Instalment Bond.

See LIMITATION ACT (XV OF 1877), 18 C. 506.

Instrument.

See LIMITATION, 19 C. 629.

Insurance.

See ACT IV OF 1879 (RAILWAYS), 19 C. 538.

Insurer.

See CARRIER, 18 C. 427.

Intention.

See HINDU LAW (INHERITANCE), 18 C. 341.

Interest.

(1) *Bond—Failure to pay on due date—Enhanced rate of interest from date of bond till date of realization—Penalty—Contract Act* (IX *of* 1872), *s.* 74.—*Held*, by the Full Bench (*Banerjee, J.*, dissenting as to part).—A provision in a bond to the effect that the principal should be repaid with interest on the due date, and that on failure thereof interest should be paid at an increased rate from the date of the bond up to the date of realization, amounts to a provision for a penalty, and s. 74 of the Contract Act applies to the money claimed at the increased rate of interest from the date of the bond until realization. *Banerjee, J.*—The decision in *Mackintosh* v. *Crow*, which regards the interest at the increased rate as a penalty is correct as to the claim of interest up to the stipulated day of re-payment, and *Baij Nath Singh* v. *Shah Ali Hossain* was wrongly decided as to this point. Section 74 of the Contract Act applies only to that part of the claim for interest which is in respect of the period from the date of the bond to the due date, and has no application to the claim for interest for the period from the due date to the date of realization. This view is in accordance with the decision in *Mackintosh* v. *Crow*. KALACHAND KAYAL v. SHIB CHUNDER ROY, 19 C. 392 (**F.B.**) ... 706

(2) *Deed of conditional sale—Interest after the date fixed for payment of principal and interest—Absence of agreement to pay such interest—Compensation for breach of contract—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 116.—Where there is no stipulation in a deed of conditional sale to pay interest, after the day fixed for the repayment of principal and interest, a claim for interest after due date is a claim for compensation for breach of contract, and a suit for the recovery of such compensation must be brought within six years from the date of the breach. GUDRI KOER v. BHUBANESWARI COOMAR SINGH, 19 C. 19 ... 459

(3) See HINDU LAW (WIDOW), 18 C. 311.

(4) See MORTGAGE (REDEMPTION), 18 C. 164.

(5) See PARTNERSHIP SHARES, 18 C. 616.

Interrogatories.

Civ. Pro. Code (*Act* XIV *of* 1882), *ss.* 121, 127, 136—*Interrogatories, omission to answer, effect of.*—Omission to answer interrogatories delivered after leave granted under s. 121 of the Civ. Pro. Code, does not render the party so omitting to answer liable to have his defence struck out under s. 136 of the Code. PREM SUKH CHUNDER v. INDRO NATH BANERJEE, 18 C. 420 (**F.B.**) ... 280

Intervenors.

See MORTGAGEE, 19 C. 48.

Intestacy.

See OCCUPANCY RAIYAT, 19 C. 790.

Irregularity.

See SALE, 18 C. 422 ; 18 C. 496.

Joinder.

Of causes of action—See CLAIM, 19 C. 615.

Joint Family Estate. PAGE

See HINDU LAW (JOINT FAMILY), 18 C. 302.

Joint Family Property.

See LIMITATION ACT (XV OF 1877), 18 C. 642.

Joint Interest.

See RIGHT OF OCCUPANCY, 18 C. 121.

Joint Landlords.

See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 593.

Joint Owners.

See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 541.

Joint Ownership.

Ijmali land, use of, as between co-owners—Rights among themselves of co-owners of joint property, where there is a profitable use of it by some or one of them without the others being excluded —Ferry worked by one of the co-owners of village lands—Second appeal, question of mixed law and fact.—Property does not cease to be joint merely because it is used so as to produce more profit to one of the joint owners, who has incurred expenditure for that purpose, than to the others, where the latter are not excluded. Joint property being used consistently with the continuance of the joint ownership and possession, without exclusion of the co-sharers who do not join in the work, there is no encroachment on the rights of any of them, as regards common enjoyment, so as to give ground for a suit. The defendant, a co-sharer in village lands without claiming to restrain competition, acted upon the right that a ferry may be established in India by a person on his own property taking toll from strangers, and that he may acquire such a right, by grant or user, over the property of others whether a co-sharer with them or not. He used property that he owned jointly with the plaintiffs, his co-sharers, excluding none of them. As no grant was ever made to him, he could only have set up an exclusive right by showing that he had either dispossessed them, or had had adverse possession for 12 years, or that he had used the ferry for 12 years as of right. The question, however, of any exclusive right in the defendant had not arisen. For the parties being co-owners, the defendant had made use of the joint property in a way quite consistent with the continuance of the joint ownership and joint possession. In regard to the exclusion of co-sharers, which there took place, and referred to as caution to be exercised by Courts in interfering with the enjoyment of joint estates as between their co-owners. The decision that the defendant's possession had been adverse having been an inference from fact in the Courts below, the correctness of this, as a legal conclusion to be drawn or not, was a question open to second appeal, and the High Court was not precluded from deciding to the contrary. Costs refused, as the defendant had set up as his defence an exclusive title in which he had failed. LACHMESWAR SINGH v. MANOWAR HOSSEIN, 19 C. 253 (P.C.) = 19 I.A. 48 = 6 Sar. P.C.J. 133 ... 614

Joint Property.

See CO-SHARERS, 18 C. 10.

Joint Proprietors.

See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 610; 19 C. 755.

Jurisdiction.

(1) *Act VI of 1871, s. 18—Sale in execution—Local limits of jurisdiction under Act VI of 1871—Practice—Form of action.*—Where a District Judge, under the authority vested in him by s. 18 of Act VI of 1871, has assigned to a Subordinate Judge the local limits of his particular jurisdiction, that officer can only exercise jurisdiction within such local limits. DAKHINA CHURN CHATTOPADHYA v. BILASH CHUNDER ROY, 18 C. 526 ... 352

(2) *Execution of Decree—Property outside jurisdiction of Court—Civ. Pro. Code (Act XIV of 1882), ss. 19 and 223 cl. (c).*—The Court that has the power to

Jurisdiction—(*Concluded*). PAGE

pass a decree for sale of a property has also power to carry out its decree by selling that property, whether any portion of that property be within the local limits of its jurisdiction or not. *Per Ghose J.*, S. 223, cl. (*c*), of the Civ. Pro. Code, leaves it to the discretion of the Court to send the decree for execution to the Court having local jurisdiction. GOPI MOHAN ROY v. DOYBAKI NANDUN SEN, 19 C. 13 ... 455

(3) *Sayer—Compensation—Malikhana—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 16.—A mortgaged at Calcutta to B his sayer compensation, payable at the General Treasury at Calcutta in respect of a certain *hat* within the Diamond Harbour sub-division. In a suit to enforce the mortgage bond in the Court of the Munsif of Diamond Harbour, held that sayer compensation did not partake of the nature of malikhana, that it was not immoveable property or any interest in immoveable property within the meaning of s. 16 of the Civ. Pro. Code, and that therefore the Munsif had no jurisdiction to entertain the suit. SURENDRO PROSAD BHATTACHARJI v. KEDAR NATH BHATTACHARJI, 19 C. 8 ... 452

(4) *Specific Performance—Letters Patent*, 1865, *cl.* 12—*Suit for land—Land situate without local limits of jurisdiction.*—A vendor, having obtained leave to sue under cl. 12 of the Letters Patent of 1865, sued in the High Court to enforce *inter alia*, the specific performance of a contract entered into by the defendant for the purchase of certain land situated in the district of Burdwan, and in the alternative for damages. *Held*, that, as far as the above-mentioned objects of the suit were concerned, the suit was not one for land within the meaning of that clause. LAND MORTGAGE BANK v. SUDURUDEEN AHMED, 19 C. 358 ... 683

(5) See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 481.

(6) See APPEAL (TO PRIVY COUNCIL), 18 C. 378.

(7) See SANCTION TO PROSECUTE, 19 C. 345.

(8) See SMALL CAUSE COURT, 18 C. 144; 18 C. 372.

(9) See SONTHAL PERGUNNAHS SETTLEMENT REGULATION (III OF 1872), 18 C. 146.

Land.

See JURISDICTION, 19 C. 358.

Land Acquisition Act (X of 1870).

See MINOR, 18 C. 99.

Landlord and Tenant.

(1) *Transfer of tenure—Contract regarding transfer of tenure—Bengal Tenancy Act* (VIII *of* 1885), *s.* 12—A transfer of a tenure made in terms of the provisions of the Bengal Tenancy Act of 1885 is not binding on the landlord if there be a contract between the landlord and tenant that the transfer shall not be valid and binding until security to the satisfaction of the landlord has been furnished by the transferee, and such security has not been furnished. The tenant is still liable for the rent. DINOBUNDHU ROY v. W. C. BONERJEE, 19 C. 774. ... 958

(2) See RENT SUIT, 19 C. 735.

Lease.

Building lease not within purview of Bengal Tenancy Act—Coal depot, lease for, not agricultural or horticulturnl within meaning of Bengal Tenancy Act (VIII *of* 1885), *ss.* 3, 4, 5—*Limitation Act* (XV *of* 1877), *sch.* II, *art.* 116.—A registered lease granted for building purposes and for establishing a coal depot does not come within the purview of the Bengal Tenancy Act, not being a lease for agricultural or horticultural purposes. The limitation applicable to a suit for the rent reserved in such a lease is that prescribed by art. 116 of the Limitation Act. RANIGANJ COAL ASSOCIATION, LIMITITED v. JUDOONATH GHOSE, 29 C. 489. ... 770

Leave to sue.

See SMALL CAUSE COURT, 18 C. 144.

Lender. PAGE

See HINDU LAW (WIDOW), 18 C. 311.

Letters of Administration.

See PRACTICE, 19 C. 582.

Letters Patent, 1865, (High Court).

(1) Cl. 12—See JURISDICTION, 19 C. 358.

(2) Cl. 15—See APPEAL—GENERAL, 18 C. 182.

Liability.

(1) See MUTUAL CREDIT, 19 C. 146.

(2) See OCCUPANCY RAIYAT, 19 C. 790.

Lien.

(1) *There is no rule of law giving a lien to a banian as against his employer, nor is there any custom to that effect.*—If the banian claims a lien he must prove its existence either by showing some express agreement, or by showing some course of dealing from which a lien can be implied. PEACOCK v. BAIJNATH AND GRAHAM v. BAIJNATH, 18 C. 573 (**P.C.**) = 18 I.A. 78 = 5 Sar. P.C.J. 651. ... 383

(2) See ATTORNEY, 19 C. 368.

Limitation.

(1) *Act* XV *of* 1877, *sch.* II, *arts.* 142, 144—*Boundaries, dispute as to—Ownership of land reclaimed from a* bhil *contested between proprietors of contiguous estates—Prior possession of land by one of two claimants—Presumption as to continuance of possession of land by original owner, limitation being pleaded by party in possession—Appellant, duty of—Burden of proof.*—In suits relating to disputed boundaries where the decision of the lower Courts as to the ownership involves questions of the correctness of surveys, map, recorded description, and other such evidence, the appellant should do more than show points requiring explanation. He should be prepared to show in what respect the decision has been wrong in regard to the evidence, and what other course would be right. The question was as to the ownership of land reclaimed from a *bhil* within the confines of one or other of two adjoining revenue mehals, the one belonging to the plaintiff, the other to the defendants, and involved the identification of the land in suit with some that had been covered with water, but of which the plaintiff's possession, with title, had been affirmed in proceedings of the revenue survey in 1857. In consequence of the nature and condition of the land there was no evidence of any act of possession done by either party during the first two years of the twelve immediately preceding the date of the institution of the suit, and during the last ten years the defendants had been in possession. The latter having tried and failed to establish adverse possessions in themselves, contended that, even if the plaintiff's possession had been shown to have existed in 1857, he could not succeed without his showing that his possession remained till later than the 9th April 1869, the suit having been filed on 9th April 1881, or unless he proved some act of dispossession by the defendants within that period. *Held*, that the presumption was in favour of the plaintiff's possession, which had been with apparent title, having in fact continued over the two years in question, as to which continuance there was no evidence to the contrary. If the burden was on the plaintiff to show possession down to within twelve years of suit, it had been discharged. RAJKUMAR ROY v. GOBIND CHUNDER ROY, 19 C. 660 (**P.C.**) = 19 I.A. 140 = 6 Sar. P.C.J. 140. ... 883

(2) *Bengal Tenancy Act* (VIII *of* 1885), s. 174—*Extension of time when Court is closed.*—When a tenure is sold for arrears of rent under the Bengal Tenancy Act of 1885, the judgment-debtor, under s. 174 of the Act, may apply to have the sale set aside on his depositing in Court for payment to the decree-holder the amount recoverable under the decree with costs, and for payment to the purchaser a sum equal to 5 per cent. of the purchase-money; and if the Court be closed on or before the last day of the period limited, the judgment-debtor may pay the said sum into Court on the

Limitation—(*Continued*). PAGE

first day the Court re-opens, notwithstanding the absence of express provision to that effect. SHOOSHEE BHUSAN RUDRO v. GOBIND CHUNDER ROY, 18 C. 231 ... 154

(3) *Ejectment, right to sue in—Order made in proceeding where a dispute exists concerning the possession of land—Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 47, 144—*Crim. Pro. Code* (*Act* X *of* 1872), *s.* 530—*Crim. Pro. Code* (*Act* X *of* 1882), *s.* 145.—A zemindar on the 3rd May 1876 agreed to let lands on lease to *A* and his co-sharers, who on the zemindar's failure to carry out the terms of the agreement, brought a suit for specific performance and obtained a decree against him in 1879. The zemindar having neglected to perform the agreement, the Court in December 1881 made an order for the execution of a pottah, and directed that the pottah should take effect from the the date of the original agreement. The pottah was executed on the 19th December 1881. In 1880 *A* instituted a proceeding under s. 530 of the Crim. Pro. Code (X of 1872), which corresponds with s. 145 of Act X of 1882 ; but the application was dismissed in December 1880. A. having failed to establish possession B, having purchased the interests of two of the co-sharers instituted a suit on the 11th May 1888 against certain persons who had been let into possession by the zemindar, the other co-sharers being added as plaintiffs. *Held*, that art. 47, sch. II, of the Limitation Act did not apply, no right to sue in ejectment being in existence in December 1889, the right with which A was clothed under the decree not having been perfected till December 1881, when the pottah was executed. *Held*, further, that the suit was not barred under art. 144, as limitation did not commence to run until the pottah had actually been executed. Art. 47 of the Limitation Act comtemplates a right to sue in ejectment being in existence at the time of the passing of an order under s. 145 of the Crim. Pro. Code. BOLAL CHAND GHOSHAL v. SAMIRUDDIN MANDAL, 19 C. 646 ... 873

(4) *Execution of decree—Civ. Pro. Code*, 1882, *s.* 373—*Dismissal of application to execute without obtaining leave to make fresh application.*—Section 373 of the Civ. Pro. Code does not apply to applications for execution of decrees. WAJIHAN *alias* ALIJAN v. BISHWANATH PERSHAD, 18 C. 462 ... 308

(5) *Instrument, suit to set aside or declare the forgery of—Immoveable property, suit for possession of—Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 91, 92, 93, 144.—One D died in 1849, leaving an ikrarnama, or will. His widows entered into possession of his property, and the survivor died on the 23rd April 1886. The predecessors in estate of the plaintiffs brought a suit to set aside the ikrarnama, which suit was dismissed in 1864, on the ground that they had no cause of action during the life-time of the surviving widow. On the 29th June, 1889 the plaintiffs, as the heirs of D after the death of the surviving widow, instituted a suit to recover possession of the property of D from the defendants, who claimed to have come into possession thereof under ths ikrarnama upon the death of the widow. *Held*, that the suit was governed by the limitation of three years for a suit to set aside an instrument, and not by the general limitation prescribed for suits to recover immoveable property, as after the widows' death the parties in possession were those claiming under the ikrarnama who could not be displaced, except by setting it aside. MAHABIR PERSHAD SINGH v. HURRIHUR PERSHAD NARAIN SINGH, 19 C. 629 ... 862

(6) *Limitation Act*, XV *of* 1877, *arts.* 62 and 97—*Money paid, suit to recover, upon failure of consideration—Consideration, failure of.*—A sale, which a member of joint-family (Mithila) had attempted to make, went off upon the objection made by other co-sharers, but not before the purchase-money had been paid. It might have been that the agreement for sale was not void from the begining, but was only void upon objection being made ; and if it was only voidable, the consideration did not fail at once at the time of the receipt of the purchase-money, so as to render it money had and received to the use of the payer within the meaning of art. 62 of sch. II of Act XV of 1877. But it failed, at all events, when the purchaser being opposed found himself unable to obtain possession. He would have had a right to sue at that time to recover his purchase-money upon a failure of consideration. And, therefore, the case appeared to

Limitation—(*Concluded*). PAGE

fall within art. 97. It must fall either within that article or within art. 62. HANUMAN KAMAT v. HANUMAN MANDUR, 19 C. 123 (P.C.)=18 I.A. 158=6 Sar. P.C.J. 91. ... 527

(7) *Plaint insufficiently stamped—Practice—Date of institution of suit—Presentation of plaint insufficiently stamped—Court fees, payment of requisites, on a date subsequent to that on which plaint was presented, effect of, on period of limitation.*—The date of the institution of a suit should be reckoned from the date of the presentation of the plaint and not from that on which the requisite Court-fees are subsequently put in, so as to make it admissible as a plaint. MOTI SAHU v. CHHATRI DASS, 19 C. 780.

(8) See ACT IV OF 1876 (CALCUTTA MUNICIPAL CONSOLIDATION, BENGAL), 18 C. 91.

(8-*a*) See ACT VIII OF 1885 (TENANCY, BENGAL), 19 C. 1.

(9) See ADVERSE POSSESSION, 19 C. 787.

(10) See EXECUTION OF DECREE, 18 C. 515.

(11) See HINDU LAW—INHERITANCE, 18 C. 341.

(12) See MERGER, 19 C. 760.

(13) See RES JUDICATA, 19 C. 159.

Limitation Act (XV of 1877).

(1) *Ss.* 5, 6.—Where parties are prevented from doing a thing in Court on a particular day, not by an act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity. PEARY MOHUN AICH v. ANUNDA CHARAN BISWAS, 18 C. 631 ... 421

(2) *S.* 10, *and sch.* II, *arts.* 62 *and* 145—*Act* XI *of* 1859, *s.* 31—*Suit to recover surplus sale proceeds of a sale for arrears of Goevernment revenue.*—Where *A* instituted a suit in November 1889 to recover from the Secretary of State for India in Council the surplus sale proceeds of three taluks sold for arrears of Government revenue on the 3rd of October 1877 and which were in the hands of the Collector, *held*, that the suit was governed by art. 62, sch. II of the Limitation Act, and was therefore barred. *Held* also, that s. 31 of Act XI of 1859 did not vest the surplus sale proceeds in the Collector as trustee, that a deposit did not necessarily create a trust, and that therefore s. 10 did not apply. *Held* further, that the Collector was not a depository of the money within the meaning of art. 145 of sch. II. SECRETARY OF STATE FOR INDIA IN COUNCIL v. FAZAL ALI, 18 C. 234 ... 157

(3) *S.* 14—*Computation of period of limitation—Suits for arrears of rent—Act* X *of* 1859. The provisions of s. 14 of Act XV of 1877 are not applicable to suits for arrears of rent under Act X of 1859. NAGENDRO NATH MULLICK v. MATHURA MOHUN PARHI, 18 C. 368 (F.B.) ... 246

(4) S. 23.—See FERRIES, 18 C. 652.

(5) Sch. II, arts. 47, 144—See LIMITATION, 19 C. 646.

(6) Arts. 62 and 97—See LIMITATION, 19 C. 123.

(7) *Arts.* 74, 116—*Registered instalment bond, suit on—Contract in writing registered.*—Article 116 of the Limitation Act is applicable to a suit on a registered instalment bond, notwithstanding the express provisions of art. 74. That art. (116) is intended to apply to all contracts in writing registered, whether there is or is not an express provision in the Limitation Act for similar contracts not registered. DIN DOYAL SINGH v. GOPAL SARUN NARAIN SINGH, 18 C. 506 ... 337

(8) Arts. 91,92,93, 144—See LIMITATION, 19 C. 629.

(9) Art. 116—See INTEREST, 19 C. 19.

(10) Art. 116—See LEASE, 19 C. 489.

(11) *Arts.* 120,124—*Shebait nominated to office, limitation to suit brought to oust—Suit to oust a shebait from office, the appointment to which is made by nomination.*—A suit to oust a shebait from his office, the appointment to which has been made by nomination, is one for which no period of limitation is specially provided, and is therefore governed by art. 120 of sch. II of the Limitation Act. The plaintiff, as shebait of a certain

Limitation Act (XV of 1877)—(*Continued*). PAGE

Hindu endowment, instituted a suit to set aside certain leases and alienations created by one who had formerly been shebait, but who, it was alleged, had relinquished and abandoned the office, on the ground that such leases and alienations were void and not binding on the endowment, and he sought to obtain khas possession of the lands occupied by the defendants under such leases and alienations. Although it was admited that the plaintiff had held possession as shebait, and managed the properties connected with the endowment for more than ten years, on the nomination of the Hindu residents of the locality, the defendants put the plaintiff to proof of his title as shebait. The lower Courts found that the plaintiff had failed to prove his title, and, holding that on this ground he had no *locus standi*, dismissed the suit. *Held*; that as a suit to oust the plaintiff from his office would have been barred by limitation by reason of his having held the office for a period exceeding that provided by the law of limitation, he had acquired a complete title for the purposes of any litigation connected with the affairs of the endowment, and that the suit had been wrongly dismissed on the ground that the plaintiff had failed to prove his title. JAGAN NATH DASS v. BILBHADRA DASS, 19 C. 776 ... 960

(12) *Arts.* 127, 142 *and* 144—*Suit by a person claiming share in joint family property.*—The word 'person' mentioned in art. 127 of schedule second to the Limitation Act means some person claiming a right to share in joint-family property, upon the ground that he is a member of the family to which the property belongs. KARTIC CHUNDER GHUTTACK v. SARODA SUNDURI DEBI, 18 C. 642 ... 428

(13) Arts. 142, 144—See LIMITATION, 19 C. 660.

(14) *Art.* 144—*Symbolical possession.*—The plaintiff Gossain Dalmar Puri's predecessor in title, one Gossain Lachmi Narain Puri, acquired the share of two annas and 8 pies in certain mouzahs by purchase at a sale held in execution of his own decree against one Het Narain Singh, and in September 1874 obtained symbolical possession. In December 1874, Het Narain Singh and his co-sharers granted a perpetual lease to one Gokulanund, reserving a nominal rent. Subsequently Gossain Lachmi Narain Puri brought a suit for possession of the 2 annas and 8 pies share against Het Narain Singh and his co-sharers, and after the death of Gossain Lachmi Narain Puri, Gossain Dalmar Puri obtained a decree. In March 1882, Gossain Dalmar Puri obtained symbolical possession in execution of that decree. On the 29th January 1887, Bepin Behary Mitter purchased at a sale in execution of a decree against Gokulanund the right of the latter as lessee, and obtained, through the Court, symbolical possession of the same. Gossain Dalmar Puri then instituted this suit to recover possession of the said 2 annas and 8 pies share against Bepin Behary Mitter, and Gokulanund in December 1887, that is, 13 years after the grant of the lease by Het Narain Singh and his co-sharers to Gokulanund. The defence set up was limitation. *Held*, that the suit was barred by limitation. *Held* also, that when the lease purports to be a perpetual lease without reversion to the grantors, and no rights reserved to them, but only a nominal rent, symbolical possession as against the grantors would not be effective against the lessee, and thus save the bar in limitation. GOSSAIN DALMAR PURI v. BEPIN BEHARY MITTER, 18 C. 520 ... 347

(15) *Art* 178—Applications for probate, or letters or certificates of administration, do not fall within the provisions of art. 178 of the Limitation Act. KASHI CHUNDRA DEB v. GOPI KRISHNA DEB, 19 C. 48 ... 478

(16) Arts. 178, 179—See MESNE PROFITS, 19 C. 132.

(17) *Art.* 179, *para.* 2—*Execution of decree—Appeal by plaintiff against part of decree making all defendants respondents—Execution of part of decree not appealed against.*—On the 23rd March 1886 the plaintiff obtained a decree in the Court of first instance against five defendants, declaring his right to certain specific immoveable property, which was, however, modified on an appeal preferred by the defendants, the decree of the lower appellate Court giving the plaintiff a decree for only two-thirds of the property claimed, and dismissing his suit in respect of the remaining one-third in favour of defendants Nos. 2 and 4. The lower appellate Court's decree was dated the 13th July 1886. Against that decree plaintiff preferred a second appeal

Limitation Act (XV of 1877)—(*Concluded*). PAGE

to the High Court, making all the defendants respondents, which appeal was, however, dismissed on the 16th June 1887. The plaintiff on the 13th June 1890 applied for execution of the decree in his favour in respect of the two-thirds of the property held to belong to him, and defendants Nos. 1 and 5 objected on the ground that the right to execution was barred, limitation running from the 13th July 1886, the date of the lower appellate Court's decree in the plaintiff's favour. *Held*, that limitation ran from the 16th June 1887, and that the application was therefore not barred. All the defendants were parties to the second appeal, and the Court to which the application was made for execution was not bound before allowing execution, to go into all the circumstances of that appeal and consider whether the decree of the lower appellate Court in favour of the plaintiff for the two-thirds of the property was or was not practically secure; the High Court had all the parties before it, and, if it had been right to do so, might have altered the decree against any of them. *Quære*:—Whether under such circumstances the Legislature could have intended the Court executing a decree to go into questions so complicated as to whether in such a case the whole decree was or might have been or become imperilled in the Court of appeal, and whether the plaint words of art. 179 might not be followed with less of possible inconvenience and complexity, even though in some cases it might result in execution of a decree going against a defendant a little more than three years after such decree was practically secure against him. KRISTO CHURN DASS *v.* RADHA CHURN KUR, 19 C. 750 ... 942

Liquidator.

Of—See COMPANY, 18 C. 31.

Lis Pendens.

See SALE, 18 C. 188.

Local Limits of Jurisdiction.

See JURISDICTION, 18 C. 526.

Magistrate.

Power of—District Magistrate, power of, to order further enquiry—Improper discharge — Sessions Case, further enquiry directed in — Crim. Pro. Code (Act X of 1882), ss. 436, 437.—It is competent to a District Magistrate, who has issued a notice to an accused person who in his opinion has been improperly discharged to show cause under s. 436 of the Crim. Pro. Code, why he should not be committed to the Court of Sessions, on cause being shown to order a further enquiry under the provisions of s. 437. QUEEN-EMPRESS *v.* MANIRUDDIN MUNDUL, 18 C. 75 ... 51

Mahomedan Law.

1.—CUSTOM.
2.—DOWER.
3.—GIFT.
4.—MARRIAGE.
5.—WAKF.
6.—WILL.

——1.—Custom.

Public worship in mosque—Injunction restraining defendants from interrupting religious ceremonies in a musjid—Right of Imam and of Matwali to be protected in their offices—Differences of opinion between the Imam and certain of the worshippers as to observances at prayer.—Among Sunni Mahomedans neither on the ground of any general and express rule of Mahomedan law, nor on the ground of the growth of customs separating different schools in so marked a manner that the followers of one school could not properly worship with those of another, did the introduction by the Imam of (*a*) the loudtoned Amen, and of (*b*) the Rafadian, show such a change of tenets. Nor was it in itself such an important departure from the custom of Sunnis as that it would disqualify the Imam for officiating in a musjid where those ceremonies had not previously been used. Nor did the introduction of (*a*) and of (*b*) justify a section of the worshippers in

Mahomedan Law—1.—Custom—(*Concluded*). PAGE

setting up another leader of prayer at the same time that prayer was being conducted by the duly authorized Imam. On the lower appellate Court's findings of fact there was nothing in the constitution of the mosque which prohibited the adoption of (*a*) and (*b*) and those findings were conclusive. For the purpose, however, of considering the case from other points of view, their Lordships examined the whole of the evidence, and they agreed with the Subordinate Judge that there was no evidence showing that the mosque was not intended for the worship of all Sunnis or for all Mahomedans. Nor was there any rule of law that, when public worship had been performed in a certain way for twenty years, there could not be any variation, however slight, from that way. The question in each case of dispute must be as to the magnitude and importance of the alleged departure. There had not been produced any text to show that a follower of Abu Hanifa would do wrong in following a practice recommended by others of the four Imams. Nor was there any usage having the force of law among Sunni communities, forbidding the introduction of (*a*) and (*b*) into ceremonial prayer, as shown by the evidence of learned Mahomedans, and by proof of their actual practice. The Court ought not to declare that the Imam or Matwalis of musjid had authority to eject the dissentients, if and when they interfered. The plaintiffs must rely on the prohibitory order or injunction, which could be enforced according to law if the occasion arose. FAZAL KARIM v. MAULA BAKSH, 18 C. 448 (**P.C.**) = 18 I. A. 59 = 15 Ind. Jur. 155 = 6 Sar. P.C.J. 19 ... 299

————**2.—Dower.**

Oudh, *Law of, relating to reduction in amount of dower—Determination of amount of deferred dower recoverable from representatives of deceased husband married in, but a non-resident of Oudh, not affected by law of that Province—Evidence Act* (I *of* 1872), *s.* 32, *cl.* (2)—*Entry in Mahomedan marriage register of amount of dower, admissible in evidence to prove amount fixed*.—A Mahomedan, a resident in Patna, since deceased, married the plaintiff, while he was for a time in Lucknow where she lived. Upon her claim, as his widow, for her deferred dower, it was found to have been contracted for at the amount alleged by her. The question of the amount of her dower was held to be determinable, without reference to a usage having the force of law in Oudh, rendering dower reducible in certain cases by the Court. The place of celebration of the marriage did not make this applicable. A register of marriages kept by the Istahad, since deceased, who celebrated this marriage, in which register was entered the amount of the dower, was held to be admissible and relevant, as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within s. 32, cl. (2) of the Evidence Act, 1872. ZAKERI BEGUM v. SIKINA BEGUM, 19 C. 689 (**P.C.**) = 19 I.A. 157 = 6 Sar. P.C.J. 213 ... 902

————**3.—Gift.**

See MORTGAGE (REDEMPTION), 18 C. 164.

————**4.—Marriage.**

See BIGAMY, 18 C. 264 ; 19 C. 79.

————**5.—Wakf.**

(1) *Construction of—Dedication of property with temporary intermediate interests—Uncertain contingency.*—To constitute a valid wakf, there must be a dedication in favour of a religious or charitable purpose, although there may be a temporary intermediate application of the whole or part of the benefits thereof to the family of the appropriator or waki, and the dedication must not depend upon an uncertain contingency, such as the possible extinction of the waki's family. RASAMAYA DHUR CHOWDHURI v. ABUL FATA MAHOMED ISHAK, 18 C. 399 ... 267

(2) *Sajjadanashin—Mutwali—Minor, appointment of, as Sajjadanashin.*—In order to constitute a *wakf*, it is not necessary to use the word *wakf*.—So long as it appears that the intention of the donor is to set apart any specific property or the proceeds thereof for the maintenance or support in perpetuity of a specific object or of a series of objects recognized as pious by Mahomedan Law, it amounts to a valid and binding dedication. The respective

Mahomedan Law—5.—Wakf—(*Concluded*). PAGE

duties of *sajjadanashin* and *mutwali* discussed. The mode of appointment of *sajjadanashin* referred to. *Semble.* A minor cannot be appointed the *sajjadanashin* of a *durgah* or shrine. PIRAN v. ABDOOL KARIM, 19 C. 203 ... 581

(3) *Settlement in favour of the settler's family with the reservation of a life-interest in part of the whole of the income for the settler—"Charitable"—Religious."*—A wakf in favour of the settler's children and kindred in perpetuity, with a reservation of a part or the whole of the income thereof in favour of the settler for his own use during his lifetime, is valid. In the construction of a deed of a wakf, the words " charitable" and 'religious' must be taken in the sense in which they are understood in Mahomedan law. MEER MAHOMED ISRAIL KHAN v. SASHTI CHURN GHOSE, 19 C. 412 ... 719

———6.—Will.

Revocation of—Evidence as to revocation of a Will—Onus of proof of revocation of Will—Will, construction of, as to whether payment of a legacy was to be out of a particular fund, or out of general assets—Demonstrative legacy.—A will, duly executed, is not to be treated as revoked, either wholly or in part, by a will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the will contained either words of revocation, or dispositions so inconsistent with those of the earlier will, that the two cannot stand together. It is not enough to show that the will which is not forthcoming differed from the earlier one, if it cannot be shown in what the difference consisted. It is also settled that the burden of proof lies upon him who challenges the existing will. These propositions are of general application. Payment of legacies, or gifts of stipends, having been refused by the representatives of the testatrix, on the ground that she had no power to dispose of the fund out of which the will must be construed to direct their payment :—*Held*, on a consideration of the whole will, that the words of the gift were wide enough to charge them upon the whole of her moveable estate; also, that if the words of the will were to be taken in a more restricted sense, the gift of the stipends must be regarded as a demonstrative legacy, and in that view they would be payable out of the general estate, on failure of the particular fund pointed out. SAHIA MIRZA v. UMDA KHANAM, 19 C. 444 (P.C.)=19 I.A. 83=6 Sar. P.C.J. 180=Rafique and Jackson's P. C. No. 126 ... 740

Malikhana.

See JURISDICTION, 19 C. 8.

Manager.

See ACT IX OF 1879 (THE COURT OF WARDS, BENGAL), 18 C. 500.

Map.

See EVIDENCE, 18 C. 224.

Marriage.

See DISSOLUTION OF MARRIAGE, 18 C. 252.

Medical Witness.

See EVIDENCE, 18 C. 129.

Memorandum of Appeal.

See COURT FEE, 19 C. 747.

Menukyay.

Authority of—See DIVORCE, 19 C. 469.

Merger.

Of putni interest in zamindar who purchases it—Putni interest, merger of, in that of zemindar—Co-sharer—Rent suit—Parties to suit, transfer of defendants to category of plaintiff, effect of—Limitation—Land Registration Act (Bengal Act VII *of* 1876), s. 78.—The doctrine of merger does not apply to the case of a putni interest coming into the same hands as the zemindari interest. *A* and *B*, two joint zemindars, having brought a putni within their zamindari to sale for arrears of rent, purchased it themselves. During

Merger—(*Concluded*). PAGE

the existence of the putni a durputni had been created of which *C* was in possession. *A* instituted a suit against *C* to recover arrears of rent of the durputni for a period of three years, setting up his claim thereto both as zemindar and putnidar, and joined *B* as a *pro forma* defendant, alleging that he was away from home at the time of the institution of the suit, and could not therefore join as a co-plaintiff. It appeared that *A*'s proprietary interest was registered under the provisions of Bengal Act VII of 1876 (the Land Registration Act), but that *B*'s interest had not been so registered. Prior to the suit coming on for hearing but after the right to recover the rent for the first two out of the three years in suit had become barred by limitation, assuming no suit to have been brought, *B* was transferred from the category of defendant in the suit into that of co-plaintiff. In answer to the suit *C* pleaded limitation, and also contended that the non-registration of *B*'s interest precluded the plaintiffs from maintaining the suit at all, *A*'s share not being specified, having regard to the provision of s. 78 of the Act. The lower appellate Court having dismissed the suit on this latter ground, and also held that the right to recover the rent for the first two out of the three years in suit was barred by limitation. *Held*, on second appeal, that the right of the plaintiffs as putnidars did not merge in their right as zemindars, and that the Land Registration Act had therefore no application to the case, the plaintiffs being entitled to maintain the suit *qua*, putnidars. *Held*, further, that when *B* was sued as a party-defendant he was made a party in violation of the rule applied in 17 C. 160, and that the suit was not therefore in the first instance properly brought, *B* not being properly on the record at all. That the effect of making *B* co-plaintiff was practically to institute a new suit on the date when he was so changed into co-plaintiff, and that the suit had been rightly dismissed on the ground of limitation, so far as the rent of the first two years was concerned, but that the plaintiffs were entitled to a decree for the rent in respect of the third year, which was not barred by limitation at the time *B* was made co-plaintiff. JIBANTI NATH KHAN v. GOKOOL CHUNDER CHOWDHRY, 19 C. 760 ... 948

Mesne Profits.

(1) *Application for ascertainment of—Limitation Act* (XV *of* 1877), *arts.* 178 *and* 179—*Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 211, 212.—Neither art. 178 nor art. 179 of the Limitation Act applies to an application to ascertain the amount of mesne profits awarded by a decree in accordance with the provisions of s. 211 or 212 of the Code of Civil Procedure. PURAN CHAND v. ROY RADHA KISHEN, 19 C. 132 (**F.B.**) ... 535

(2) *Evidence—Presumption of fact.*—In determining the mesne profits upon alluvial land gained by accretion and decreed to the respondents, the amount of such profits depending upon the quantity of land that had been under cultivation during a definite period, the Courts below found that, at the end of that time, an area of a certain number of bighas was cultivated land. There was no evidence, however, to show what had been the increase year by year of the area cultivated; and, on this question, the appellants, objecting to the amount of the mesne profits assessed by the Court, could have produced evidence consisting of the papers usually kept in a zemindar's serishta, showing how gradual the increase had been. But these documents they withheld. *Held*, that, on the above facts, the Courts had properly presumed against them, that the entire area of all the bighas abovementioned had come under cultivation from the beginning of the period. MAHABIR PERSHAD v. RADHA PRASAD SINGH, 18 C. 540 (**P.C.**) =6 Sar P.C.J. 16 ... 361

(3) See APPEAL (SECOND APPEAL), 18 C. 316.

(4) See RES JUDICATA, 19 C. 159.

Minor.

(1) *Guardian, powers of, to deal with minor's estate—Application of the Land Acquisition Act.* 1870, *to the land of a minor—Insufficiency of compliance with the other requirements of the Act, without actual compensation to the minor's estate—Recovery of land by minor on coming of age.*—The guardian of the minor's estate has no power to waive a right to compensation

Minor—(Concluded). PAGE

for part of the estate taken under the Land Acquisition Act, 1870; although the owner, had he been of full age might have waived it. Although the Court of Wards had no power to alienate the land of a minor of whose estate it had charge, yet possession might have been lawfully taken of the land for a public purpose, under and in conformity with the Land Acquisition Act, 1870, if there had been due compliance with the provisions of the Act, as regards compensation to the minor's estate. Where, however, compensation had not been given, and a merely nominal consideration had passed, the Collector not having acted, as the representative of the Court of Wards, so as to protect the interests of the minor, *held*, that no valid title to the land was established as against the ward, and that on his attaining full age he could recover it with mesne profits. LUCHMESWAR SINGH v. CHAIRMAN OF THE DARBHANGA MUNICIPALITY, 18 C. 99 (P.C.)=17 I.A. 90=5 Sar. P.C.J. 504 ... 67

(2) See CONTRACT, 18 C. 259.

(3) See GUARDIAN AND WARD, 19 C. 507.

(4) See GUARDIANSHIP, 19 C. 301.

(5) See HINDU LAW (INHERITANCE), 18 C. 69.

(6) See MAHOMEDAN LAW (WAKF), 19 C. 203.

Mitakshara Family.

See PARTIES, 18 C. 86.

Mitakshara Law.

(1) See GUARDIANSHIP, 19 C. 301.

(2) See HINDU LAW (ADOPTION), 18 C. 385.

(3) See HINDU LAW (INHERITANCE), 18 C. 151; 18 C. 341.

(4) See HINDU LAW (JOINT FAMILY), 18 C. 157; 19 C. 401.

Mortgage.

1.—GENERAL.
2.—BY CONDITIONAL SALE.
3.—CONTRIBUTION.
4.—REDEMPTION.
5.—SALE.

————**1.—General.**

(1) See HINDU LAW (JOINT FAMILY), 19 C. 401.

(2) See INSOLVENCY, 19 C. 223.

————**2.—By Conditional Sale.**

See INTEREST, 19 C. 19.

————**3.—Contribution.**

See TRANSFER OF PROPERTY ACT (IV OF 1882), 18 C. 320.

————**4.—Redemption.**

Redemption of prior mortgage by puisne mortgagee—Sale, at his suit, of mortgaged property, on what terms, and with payment of what incumbrances—Purchases before and during mortgagee's suit and after decree therein how affected by it—Interest on mortgage debt, when reducible by the decree from its date; and when continuing payable at the contract rate—Execution of decree—Civ. Pro. Code, s. 266—Attachment of future estate—Construction, according to Mahomedan law, of grant of such estate.—Upon a claim by a puisne mortgagee, to redeem prior incumbrances, and in the alternative, for a decree ordering a sale of the property mortgaged, the sale was decreed, with application of the purchase-money to pay incumbrances in their due order; and with redemption by the plaintiff of a prior mortgagee, who was to have an adoption to redeem. Previously to the mortgage, a fractional interest in the property (which interest was purchased by the plaintiff at a judicial sale, had been the subject of a settlement by a Mahomedan on his wife, under the condition that if he should have no child by her, his two sons by another wife should each have an estate therein. He died without other children. *Held*, that the two sons had taken definite interest

Mortgage—4.—Redemption—(*Concluded*). PAGE

capable of being attached, within s. 266 of the Civ. Pro. Code, not being mere expectancies. *Held*, also, that a judicial sale of property, purporting to be of all the interest of a judgment-debtor, carries with it any enlargement thereof that may have occurred after the attachment and before the sale; and that, accordingly, the abovementioned settler having died without a child by that wife between the date of the attachment and the sale, the sons, augmented interests passed thereby. The plaintiff in this suit had succeeded to four, out of five, mortgages, subsequent to his own, which had been executed before a decree obtained by a mortgagee. This decree had been purchased by the first defendant who also bought the property at the execution sale. The plaintiff had also succeeded to several mortgages executed pending the suit in which the decree was made. *Held*, that a distinction must be made in respect of whether the mortgages so transferred to the plaintiff had been executed before or after the bringing of the above suit. As regards the mortgages, executed before it, the plaintiff, not having been a party to that suit, was entitled to redeem the first defendant who was purchaser of the decree. As regards the mortgages executed after that suit was brought, the plaintiff was bound by the decree, and his interest in the mortgages transferred *pendente lite*, passed to the purchaser. On the other hand, persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit, between the prior mortgagee and the mortgagor, to which they have not been made parties. As regards the Court's power to regulate the interest, *held*, that although in the decree for sale, the rate of interest on the debt, payable to the mortgage decree-holder was reducible from the date of the decree from the rate stipulated, to the Court rate, an order to that effect could only be made for the benefit of the judgment-debtor, as a party to the suit. The plaintiff, seeking to redeem a mortgage prior to the suit, must pay the interest at the rate agreed upon in the mortgage; there being no authority, either under s. 10 of Act XXIII of 1861, or under the Civ. Pro. Code, s. 209, to reduce into the Court rate. UMES CHUNDER SIRCAR v. ZAHUR FATIMA, 18 C. 164 (P.C). = 17 I.A. 201 = 5 Sar P.C.J. 507 ... 110

———5.—Sale.

See MORTGAGE (REDEMPTION), 18 C. 164.

Mortgagee.

(1) *Who has obtained leave to bid, position of—Mortgage, suit on—Civ. Pro. Code, Act* XIV *of* 1882, *s.* 294—*Satisfaction not calculated on what mortgaged premises are worth, but on what they fetch—Credit for amount bid.*—A decree-holder (a mortgagee) who has, after obtaining leave to bid at a sale, purchased the mortgaged premises, is in the same position as an independent purchaser and is only bound to give credit to the mortgagor for the actual amount of his bid. GUNGA PERSHAD v. JAWAHIR SINGH, 19 C. 4 ... 449

(2) Mortgagees of the estate of a deceased person have an interest in such estate entitling them to intervene and be heard in opposition to an application made to withdraw probate. KASHI CHUNDRA DEB *v.* GOPI KRISHNA DEB, 19 C. 48 ... 478

Mostajiri Lease.

See RIGHT OF OCCUPANCY, 18 C. 349.

Municipal Elections.

See ELECTION LAW, 19 C. 192

Murder.

See PENAL CODE (ACT XLV OF 1860), 18 C. 484.

Mutual Credit.

St. 11 *and* 12, *Vic., c.* 21, *s.* 39—*Liability of drawer before dishonour—Dishonour of bill of exchange—Vesting order—Insolvency—Costs of suit in two extensive claims where claim denied* in toto.—There is no debt due by a drawer of a bill-of-exchange until dishonour. A mutual credit within the meaning of s. 39 of the Insolvent Act must in its nature terminate in a date. MILLER v. NATIONAL BANK OF INDIA, 19 C. 146 ... 548

PAGE

Mutual Rights.

See PLEDGE, 19 C. 322.

Mutwalli.

(1) See MAHOMEDAN LAW—CUSTOM, 18 C. 448.

(2) See MAHOMEDAN LAW—WAKF, 19 C. 203.

Nagdi Rent.

See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 467.

Negligence.

(1) See CARRIER, 18 C. 427.

(2) See CHILD—WIFE, 18 C. 24.

Negotiable Instruments Act (XXVI of 1881).

Ss. 30, 37, 94—See MUTUAL CREDIT, 19 C. 146.

New Trial.

See SMALL CAUSE COURT, 18 C. 83.

Non-publication.

See PUTNI TALUQ, 19 C. 703.

Notice.

(1) Of application—See DIVORCE, 18 C. 473.

(2) Of application to make decree absolute—See PRACTICE, 18 C. 443.

(3) Of motion—Not given in application for decree absolute—See PRACTICE, 18 C. 539.

(4) Of sale—Defect in service of—See SALE, 18 C. 125.

(5) Of sale of putni taluq, onus of proof of publication of—See PUTNI TALUQ, 19 C. 699.

(6) Of sale—Publication of—See SALE, 18 C. 363.

(7) Of suit—See ACT IV OF 1876 (CALCUTTA MUNICIPAL CONSOLIDATION ACT, BENGAL), 18 C. 91.

(8) Of transfer of tenure—See TRANSFER, 19 C. 17.

(9) To quit—Tenant holding over after—See RECEIVER, 18 C. 477.

Notification.

See STAMP ACT (I OF 1879), 18 C. 39.

Nuisance.

See CRIM. PRO. CODE (ACT X OF 1882), 19 C. 127.

Objects and Reasons.

Of Bill, reference to—See FISHERY, 19 C. 544.

Occupancy Raiyat.

Intestacy—Liability of the heirs of a deceased occupancy raiyat to pay rent—Surrender of holding—Bengal Tenancy Act (VIII *of* 1885), *ss.* 5, 26 *and* 86.—The heirs of an occupancy raiyat, dying intestate, are liable to pay rent, whether they occupy the land or not until they surrender the holding in the manner prescribed by s. 86 of the Bengal Tenancy Act, 1885. PEARY MOHUN MOOKERJEE v. KUMARIS CHUNDER SIRKAR, 19 C. 790. 970

Office of Shebait.

See HINDU LAW—ADOPTION, 19 C. 513.

Officer.

(1) See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 255.

(2) See SONTHAL PERGUNNAHS, 18 C. 133.

Official Assignee.

See PARTIES, 18 C. 43.

Omission. PAGE

(1) To answer interrogatories—See INTERROGATORIES, 18 C. 420.

(2) To prove that accused was sworn or affirmed before giving his evidence—See FALSE EVIDENCE, 19 C. 355.

(3) To state time when order is to take effect—See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 467.

Order.

(1) Commuting Bhowli to Nagdi rent—See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 467.

(2) Confirming sale—See APPEAL (SECOND APPEAL), 18 C. 422.

(3) Declaring the rights of parties to a partition in certain specific shares appealable before actual partition made—See APPEAL (GENERAL), 19 C. 463.

(4) Giving leave to sue under s.18—Act XX of 1863—See HINDU LAW—RELIGIOUS ENDOWMENT, 19 C. 275.

(5) Made in proceeding where a dispute exists concerning the possession of land—See LIMITATION, 19 C. 646.

(6) Of Judge in Privy Council Department refusing to extend time for furnishing security for cost—See APPEAL—GENERAL, 18 C. 182.

(7) Refusing leave to sue—See APPEAL—GENERAL, 18 C. 382.

(8) Refusing to remove a guardian—See APPEAL—GENERAL, 19 C. 487.

(9) See APPEAL—GENERAL, 18 C. 469.

Oudh Law.

See MAHOMEDAN LAW, (DOWER), 19 C. 689.

Ownership.

See LIMITATION, 19 C. 660.

Parties.

(1) *Insolvent Act* (11 *and* 12 *Vict.*, *cap.* 21)—*Official Assignee made a party-defendant.*—In a suit in the mofussil the defendant having been adjudicated an insolvent under the Indian Insolvent Act (11 and 12 Vict., c. 21), the Official Assignee was placed upon the record as a defendant, and judgment was entered against him for the sum claimed to be paid out of the insolvent's estate. *Held*, that the Official Assignee was not a proper party, there being nothing in the Insolvent Act which enables a suit of this kind to be continued against the Official Assignee. MILLER v. BUDH SINGH, DUDHURIA, 18 C. 43 ... 29

(2) *Joinder of parties—Partnership—Debt—Representatives of a deceased partner—Mitakshara family—Contract Act* (IX *of* 1872), *s.* 45—*Succession Certificate Act* (VII *of* 1889).—In a suit by surviving partners for the recovery of a partnership debt which became due during the life of a deceased partner, the representatives of such deceased partner, having regard to s. 45 of the Contract Act (IX of 1872), are necessary parties; and the provisions of s. 4 of the Succession Certificate Act (VII of 1889) must be complied with in order that the suit may be properly constituted. *Quære*—whether in the case of a family partnership under the Mitakshara law a question might arise as to the applicability of s. 45 of the Contract Act and s. 4 of the Succession Certificate Act (VII of 1889). RAM NARAIN NURSING DOSS v. RAM CHUNDER JANKEE LOLL, 18 C. 86 ... 58

(3) See MERGER, 19 C. 760.

Partition Proceedings.

See PRACTICE, 18 C. 199.

Partner.

(1) Change of, with continuance of mortgage liability—See INSOLVENCY, 19 C. 223.

(2) Representative of—See PARTIES, 18 C. 86.

Partnership Debt.

See PARTIES, 18 C. 86.

Partnership Shares. PAGE

Interest—Civ. Pro. Code (*Act* XIV *of* 1882), *S.* 32.—The parties to the suit, the heirs and representatives of the original parties, a family carrying on a banking business, made and acted, upon a new arrangement of their shares, the amounts of which were found in the first Court, and affirmed on appeal. A decree for an account and an award of interest at 12 per cent. on the amounts found to be due upon the shares from the date of the closing of the business was maintained. MUTIA CHETTI v. A. V. SUBRAMANIAN CHETTI, 18 C. 616 (P.C.)=15 Ind. Jur. 472=6 Sar. P.C. J. 49. ... 410

Patwari.

Is not a public servant—See EVIDENCE, 18 C. 534.

Payments.

See ATTACHMENT, 18 C. 216.

Penal Code (Act XLV of 1860).

(1) Ss. 24, 25, 415, 471—See FORGERY, 19 C. 380.

(2) Ss. 71, 148, 152, 332, 333—See CUMULATIVE SENTENCES, 19 C. 105.

(3) S. 124-A—See DISAFFECTION, 19 C. 35.

(4) *S.* 186—*Public Servant—Ameen appointed under Bengal Tenancy Act* (VIII *of* 1865), *s.* 69—*Bengal Tenancy Act, s.* 89.—A person nominated by the Collector under s. 69 of the Bengal Tenancy Act, for the purpose of making a division of crops between the landlord and the tenant, is not a public servant within the meaning of s. 186 of the Penal Code. CHATTER LALL v. THACOOR PERSHAD, 18 C. 518 ... 346

(5) Ss. 191, 193—See FALSE EVIDENCE, 19 C. 355.

(6) *S.* 300, *cl.* 5, *and ss.* 149 *and* 307—*Murder, attempt to commit—Rioting armed with deadly weapons—Pre-arranged fight.*—In a case in which it was found that all the accused were guilty of rioting armed with deadly weapons, that the fight was premeditated and pre-arranged, a regular pitched battle or trial of strength between the two parties concerned in the riot, and that one of the accused in the course of the riot, and in prosecution of the common object of the assembly, killed or attempted to kill a man under such circumstances that his act amounted to an attempt to murder, the question arose whether that act could be said to bear a less grave character by reason of exception 5 to s. 300 of the Indian Penal Code. *Per Curiam held*, that upon such finding the case did not fall within the exception, *Per Piggot, J.* (*Petheram, C.J.* and *Macpherson, J.* concurring)—The 5th exception to s. 300 should receive a strict and not a liberal construction: and in applying the exception it should be considered with reference to the act consented to or authorized and next with reference to the person or persons authorized, and as to each of those some degree of particularity at least should appear upon the facts proved before the exception can be said to apply. 6 C. 154, and *Queen* v. *Kukier Nather* dissented from so far as they decide that from such a finding as the above, consent to take the risk of death is inferred *Per O'Kinealy, J*—Before excep. 5 can be applied, it must be found that the person killed, with a full knowledge of the facts determined to suffer death, or to take the risk of death; and that this determination continued up to and existed at, the moment of his death. *Per Ghose J.*—No general rule of law can be laid down in determining in cases of this description whether the person killed or wounded suffered death or took the risk of death with his own consent, it being a question of fact, and not of law, to be decided upon the circumstances of such case as it arises. 6 C. 154 and *Queen* v. *Kukier Nather* observed on, and the propositions of law laid down therein concurred with. QUEEN-EMPRESS v. NAYAMUDDIN, 18 C. 484, (F.B.) ... 323

(7) Ss. 304, 304—A. 325, 338—See CHILD-WIFE, 18 C. 49.

(8) Ss. 344, 352, 370 and 374—See UNLAWFUL COMPULSORY LABOUR, 19 C. 572.

(9) *S.* 413—*Theft—Habitually receiving stolen property—Evidence to justify conviction.*—A person cannot be said to be a habitual receiver of stolen

Penal Code (Act XLV of 1860)—(*Concluded*). PAGE

goods who may receive the proceeds of a number of different robberies from a number of different thieves on the same day. In order to support a conviction under s. 413 of the Penal Code of being a habitual receiver of stolen property, it must be shown that the property was received on different occasions and on different dates. QUEEN-EMPRESS v. BABURAM KANSARI, 19 C. 190 ... 572

(10) S. 494—See BIGAMY, 18 C. 264; 19 C. 79; 19 C. 627.

Penalty.

See INTEREST, 19 C. 392.

Pension.

See ATTACHMENT, 18 C. 216.

Permission of Court.

See RECEIVER, 18 C. 477.

Personal Debt.

See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY), 19 C. 783.

Photography.

See HINDU LAW (WILL), 19 C. 65.

Plaint.

See LIMITATION, 19 C. 780.

Pleadings.

See RES JUDICATA, 19 C. 159.

Pledge.

Mutual rights of pledgor and pledgee—Pledgees taking over the property pledged, crediting the value as if it had been sold to himself, effect of—Wrongful conversion—Absence of proof of damage to the pledgor—Account—Damage to pledgor, Proof of.—Where a pledgee, having power to sell for default, takes over, as if upon a sale to himself the property pledged without the authority of the pledger, but crediting its value in account with him, this act, though an unauthorized conversion, does not put an end to the contract of pledge, so as to entitle the pledgor, to have the property back without payment. Government paper having been deposited by a borrower from a Bank as security, part was legally sold upon his failing to comply with the terms between them. As to the rest, the borrower, afterwards, on redeeming a part, was led to believe that the paper returned was the whole of that which remained unsold in the Bank's possession. The Bank, however, had taken over part, as if sold to itself, crediting the price, *held* that the Bank could not, after this, treat the securities as still subject to the pledge; although this transaction had not put an end to the contract of pledge, so to entitle the pledgor to have back the paper without payment of the loan and interest. The Bank was no longer a pledgee of this paper, but having converted it to the Bank's own use, might have been liable in damages for the value including the interest thereon. However, had this liability been enforced, the pledgor could not have had credit in the loan account for the proceeds of the paper. The cessation of interest on the loan was more to his advantage than to receive the interest on the paper, the market value of which was also falling, so that the longer the account had been kept open the greater the balance would have been against the pledgor. It followed that there was no evidence of damage to him resulting from the conversion. The first Court decreed an account, wrongly deciding that interest could not run upon the loan, which the amount of the paper transferred by the Bank to itself purported to wipe off from the date of the transfer. On this point as well as because there was no proof of damage to the pledgor, the High Court, reversing that decree, had rightly dismissed the pledgor's suit. NECKRAM DOBAY v. THE BANK OF BENGAL, 19 C. 322 (P.C.)=19 I.A. 60=6 Sar. P.C.J. 164 ... 660

Policy of Insurance.

See STAMP ACT (I OF 1879), 19 C. 499.

Possession. PAGE

(1) See CO-SHARERS, 18 C. 10.

(2) See FISHERY, 19 C. 544.

(3) See HINDU LAW (JOINT FAMILY), 18 C. 302.

(4) See RIGHT OF OCCUPANCY, 18 C. 349.

(5) See SONTHAL PERGUNNAHS SETTLEMENT REGULATION (III OF 1872), 18 C. 146.

(6) See SPECIFIC RELIEF ACT (I OF 1877), 18 C. 80.

Powers.

(1) Of executive officers—See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 643.

(2) Of Settlement Officers—See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 641.

(3) Of supervision of High Court—See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 641.

Practice.

(1) *Decree absolute, application for—Decree* nisi, *non-service of—Notice of motion —Divorce.*—In an application to have a decree *nisi* made absolute where it appeared that the decree had been passed *ex parte*, after the original summons had been personally served on the respondent, and that owing to this, the petitioner being unable to discover the where-abouts of the respondent who had left Calcutta immediately after the decree was passed, no copy of the decree had been served on him or notice of the application given him, *held*, that sufficient cause was shown for the decree being made absolute, notwithstanding it had not been served or notice of the application given, and order made accordingly. HUNTER v. HUNTER, 18 C. 539 ... 360

(2) *Divorce, Suit for—Decree absolute — Notice of application to make decree absolute.*—When a decree *nisi* has been served on the respondent in a divorce suit, it is not necessary to give him notice of an application to make such decree absolute. GOMES v. GOMES, 18 C. 443 ... 295

(3) *Hindu will—Universal legatee not entitled to probate.—Letters of Administration with will annexed grant of to universal legatee—Probate and Administration Act* (V *of* 1881), *s.* 19.—A universal legatee is not entitled to probate, but only to letters of administration with the will annexed, SHOSHEE BHUSAN BANNERJI, *In the goods of*, 19 C. 582 ... 830

(4) *Partition proceedings—Form of order for costs—Order for execution.*—Where one of the parties to a partition suit bears all the costs of the proceedings subsequent to decree, and the other parties make default in payment to him of their respective shares of the costs, he is not entitled to embody in his order against them for payment an order for execution. He must first obtain an order for payment, and, if payment be not obtained, application for execution may be made. BROJOLALL SEN v. MOHENDRO NATH SEN, 18 C. 199 ... 133

(5) *Reference to High Court—District Magistrate, competency of, to refer—Criminal Procedure Code* (*Act* X *of* 1882), *s.* 438.—When a case has been decided by the Sessions Judge on appeal from a Sub-divisional Magistrate, the District Magistrate should not refer the case to the High Court on the ground that the Sub-divisional Magistrate acted without jurisdiction. If he desires to move in the matter, he should proceed through the Legal Remembrancer. HIRAMAN DE v. RAM KUMAR AIN, 18 C. 186 ... 125

(6) See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 667.

(7) See ARBITRATION, 19 C. 334.

(8) See ATTORNEY, 19 C. 368.

(9) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 19 C. 201.

(10) See COMMISSION, 19 C. 113.

(11) See DIVORCE, 18 C. 473.

(12) See EVIDENCE, 18 C. 534.

Practice—(*Concluded*). PAGE

(13) See JURISDICTION, 18 C. 526.

(14) See LIMITATION, 19 C. 780.

(15) See RIGHT TO BEGIN, 19 C. 380.

(16) See SMALL CAUSE COURT, 18 C. 445.

Prayer.

See JURISDICTION, 18 C. 526.

Pre-arranged Fight.

See PENAL CODE (ACT XLV OF 1860), 18 C. 484.

Presentation of Plaint.

Unsufficiently stamped—See LIMITATION, 19 C. 780.

Presumption.

(1) See LIMITATION, 19 C. 660.

(2) See MESNE PROFITS, 18 C. 540.

Principal and Agent.

(1) See ACCOUNT, 19 C. 174.

(2) See COMPANY, 18 C. 31.

Priority.

See ATTACHMENT, 19 C. 286.

Prior Possession.

See LIMITATION, 19 C. 660.

Privy Council.

(1) See APPEAL TO PRIVY COUNCIL, 18 C. 378.

(2) See DECREE, 18 C. 108.

Probate.

(1) *Revocation of Probate—"Just cause" for revocation—Probate and Administration Act* (V *of* 1881), *s.* 50.—The mere absence of a special citation in proceedings in which probate of a will is granted is not, where the person to whom a citation has not been issued is otherwise aware of the proceedings, a "just cause" for revocation of probate as making the proceedings substantially defective within the meaning of s. 50 of the Probate Act, even where such person is a minor. NISTARINY DABYA v. BRAHMOMOYI DABYA, 18 C. 45 ... 31

(2) See HINDU LAW—WILL, 19 C. 65.

(3) See LIMITATION ACT (XV OF 1877), 19 C. 48.

(4) See PRACTICE, 19 C. 582.

Procedure.

See DIVORCE, 19 C. 469.

Proclamation of Sale.

See SALE, 18 C. 125, 422.

Promissory Note.

Right of indemnification, attendant upon suretyship—Right of endorser who pays a promissory note or bill of exchange, to benefit of securities deposited—Agents' authority, extent of.—The same rule is applicable to the endorser of a promissory note that applies to the endorser of a bill-of-exchange that, if he pays the holder of it, he is entitled to the benefit of the securities given by the maker in the one case, the acceptor in the other, which the holder has in his hands at the time of the payment, and upon which he has no claim except for the note or bill. Promissory notes made by an agent, acting for himself and for his principal, were secured by the deposit of title-deeds of property, belonging to the principal, in the hands of a Bank which discounted the notes, and the latter were paid at maturity by an endorser. *Held*, that the endorser was entitled to a transfer of the deeds to him as security, without further assent from the owner. *Held*,

Promissory Note—(*Concluded*). PAGE

also, that he was entitled to have them transferred to him on the ground that, as a fact, the agent, acting within the principal's authority, had agreed that, in consideration of his paying the amount of the notes to the holder, he should have this security, the Bank assenting. AGA AHMED ISPAHANI v. CRISP, 19 C. 242 (P.C.) = 19 I.A. 24 = 5 Sar. P.C. J. 109 ... 607

Property.

(1) See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY), 19 C. 783.

(2) See ATTACHMENT, 18 C. 290.

(3) See HINDU LAW, MARRIAGE, 19 C. 289.

Puberty.

(1) See BIGAMY, 19 C. 79.

(2) See CHILD-WIFE, 18 C. 24.

Publication.

See PUTNI TALUQ, 19 C. 703.

Public Document.

See EVIDENCE, 18 C. 534.

Public Servant.

(1) See EVIDENCE, 18 C. 534.

(2) See PENAL CODE (ACT XLV OF 1860), 18 C. 518.

Public Worship.

See MAHOMEDAN LAW (CUSTOM), 18 C. 448.

Purchase-money.

See CIV. PRO. CODE (ACT XIV OF 1882), 18 C. 242.

Purchaser.

(1) See ADVERSE POSSESSION, 19 C. 787.

(2) See HINDU LAW (JOINT FAMILY), 18 C. 157.

(3) See MORTGAGE (REDEMPTION), 18 C. 164.

(4) See SALE, 18 C. 188.

Putni Interest.

See MERGER, 19 C. 760.

Putni Sale.

See SALE, 18 C. 363.

Putni Taluq.

(1) *Sale of putni tenure for arrears of rent—Bengal Regulation* VIII *of* 1819, *s*.8, *cl*. 2—*Onus of proof of publication of notice before sale of putni taluq, for arrears of rent—Notice of sale of putni taluq, onus of proof of publication of—Suit to set aside sale.*—In a suit to set aside a sale of a putni taluq, held under the provisions of s. 8 of Regulation VIII of 1819, on the ground that the notices required by sub-s. 2 of that section had not been duly published, it lies upon the defendant to show that the sale was preceded by the notices required by that sub-section, the service of which notice is an essential preliminary to the validity of the sale. In such a suit, where there was no evidence one way or the other to show that the notice required by that sub-section to be stuck up in some conspicuous part of the Collector's cutcherry had been published, *held*, that the plaintiff was entitled to a decree setting aside the sale. HURRO DOYAL ROY CHOWDHRY v. MAHOMED GAZI CHOWDHRY, 19 C. 699 ... 903

(2) *Sale of putni tenure for arrears of rent—Bengal Regulation* VIII *of* 1819, *s*. 8, *cl*. 2, *and s*. 14—*Publication of notice in the Collector's cutcherry—Non-publication of notice in manner prescribed, effect of, on the validity of a sale of a putni tenure—"Sufficient plea."*—The sticking up, or publication in a conspicuous part of the Collector's cutcherry, of a notice in accordance

Putni Taluq—(*Concluded*). PAGE

with the provisions of cl. 2 of s. 8 of Regulation VIII of 1819 is essential to the validity of a sale of a putni tenure under that Regulation. Where a notice of sale, instead of being stuck up and published in some conspicuous part of the Collector's cutcherry as required by law, was in accordance with the practice which prevailed during the incumbency of the Nazir of the Collector's cutcherry at Birbhum and of his predecessors in office, kept by the Nazir with other petitions for sale and notice relating to them in a bundle, which was at night locked up for safe custody, and in the day time kept in a conspicuous place near his seat, at the entrance to the cutcherry, any person who chose to ask for it or wished to see it being at liberty to inspect the whole bundle:—*Held* by *Petheram, C. J.*, and *Ghose, J.* (*Tottenham, J.*, dissenting) — that this was not a publication of the notice within the meaning of cl. 2 of s. 8 of the Regulation, and that it was a 'sufficient plea' for the defaulting putnidars within the meaning of s. 14 to have the sale set aside. RAJNARAIN MITRA v. ANANTA LAL MONDUL, 19 C. 703 ... 911

(3) See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 504.

Question of Fact.

See APPEAL (SECOND APPEAL), 18 C. 302.

Railway.

(1) See ACT IV OF 1879 (RAILWAYS), 19 C. 538.
(2) See CARRIER, 18 C. 427.

Rashness and Negligence.

See CHILD-WIFE, 18 C. 49.

Reasonable and Sufficient Purpose.

See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 271.

Receiver.

Powers of—Right to sue without permission of Court — Suit for ejectment—Monthly tenant holding over after expiry of notice to quit.—The order appointing a receiver gave him power "to let and set the immoveable property or any part thereof as he shall think fit, and to take and use all such lawful and equitable means and remedies for recovering, realizing, and obtaining payment of the rents, issues, and profits of the said immoveable property, and of the outstandings, debts and claims by action, suit or otherwise, as shall be expedient." *Held*, under the terms of such order, the receiver had power to sue to eject, without obtaining permission of the Court, a monthly tenant whose tenancy was determinable by a notice to quit which had been duly served. HURI DASS KUNDU v. MACGREGOR, 18 C. 477 ... 318

Record and Settlement of Rents.

See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 667.

Record of Rights.

See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 641 ; 19 C. 643.

Recovery of Cesses.

See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY), 19 C. 783.

Reference to High Court.

(1) See INSOLVENT ACT (11 AND 12, VIC. CH. 21), 19 C. 605.
(2) See PRACTICE, 18 C. 186.

Refusal.

To file award—See ARBITRATION, 18 C. 414.

Registered Contract.

See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 1.

PAGE.

Registration.

(1) *Act* III *of* 1877, *ss.* 5, 6, 7, 21, 22, 28, 30, 31, 35, 49 *and* 60—*Description of property misleading—Registration of document referring to land not in the Sub-district of Registering officer a Sub-Registrar—Transfer of Property—Act IV of* 1882, *s.* 59.—Certain property was described in a mortgage bond as bearing towji No. 10, as paying a *sudder jama* of Rs. 719 and as lying within the jurisdiction of thana Kotwali, sub-district Bhagulpur, Collectorate of Bhagulpur. This description was so far erroneous, in that the property was in reality situated in thana Amarpur, sub-district Banka, and bore a sudder jama of Rs. 919-15. Banka was, however, within the area of the district of Bhagulpur. The mortgage bond was registered by the Sub-Registrar of Bhagulpur, who was, under s. 7 of the Registration Act, authorized in addition to his own duties, to exercise and perform the duties and powers of the Registrar of Bhagulpur. *Held*, by *Pigot, O'Kinealy, Macpherson*, and *Ghose, JJ.* that the provisions of s. 21 of the Act had not been complied with; that the description of the property was misleading and insufficient for the purposes of identification, and that therefore no registration of the document had been effected within the provisions of the Registration Act. *Held* by *Petheram, C.J.*, that the description was sufficient to identify the property, and that the Sub-Registrar having been authorized to exercise the powers and duties of the Registrar of Bhagulpur, and the property being situate in sub-district Banka, the Sub-Registrar of which sub-district was subordinate to the Registrar of the district of Bhagulpur, the provisions of s. 28 of the Act being directory only, registration of the document was valid. *Semble per Pigot, J.*—A document on which a certificate under s. 60 has been duly endorsed cannot be held to have been duly registered under s. 49 of Act III of 1877 if it appears that the officer who made the certificate should not under s. 28 have registered the document. BAIJ NATH TEWARI v. SHEO SAHOY BHAGUT, 18 C. 556 (F.B.) ... 372

(2) *Exemption from registration of documents purporting to be, or to evidence, grants or assignments by Government of land or of any interest in land.—Registration Act* (*III of* 1877), *s.* 90, *cl.* (*d*)—*Nawab Nazim's Debts Act* (*XVII of* 1873). The Agent to the Governor-General in a letter to the Nawab Bahadur of Murshidabad announced the intentions of the Government as to his position and income, and informed him that he was to have possession of the State lands and jewels. In a suit by the sons of the Nawab to recover possession from a person wrongfully in possession of land which was held by the lower Courts to be portion of such State lands, it was, *inter alia*, objected that the letter required registration. *Held* that the letter operated as a grant or an authority from Government, and was exempt from registration, under the provisions of s. 90, cl. (*d*) of the Registration Act. *Held*, further, that the Commissioners appointed under the Nawab Nazim's Debts Act had jurisdiction to declare the land claimed in the suit to be State property, notwithstanding the fact that an alienation of such land had taken place before the date of the Commissioner's award. HASSAN ALI v. CHUTTERPUT SINGH DUGARH, 19 C. 742 ... 936

(3) See TRANSFER OF TENURE, 19 C. 17.

Registration Act (III of 1877).

(1) Ss. 5, 6, 7, 21, 22, 28, 30, 31, 35, 49, 60—See REGISTRATION, 18 C. 556.

(2) S. 90, cl. (*d*)—See REGISTRATION, 19 C. 742.

Regulation XIX of 1810 (Charitable Endowments, Public Buildings and Escheats, Bengal).

See HINDU LAW—RELIGIOUS ENDOWMENT, 19 C. 275.

Regulation XII of 1817 (Patwaris Regulation, Bengal).

S. 16—See EVIDENCE, 18 C. 534.

Regulation VIII of 1819 (Patni Taluqs, Bengal).

(1) S. 8, cl. 2—See PUTNI TALUQ, 19 C. 699, 703.

(2) S. 8, cl. 3, and s. 14—See SALE, 18 C. 363.

Re-hearing.

See SMALL CAUSE COURT, 18 C. 445.

PAGE.

Reliefs.

See EXECUTION OF DECREE, 18 C. 515.

Religious Ceremonies.

See MAHOMEDAN LAW (CUSTOM), 18 C. 448.

Religious Trust.

See HINDU LAW (RELIGIOUS ENDOWMENT), 19 C. 275.

Relinquishment.

Of wife—See BIGAMY, 19 C. 627.

Remand.

On ground of refusal to allow questions—See EVIDENCE, 18 C. 534.

Removal.

See APPEAL (GENERAL), 19 C. 487.

Rent.

(1) See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 333.
(2) See CRIM. PRO. CODE (ACT X OF 1882), 19 C. 127.
(3) See RES JUDICATA, 19 C. 656.

Rent Suit.

(1) *Landlord and tenant co-sharers, suit by one of several, for separate share of rent, or, in alternative, for whole rent due if more than share claimed should be found due.*—The plaintiffs, some of the co-sharers in certain lands, instituted a suit against a tenant and the remaining co-sharer *P*, alleging that the tenant held under a pottah granted by all the co-sharers; that rent was due from him for the period in suit; and that they had ascertained from *P* that he alleged that he had received his share of the rent for that period from the tenant, and that he refused to join as plaintiff in the suit. They accordingly prayed (*a*) for a decree for the amount of their share of the rent against the tenant; (*b*) if it should appear that any part of *P*'s share of the rent remained unpaid, the requisite extra Court-fee might be received, and a decree made for the whole of the arrears in favour of themselves and *P*, and that the latter might, if he consented, be made a co-plaintiff; (*c*) that if it appeared that *P* had realized more than his share of the rent, a decree might be made against him for the excess, and against the tenant for balance. The plaintiff also asked for costs and further relief. The tenant contested the suit, and submitted that it was in effect a suit for plaintiffs' share of the rent only, and could not therefore be maintained. He further pleaded that the plaintiffs and *P* were members of a joint Hindu family, of which *P* was the manager, and that under arrangement with the latter, he had applied the rent due under the pottah towards the liquidation of debts due under bonds in *P*'s name, but for which the joint family were liable. The first Court dismissed the suit on the preliminary issue that it was in substance a suit for a specific share of the rent, by some only of the co-sharers, and that there being no agreement by the tenant to pay the co-sharers their respective shares of the rent separately, such a suit would not lie. *Held* (upholding the order of the lower appellate Court), that the order of the first Court was wrong. The suit, as framed, was necessarily a suit in the alternative: and as the plaintiffs were necessarily not aware whether any portion of *P*'s share of the rent was due or not but believing that none was due, they could only claim their share, asking to have the plaint amended so as to include the whole rent due if it should appear that anything was due to *P*, and thus bring the suit within the rule that, in the absence of special agreement between a tenant and co-sharers to pay their rateable proportion of the rent, a suit by one of the co sharers must be for the entire rent due, making his co-sharers defendants if they refuse to join as plaintiffs. The prayer of the plaint fully provided for this, and the suit should have been tried on its merits, and the plaint amended if the facts proved showed that any rent remained unpaid and due to *P*, as asked for by the plaintiffs. PERGASH LAL v. AKHOWRI BALGOBIND SAHOY, 19 C. 735 ... 932

Rent Suit—(*Concluded*). PAGE

(2) See ACT VIII OF 1885 (BENGAL TENANACY), 19 C. 755.

(3) See ARREARS OF RENT, 19 C. 267.

(4) See MERGER, 19 C. 760.

(5) See RES JUDICATA, 19 C. 656.

Representatives.

See PARTIES, 18 C. 86.

Res Judicata.

(1) *Civ. Pro. Code*, 1882, *s.* 13—*Suit in ejectment.*—*A* as *ticcadar* brought a suit to eject *B* from certain lands, which he had claimed as *majhes* land, or land which is ordinarily cultivated by the landlord himself or by the *ticcadar*. *B* pleaded his right of occupancy. The Court found that the land was *majhes* land, but dismissed the suit on the ground that *A* had failed to prove notice to quit. Afterwards *A* brought a suit againt *B* for ejectment from the same land. *B* again pleaded his right of occupancy. *Held*, that *B* was not precluded from raising the same plea, inasmuch as the finding in the previous suit upon the issue whether *B* was an occupancy tenant was not conclusive against him; nor could that issue be said to have been "finally decided" in that suit within the meaning of s. 13 of the Civ. Pro. Code. THAKUR MAGUNDEO v. THAKUR MAHADEO SINGH, 18 C. 647 ... 432

(2) *Civ. Pro. Code*, 1882, *ss.* 13, 42, 43—*Execution—Suit for Possession of land ascertained after decree—Limitation, commencement of twelve years' claim in part included in former dismissed suit—Reference to pleadings and judgments to explain decree—Mesne profits—Act* XIX *of* 1868, *s.* 111.—That a claim has been included in a previous suit, without its having been directly and substantially put in issue and decided, does not upon the dismissal of that suit preclude a subsequent suit upon it. A consent decree of 1873 decided that alluvial land belonged to the plaintiff's village Sipah. The area was judicially determined in 1876 on a map of 1874, but actual possession was not obtained from the defendant, who owned villages on the opposite side of the river. The decree-holder in 1877 included a claim for part of the same land in a suit for an accretion to another of his riparian villages, Khasapur, and the latter suit was wholly dismissed. To get possession of the land decreed in 1873 he then brought rent suits against two tenants upon it, the defendant intervening under s. 111 of the Oudh Rent Act, 1868. Both the rent-suits were dismissed; and, according to the right reserved in the latter section, the plaintiff, to establish his title in a competent Court, brought the present suit including in it the land which he had made part of his claim in the dismissed suit of 1877. *Held*, first as to limitation, that the 12 years' bar must be calculated from 1876, the date of the judicial ascertainment of the land decreed. Secondly, on the question whether the dismissal of the suit of 1877 precluded further suit for that part of the land which had been included in it, *held*, that it did not, and that s. 13 of the Civ. Pro. Code, was inapplicable. The pleadings and judgment in the suit of 1877 were referred to, showing that what belonged to Sipah had not been in issue, and that nothing respecting it had been heard or decided. Thirdly, *held* as to the rest of the land claimed in this suit, that there was no bar on account of its omission from the suit of 1877. As to mesne profits, it would have been open to the High Court to direct an enquiry under s 212 of the Civ. Pro. Code. JAGATJIT SINGH v. SARABJIT SINGH, 19 C. 159 (P.C.) = 18 I A. 165 = 15 Ind. Jur. 749 = 6 Sar. P.C.J. 60 = Rafique and Jackson's P.C. No. 125 ... 553

(3) *Civ. Pro. Code*, 1882, *ss.* 13, 224—*Decree for land, not effectively defining the boundaries effect of.*—The proprietary possession of alluvial land was claimed upon the averment that, having been gained as an accretion to the plaintiff's village, it had been wrongly excluded from settlement with the latter in consequence of a prior decree, which however, had not decreed the land to the defendant, as they alleged it to have done. In pursuance of that decree, which was made in 1865, the land had been, according to the evidence taken by the defendants, in whose possession it was in 1868, from which date till 1883, when the present suit was brought, that land had been

Res Judicata—(*Concluded*). PAGE

treated, alike by the Government authorities and by the defendants, as belonging to the latter. Had the question been one of limitation, the possession of the defendants for a period of 12 years would not have been sufficient to exclude this claim by the plaintiff, the Government to recover whatever could have been shown to be its property. The question, however, was not one of limitation, and the fact of the possession having been retained for so long a period was used by the defendants not to make a title but to define or identify the land which the decree of 1865 had awarded to them. Although the specification of the boundaries (which had been merely by reference to the plaint which mentioned adjoining villages) had been ineffectnal, the acts of the parties had been such as to fix the meaning of the terms used, and it was established by the evidence that the land now claimed was identical with that which had been made over under the decree of 1865, to which it related. SECRETARY OF STATE FOR INDIA IN COUNCIL v. DURBIJOY SINGH, 19 C. 312 (P.C.) = 19 I. A. 69 = 6 Sar. P.C.J. 113 ... 653

(4) *Rent suit—Decree as to rent payable for former years—Rate of rent payable—Decree on admission of defendant.*—The plaintiff in a suit for rent which was contested, having failed to prove that the rent was payable at the rate claimed by him, the Court, in trying the issue "what is the amount of the jama," after considering the whole of the evidence and the circumstances of the case, *held*, that the plaintiff had entirely failed to prove his allegation of the jama, and gave him a decree for the amount admitted by the defendant, which was less than that claimed by the plaintiff. In a later suit the plaintiff sued the defendant, in respect of the same holding, for rent for a subsequent year, and he claimed at the same rate as he had claimed in his previous suit. It was contended on behalf of the defendant that the question as to the rate at which the rent was payable was *res judicata*, it not being alleged that there had been any agreement subsequent to the first suit by which the rate was altered. *Held* that the questions as to the rent payable for the period covered by the first suit was *res judicata* ; but that it did not follow that the decree in that suit operated as *res judicata* and conclusively determined the rate of the rent payable for the year in respect of which the subsequent suit was brought. That depended on whether the previous decision was that the plaintiff should recover from the defendant the sum admitted by him to be due, or that the sum so admitted to be due was the proper amount of rent payable for the period in question. *Held*, that in this case the previous decision was to the latter effect and that the question of the rate at which the rent was payable by the defendant was *res judicata*. HURRY BEHARI BHAGAT v. PARGUN AHIR, 19 C. 656 ... 880

(5) See ARBITRATION, 18 C. 414.

(6) See ATTACHMENT, 18 C. 296.

Restitution of conjugal rights.

See APPEAL (TO PRIVY COUNCIL), 18 C. 378.

Restraint of trade.

See CONTRACT, 19 C. 765.

Revenue Officer.

See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 667.

Revisional Powers.

See CRIM. PRO. CODE (ACT X OF 1882), 19 C. 127.

Revocation.

See PROBATE, 18 C. 45.

Rights of Co-owners.

Rights among themselves of co-owners of joint property where there is a profitable use of it by some or one of them without the others being excluded. —See JOINT OWNERSHIP, 19 C. 253.

Right of Fishery.

See FISHERY, 19 C. 544.

Right of Indemnification. PAGE

See PROMISSORY NOTE, 19 C. 242.

Right of interested Persons.

Rights of persons intrested in a contract though not formal parties—See HINDU LAW—ADOPTION, 19 C. 513.

Right of Occupancy.

(1) *Act* X *of* 1859 (*Bengal Rent Law*), *ss.* 6 *and* 7—*Bengal Rent Act* (*Bengal Act* VIII *of* 1869), *ss.* 6 *and* 7—*Mostajiri lease—Cultivating possession.*—Under Beng. Act VIII of 1869, ss. 6 and 7, as well as previously under the similar ss. 6 and 7 of the Rent Act, X of 1859, a raiyat paying rent for, and cultivating, land continuously for a period of twelve years had a right of occupancy, whether he held under a potta or not. In reference to this, it was *held* that a lessee of land continuously in cultivating possession for a period of twelve years, under several written leases or pottas, which were for specified terms of years, but in which there was no express stipulation for the landlord's re-entry on their expiration, had a right of occupancy. The mere existence of a term in a lease was not an "express stipulation" to the contrary, within the meaning of s. 7, so as to exclude the right of occupancy. In a suit for the recovery of possession, with mesne profits, of land, brought by a lessor against a tenant holding over, the defence was, as to part of the land, that the tenant had a right of occupancy, his cultivating possession having lasted for more than twelve years. The right was established, but the burden of proving to which part of the land it attached was upon the tenant, and for proof as to this the suit was remanded. CHANDRABATI KOERI v. HARRINGTON, 18 C. 349 (P.C.) = 18 I.A. 27 = 15 Ind. Jur. 153 = 5 Sar. P.C.J. 681 ... 233

(2) *Effect upon acquisition of right of occupancy of raiyat being jointly interested in land of ijaradar—Bengal Tenancy Act* (VIII *of* 1885), *s.* 22, *sub-s.* (3).—Both under s. 22, sub-s. (3) of the Bengal Tenancy Act (VIII of 1885), and under the previous law, a person jointly interested in land as ijaradar does not thereby lose his occupancy rights, and *a fortiori* his entire rights as a tenant, in land held and cultivated by him as a raiyat. MASEYK v. BHAGABATI BARMANYA, 18 C. 121 ... 81

Right of Suit.

(1) See SALE, 18 C. 139.

(2) See SONTHAL PERGUNNAHS SETTLEMENT REGULATION (III OF 1872), 18 C. 146.

Right to begin.

(1) *In reference by Presidency Magistrate on question of law—Practice—Crim. Pro. Code* (*Act* X *of* 1882), *s.* 432.—In a reference by a Presidency Magistrate to the High Court as to whether, on the facts stated, any offence has been committed by an accused person, it lies on the prosecution to make out that an offence has been committed, and under the circumstances the prosecution must begin. QUEEN-EMPRESS v. HARADHAN *alias* RAKHAL DAS GHOSH, 19 C. 380 ... 698

(2) See EVIDENCE, 18 C. 201.

Right to Sue.

(1) See ACT IV OF 1876 (CALCUTTA MUNICIPAL CONSOLIDATION, BENGAL), 18 C. 91.

(2) See RECEIVER, 18 C. 477.

Rioting.

(1) See CUMULATIVE SENTENCES, 19 C. 605.

(2) See PENAL CODE (ACT XLV OF 1860), 18 C. 484.

Road Cess.

See SALE, 18 C. 125.

Rules.

(1) Made by Governor-General—See STAMP ACT (I OF 1879), 18 C. 39.

(2) Of High Court, 1st September, 1877, r. 33—See APPEAL—GENERAL, 18 C. 182.

Sagai or Nikka Marriage. PAGE

See BIGAMY, 19 C. 627.

Sajjadanashin.

See MAHOMEDAN LAW—WAKF, 19 C. 203.

Sale.

(1) And consignment of goods—See BANIAN, 18 C. 573.

(2) By Administrators not qua-administrators, but as heirs, effect of—See ADMINISTRATOR, 19 C. 26.

(3) By one Court pending attachment by another Court—See EXECUTION OF DECREE, 19 C. 651.

(4) For arrears of rent—See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 255, 18 C. 360, 18 C. 481.

(5) *For arrears of rent—Reg.* VIII *of* 1819, *cl.* 3, *ss.* 8 *and* 14—*Putni sale—Notices—Publication of custom sale.*—It is imperative that the notices referred to in cl. 3, s. 8 of Reg VIII of 1819, be published previously to the 15th Kartick. Non-compliance with such direction is a "sufficient plea" within the meaning of s. 14 of the Regulation for reversal of a sale held thereunder. SORNOMOYI DABIA v. GRISH CHUNDER MOITRA, 18 C. 363 **(F.B.)** ... 242

(6) For arrears of revenue—Suit to recover surplus sale proceeds of—See LIMITATION ACT (XV OF 1877), 18 C. 234.

(7) *For arrears of Road Cess—Certificate of title—Certificate of unpaid demand—Collector of the district—Defects in service of notice and in proclamation of sale—Act* XI *of* 1859, *ss.* 27, 28—*Beng. Act* VII *of* 1868, *ss.* 5, 8, 11—*Beng. Act* VII *of* 1880, *ss.* 2, 4, 7, 8, *cl.* (4), 10, 19—*Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 289, 314.—A certificate of title under Act XI of 1859, s. 28 and Beng. Act VII of 1868, s. 11, issued before the expiry of the period of sixty days required by s. 27 of Act XI of 1859 from the date of sale, is not a certificate duly issued under the provisions of these Acts, and cannot cure defects in the service of notice or in the proclamation of sale. The certificate in execution of which the plaintiff's estate was sold was not made or signed by the Collector of the district, but by a Deputy Collector. *Held*, that under s. 7 of the Public Demands Recovery Act (VII of 1880) a certificate under the Act must be made and filed by the Collector of the district, and not by any officer gazetted to perform the functions of a Collector under Act VII of 1880. MONINDRA NATH MOOKERJI v. SARASVATI DASI, 18 C. 125 ... 84

(8) In execution—See JURISDICTION, 18 C. 526.

(9) In execution of decree—See ACT VIII OF 1885 (TENANCY BENGAL), 18 C. 360.

(10) In execution of decree—See CIV. PRO. CODE (ACT XIV OF 1882), 18 C. 242.

(11) *In execution of Decree—Effect on sale when confirmed, of the absence of attachment*—Lis pendens—*Suit resulting in proceedings unexpected from its nature and relief sought—Possibility of appeal—Compromise of suit*—Bona fide *purchaser without notice—Estoppel.*—After a sale has been confirmed, and a sale certificate granted to the purchaser the sale is not to be considered as a nullity, merely by reason of the absence of any attachment. The plaintiffs in execution of decree against the estate of the deceased husband of *A*, attached, among others, certain properties, as to which *A* put in a petition of objections on 11th July 1872, claiming them as her own by right of purchase from her husband in lieu of her dower, and her claim was allowed, and the properties released from attachment on 20th December 1872. Subsequently in May 1873, *A* mortgaged the properties to *R*. An appeal was preferred (but whether before or after the mortgage to *R* was not clear) against the order of 28th December 1872, and the appeal was, on 30th May 1874, settled by a compromise between the plaintiffs and *A*, by which among other conditions, time was granted to *A* to pay off the decree, and a 12-anna share of the properties claimed was released from attachment, the attachment being continued against the other 4-anna share: the order of the Court was simply that "the case be

Sale—(*Continued*). PAGE

struck off." The decree not being satisfied, the plaintiffs took out execution, and the properties were put up for sale and purchased by the plaintiffs on 27th November 1882. Subsequently in execution of the decree *R* held against *A*, the properties were again put up for sale and purchased by *R* on 14th November 1884. In a suit against *R* and *A* for declaration of the plaintiff's title and for possession of the properties, *held*, that the order of the Court and the compromise in the claim suit were not such proceedings as from the nature of the suit and the relief prayed *R* could have expected would result, and that he was therefore not bound by them as a purchaser *pendente lite*. *Semble*, neither the possibility of an appeal nor the consent decree were proceedings by which *R* as a purchaser *pendente lite* would be bound. *Held*, also, that, under the circumstances, *R* had a good title as a *bona fide* mortgagee and auction-purchaser without notice, and that the plaintiffs were estopped from questioning that title. KISHORY MOHUN ROY v. MAHOMED MUJAFFAR HOSSEIN, 18 C. 188 ... 126

(12) *In execution of decree—Fraud—Suit to set aside sale on ground of fraud —Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 244 *and* 311.—*A* and *B* were two tenants whose names were registered in the landlord's *sherista*. *B* died, leaving *C*, *D*, and *E*, his sons and heirs, but no application for mutation of names in the *sherista* was made. Disputes as to rent having arisen, *A* and *C* proceeded to make deposits in Court in respect thereof, and the landlord instituted a suit against *A*, joining *C* as party defendant to recover the amount of rent he claimed, and obtained an *ex parte* decree which, *inter alia*, directed that it should be satisfied out of the amount so deposited in Court. That amount, according to the landlord's case proving insufficient to satisfy his demands, he proceeded to execute the decree, and brought the holding to sale and purchased it himself. *A* and *C* then applied under s. 311 of the Code to have the sale set aside alleging that the decree had been fraudulently executed, the sale proclamation suppressed, and that the decree was incapable of execution in the manner adopted, and contending that it could only be executed against the amounts so deposited in Court, which were more than ample to satisfy the full amount justly due under it. That application was unsuccessful. *A*, *C*, *D*, and *E* then instituted a suit to have the sale set aside on the ground of fraud. *Held*, as regards *A* and *C*, following the decision in 17 C. 769, that the questions as to the propriety of the execution of the rent decree by sale, and as to the suppression of the sale proclamation, were questions which could and ought to have been decided under s. 244, and that, so far as they were concerned, the suit would not lie *Held*, however, as regards *D* and *E* that as they were not parties to the rent suit or proceedings had therein and although as heirs of a deceased tenant who had not got their names registered in the landlord's *sherista*, they might not be able to question the decree obtained for arrears of rent, they were not thereby precluded from contesting a sale on the ground that it had been fraudulently obtained under colour of such a decree, and that it was competent to them at any rate to sue for a declaration that the sale in question did not in any way affect their rights. JAGAN NATH GORAI v. WATSON & Co., 19 C. 341 ... 672

(13) *In execution of decree—Proclamation—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 289, 311, 312—*Substantial injury—Irregularity.*—A sale of revenue-paying land is not *ipso facto* void by reason of a copy of the sale proclamation not having been fixed up in the Collector's office as required by s. 289 of the Code of Civil Procedure. An omission so to fix up such notice is an irregularity the remedy for which can only be by an application under s. 311. NANA KUMAR ROY v. GOLAP CHUNDER DEY, 18 C. 422 (F.B.) 282

(14) *In execution of decree—Setting aside sale—Irregularity—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 290, 291—*Appeal—Civ. Pro. Code Amendment Act of* 1888.—Where a sale in execution of decree was adjourned on the application of one of two judgment-debtors who waived the issue of a fresh proclamation of sale, and the interests of both were sold, *held*, on the application of the other judgment-debtor to set aside the sale, that the omission to issue a fresh proclamation of sale under s. 291 of the Civ. Pro. Code amounted only to an irregularity, and did not vitiate

Sale—(*Concluded*). PAGE

the sale. *Held* further, that the District Judge had jurisdiction to here the appeal from an order passed after the 1st of July 1888, under the Civ. Pro. Code Amendment Act of 1888, although the execution proceedings were commenced before that date. BAGAL CHUNDER MOOKERJEE v. RAMESHUR MUNDUL, 18 C. 496 ... 331

(15) *In execution of decree—Suit to set aside sale on ground of fraud—Sale in execution of mortgage decree directing the sale of the mortgaged property under ss.* 88 *and* 89 *of Transfer of Property Act—Decree* nisi *not absolute —Right of suit—Civ. Pro. Code*, ss. 244, 311 *and* 312.—Where a suit to set aside a sale in execution of a decree was brought on the ground that by the fraud of the judgment-creditor the proclamation of sale had not been duly made, and the facts were that the sale was not and ordinary sale of attached property in execution of a decree, but a sale in execution of a mortgage decree which directed the sale of the mortgaged property in accordance with the provisions of ss. 88 and 89 of the Transfer of Property Act, but that there was no such decree in existence, as only a decree *nisi* and not a decree absolute directing the sale had been made; and it was contended that a decree absolute was made for the sale, the right to redeem existed, and that the suit might be regarded as a suit to redeem, *held*, that there was nothing in these facts to distinguish the case from the Full Bench case of 17 C. 769, and that the suit was therefore not maintainable. An order directing a sale in such a case would be sufficient authority under s. 89 of the Transfer of Property Act, even if the order did not take the form of a decree such as is prescribed for a decree absolute in the case of a suit for foreclosure. SIVA PERSHAD MAITY v. NUNDO LAL KAR MAHAPATRA, 18 C. 139 ... 93

(16) Of mortgaged property—See MORTGAGE—REDEMPTION, 18 C. 164.

(17) Of putni tenure for arrears of rent—See PUTNI TALUQ, 19 C. 699.

Sanction to prosecute.

Case settled uithout evidence—Jurisdiction to give sanction—Enquiry by Court prior to granting sanction—Crim. Pro. Code (Act X *of* 1882), *ss.* 195, 476. —It is competent for a Civil Court before which a case may have been settled without any evidence being gone into, and which has grounds for supposing the offence of the nature referred to in s. 195 of the Code of Criminal Procedure has been committed before it during the pendency of such case, to make a preliminary enquiry, and thus satisfy itself whether a *prima facie* case has been made out for granting sanction, and if so satisfied, to grant sanction for the prosecution of the person alleged to have committed such offence. A sanction granted after such preliminary enquiry and based thereon is not illegal. SHASHI KUMAR DEY v. SHASHI KUMAR DEY, 19 C. 345 ... 675

Sayer Compensation.

See JURISDICTION, 19 C. 8.

Separate Conviction.

See CUMULATIVE SENTENCES, 19 C. 105.

Separate Suits.

See CLAIMS, 19 C. 615.

Separate Tenancy.

See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 610.

Sessions case.

See MAGISTRATE, 18 C. 75.

Settlement.

See MAHOMEDAN LAW—WAKF, 19 C. 412.

Settlement Officer.

See SONTHAL PERGUNNAHS SETTLEMENT REGULATION (III OF 1872), 18 C. 146.

Shebaits. PAGE

(1) See HINDU LAW—RELIGIOUS ENDOWMENT, 19 C. 275.

(2) See LIMITATION ACT (XV OF 1877), 19 C. 776.

Signature.

See HINDU LAW—WILL, 19 C. 65.

Slavery.

See UNLAWFUL COMPULSORY LABOUR, 19 C. 572.

Small Cause Court.

(1) Claim to attached property in—See ATTACHMENT, 18 C. 296.

(2) *Presidency Towns - Jurisdiction—Presidency Towns Small Cause Court Act* (XV *of* 1882), *cl.* 2, *ss.* 1, 18—*Army Act*, 44 *and* 45 *Vic.*, *c.* 58, *sub-s.* 1, *s.* 151—51 *Vic.*, c. 4, s. 7.—The words of s. 7 of 51 Vic., c. 4, amending sub-s. 1 of s. 151 of 44 and 45 Vic., c. 58, are meant to restrict the words "within the jurisdiction, &c.," (found in sub-s. 1 of s. 151) to persons resident within it, so as to meet and exclude the case of persons casually within the jurisdiction and not actually resident within it and are limited to that purpose, and do not therefore affect the powers conferred by s. 18 of Act XV of 1882. WALLIS & CO. v. BAILEY, 18 C. 372 ... 249

(3) *Presidency Towns Small Cause Court Act* (XV *of* 1882), *s.* 18—*Jurisdiction—Army Act*, 1881 (44 *and* 45 *Vic.*, *c.* 58), *s.* 151—*Army* (*Annual*) *Act*, 1888 (51 *Vic.*, *c.* 4), *s.* 7—*Leave to sue.*—The jurisdiction given to Presidency Small Cause Courts by Act XV of 1882, s. 18, is not affected by 51 Vic., c. 4, s. 7. WATTS & CO. v. BLACKETT, 18 C. 144 ... 96

(4) *Presidency Towns Small Cause Courts Act* (XV *of* 1882), *ss.* 38 *and* 71 —*Practice—Stamp—Re-hearing, application for—Petition insufficiently stamped—Deficiency of stamp, power to make good, after period of limitation allowed for presentation of application.*—On the 7th April, being the last day on which such application could be made under the provisions of s. 38 of the Presidency Small Cause Courts Act, an application was made to the High Court under that section for the re-hearing of a suit which had been dismissed by the Small Cause Court. The application was made by petition at the rising of the Court, and not being a regular motion day, the hearing of the matter was postponed till the 9th April. On that day, on the application being brought on, it appeared that the petition only bore a 7 rupee stamp instead of one of the much larger value required by s. 71 of the Act. It was contended on behalf of the petitioner that the deficiency could then be made up, and that he was entitled to have the application heard. *Held*, that this could not be done. The eight days allowed by s. 38 expired on the 7th April, and had the application been then considered, it could not have been received, but must have been rejected, as s. 71 requires the proper fee to be paid before the application can be received. Although the consideration of the application was deferred to the 9th April, that made no difference, as the eight days had expired before the petition was in such a condition that it could be received. NORENDRA NATH BOSE v. ABINASH CHUNDER ROY, 18 C. 445 ... 296

(5) *Provincial—Provincial Small Cause Court Act* (IX *of* 1887), *s.* 17—*Application for new trial—Deposit of decretal amount or security for same, condition precedent to the granting of such application.*—It is condition precedent to the granting of a new trial that, in accordance with the provisions of s. 17 of the Provincial Small Cause Court Act, 1887, an applicant should at the time of presenting his application for new trial deposit in Court the decretal amount or tender security for payment of the same. JOGI AHIR v. BISHEN DAYAL SINGH, 18 C. 83 ... 56

Sonthal Pergunnahs.

(1) *Act* XXXVII *of* 1885, *s.* 2—*Reg.* III *of* 1872, *ss.* 3 *and* 4—*Civil Courts Act* (XII *of* 1887)—*Suit exceeding Rs.* 1,000 *in value—Officer invested with power of a Civil Court*—"*Court.*"—The effect of s. 2 of Act XXXVII of 1885 and s. 3 of Reg. III of 1872 is to make the general laws and regulations, including the provisions of the Code of Civil Procedure, applicable in the Sonthal Pergunnahs to suits exceeding Rs. 1,000 in

Sonthal Pergunnahs—(*Concluded*). PAGE

value without any qualifications : provided that such suits are tried in the Court established under the Civil Courts Act, XII of 1887. An officer in the Sonthal Pergunnahs invested by the Local Government with the powers of a Civil Court under s. 4 of Reg. III of 1872 is a Court established under Act XII of 1887 within the meaning of s. 3 of the Regulation. DUNGARAM MARWARY v. RAJKISHORE DEO, 18 C. 133 ... 89

(2) *European British subject—Jurisdiction of High Court to transfer—Grounds for transfer—Crim. Pro. Code* (X *of* 1882), *s.* 526—*Act* XXXVII *of* 1855. —The Court of a Magistrate in the Sonthal Pergunnahs is, as regards the trial of an European British subject, subordinate to the High Court, and the High Court has power under s. 526 of the Crim. Pro. Code, to direct the transfer of a case in which such subject is concerned. The transfer of a case should be ordered when there are circumstances which may reasonably lead the petitioner to believe that the Magistrate has to some extent prejudged the case against him, and will in consequence be prejudiced in the trial. *In the matter of the petition of* J. WILSON, 18 C. 247 ... 165

Sonthal Pergunnahs Settlement Regulation (III of 1872).

(1) Ss. 3 and 4—See SONTHAL PERGUNNAHS, 18 C. 133.

(2) *Ss.* 11, 25—*Suit regarding matter decided by Settlement Court—Settlement Officer, finding of—Jurisdiction of Civil Court—Right of suit—Suit to set aside settlement and for possession.*—Where a suit was brought to establish, by avoiding the instrument under which he held, that the defendant was not a tenant of the lands in dispute, and to oust him from possession, and he had been recorded in the record of rights made by the Settlement Officer as a tenant of such lands, *held*, that the suit was one regarding a matter decided by the Settlement Court within the meaning of s. 11 of the Sonthal Pergunnahs Settlement Regulation (III of 1872), and was therefore not maintainable. The introductory words of cl. 4 of s. 25 of the Regulation which impose a personal limitation on the jurisdiction of the Civil Courts apply to suits of all the three classes to which the clause relates ; so that the bar to the jurisdiction can take effect on a suit in the third of the three clauses only when it is both a " suit to contest the finding or record of the Settlement Officer," and involves also the determination of "the rights of zemindars or other proprietors as between themselves." RAM CHURN SING v. DHATURI SING, 18 C. 146 ... 98

Specific Performance.

See JURISDICTION, 19 C. 358.

Specific Relief Act (I of 1877).

(1) *S.* 9—*Right of fishery—Suit for possession of right to fish in a khal.*—A suit for the possession of a right to fish in a khal, the soil of which belongs to another, does not come within the provisions of s. 9 of the Specific Relief Act, 1877. NATABAR PARUR v. KUBIR PARUR, 18 C. 80 ... 54

(2) S. 9—See FISHERY, 19 C. 544.

(3) S. 45—See ELECTION LAW, 19 C. 192.

Stamp.

See SMALL CAUSE COURT, 18 C. 445.

Stamp Act (I of 1879).

(1) *Ss.* 3 (10), 61—*Instruments "duly stamped"—Rule* 5 (*b*) *of the rules made by the Governor-General in Council under Notification No.* 1288 *of* 3*rd March*, 1882.—The absence of the certificate required by r. 5 (*b*) of the rules dated 3rd March 1882, issued by the Governor-General in Council under ss. 9, 15, 17, 32, 51 and 56 of the Indian Stamp Act (I of 1879) does not make the document in question not " duly stamped " within the intention of the Stamp Act. The non-compliance by the treasury officer or the stamp vendor with the direction to give such a certificate is not an act for which the person purchasing the stamp from him can be punished, by the invalidation of the stamp innocently bought by him, or under s. 61 of the Indian Stamp Act. QUEEN-EMPRESS v. TRAILAKAYA NATH BARAL, 18 C. 39 ... 27

Stamp Act (I of 1879)—(*Concluded*). PAGE

(2) *Ss.* 3 (15), 25 (c) *and sch.* I. *art.* 49—*Policy of Insurance—Uncovenanted Service Family Pension Fund, stamp on entrance certificate of the.*—An entrance certificate granted under the rules of the Uncovenanted Service Family Pension Fund is a life-policy within s. 3 (15) of the Stamp Act for an amount not exceeding Rs. 1,000, and is therefore chargeable with a duty of 6 annas. Such an instrument is not within the scope of s. 25 (c) of the Stamp Act. REFERENCE UNDER STAMP ACT, 1879, S.46, 19 C. 499 ... 777

Statements.

See EVIDENCE, 18 C. 224.

Statute 11 and 12 Vic., c. 21.

(1) See PARTIES, 18 C. 43.

(2) S. 39—See MUTUAL CREDIT, 19 C. 146.

(3) S. 50—See INSOLVENT ACT, 11 AND 12 VIC., C. 21, 19 C. 605.

Statute 24 and 25 Vic., c. 104.

S. 15—See CRIM. PRO. CODE (ACT X OF 1882), 19 C. 127.

Statute 44 and 45 Vic., c. 58.

S. 151—See SMALL CAUSE COURT, 18 C. 144, 18 C. 372.

Statute 51 Vic., c. 4.

S. 7—See SMALL CAUSE COURT, 18 C. 144, 18 C. 372.

Stolen Property.

See PENAL CODE (ACT XLV OF 1860), 19 C. 190.

Sub-Agent.

See BANIEN, 18 C. 573.

Submission.

See ARBITRATION, 19 C. 334.

Subrogation.

See COMPANY, 18 C. 31.

Substantial Injury.

See SALE, 18 C. 422.

Succession.

See ACT I OF 1869 (OUDH ESTATES), 18 C. 1.

Succession Certificate Act (VII of 1889).

(1) See PARTIES, 18 C. 86.

(2) S. 4—*Execution of decree—Application for execution by legal representative without certificate.*—S. 4 of the Succession Certificate Act, 1889, merely provides that the Court shall not proceed upon an application of a person claiming to be entitled to execute a decree, except on the production of a certificate, or other authority of a like nature. But it does not follow from that section that an application might not be made without the production of a certificate, the certificate being supplied during the pendency of the proceedings. BROJO NATH SURMA v. ISSWAR CHANDRA DUTT, 19 C. 482 ... 765

(3) S. 4—See CERTIFICATE, 19 C. 336.

Sudras.

See HINDU LAW (INHERITANCE), 18 C. 151, 19 C. 99.

Suit.

(1) Against a purchaser from a benamidar—See BENAMI PURCHASE, 19 C. 199.

(2) By assignee of mortgage for sale—See CERTIFICATE, 19 C. 336.

(3) By one co-sharer entitled to collect rent separately for additional rent for land brought under cultivation payable in terms of lease—See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 755.

(4) By purchaser for possession when vendor is out of possession—See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 C. 623.

Suit—(*Concluded*). PAGE

(5) Exceeding Rs. 1,000 in value—See SONTHAL PERGUNNAHS, 18 C. 133.
(6) For arrears of putni rent for period during which zemindar had been in possession as purchaser at a sale which was subsequently set aside—See ARREARS OF RENT, 19 C. 267.
(7) For arrear of rent—See LIMITATION ACT (XV OF 1877), 18 C. 368.
(8) For enhancement of rent of a tenure by some only of several joint-landlords—See ACT VIII OF 1885 (BENGAL TENANCY), 19 C. 593.
(9) For land—See JURISDICTION, 19 C. 358.
(10) For possession—See ADVERSE POSSESSION, 19 C. 787.
(11) For possession of land ascertained after decree—See RES JUDICATA, 19 C. 159.
(12) In High Court by unsuccessful claimant to attached property in Small Cause Court—See ATTACHMENT, 18 C. 296.
(13) On ground of fraud—See SALE, 19 C. 341.
(14) Regarding matter decided by Settlement Court—See SONTHAL PERGUNNAHS SETTLEMENT REGULATION (III OF 1872), 18 C. 146.
(15) Resulting in proceedings unexpected from its nature and the relief sought—See SALE, 18 C. 188.
(16) To have an execution sale of land set aside—See EXECUTION OF DECREE, 19 C. 683.
(17) To oust a Shebait from office, the appointment to which is made by nomination—See LIMITATION ACT (XV OF 1877), 19 C. 776.
(18) To recover surplus sale proceeds of sale for arrears of revenue—See LIMITATION ACT (XV OF 1877), 18 C. 234.
(19) To set aside order under proviso to s. 272, Code of Civil Procedure—See ATTACHMENT, 19 C. 286.
(20) To set aside sale—See PUTNI TALUQ, 19 C. 699.
(21) To set aside sale on ground of fraud—See SALE, 18 C. 139,

Summons.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 19 C. 201.
(2) See CRIM. PRO. CODE (ACT X OF 1882), 19 C. 52.

Superintendence.

See CRIM. PRO. CODE (ACT X OF 1882), 19 C. 127.

Surrender.

See OCCUPANCY RAIYAT, 19 C. 790.

Survey Map.

See EVIDENCE, 18 C. 224.

Survivorship.

(1) See HINDU LAW—INHERITANCE, 18 C. 151.
(2) See HINDU LAW—JOINT FAMILY, 18 C. 157.

Symbolical Possession.

See LIMITATION ACT (XV OF 1877), 18 C. 520.

Takbast Survey Map.

See EVIDENCE, 18 C. 224.

Taluk.

See ACT I OF 1869 (OUDH ESTATES), 18 C. 111.

Talukdar.

See ACT I OF 1869 (OUDH ESTATES), 18 C. 1.

Teiskhana Registers.

See EVIDENCE, 18 C. 534.

Temporary Orders.

See CRIM. PRO. CODE (ACT X OF 1882), 19 C. 127.

Tenant holding over. PAGE

See RECEIVER, 18 C. 477.

Tenants-in-common.

See CO-SHARERS, 18 C. 10.

Theft.

See PENAL CODE (ACT XLV OF 1860), 19 C. 190.

Title.

(1) See ATTACHMENT, 19 C. 286.

(2) See EXECUTION OF DECREE, 19 C. 651.

(3) See SALE, 18 C. 125.

Transfer.

(1) *Of tenure—Registration—Notice—Bengal Tenancy Act* (VIII *of* 1885), *s.* 12.—After a recorded tenant has transferred his tenure to another person, and that transfer has been duly registered under the provisions of the Bengal Tenancy Act, he is no longer liable for the rent of the tenure, although the landlord may not have received actual notice of such transfer. CHINTAMONI DUTT v. RASH BEHARRY MONDUL, 19 C. 17 ... 457

(2) See EXECUTION OF DECREE, 18 C. 631.

(3) See LANDLORD AND TENANT, 19 C. 774.

(4) See SONTHAL PERGUNNAHS, 18 C. 247.

Transfer of Property Act (IV of 1882).

(1) *S.* 54, *Para* 3—*Transfer of Property Act Amendment Act* (III *of* 1885), s. 3—*Immoveable property of value less than one hundred rupees, transfer of—Suit by purchaser for possession when vendor is out of possession.*—The transfer by sale of tangible immoveable property of a value less than one hundred rupees can be effected only by one of the two modes mentioned in s. 54, para 3 of the Transfer of Property Act, *viz.*, by a registered instrument, or by delivery of possession. MAKHAN LAL v. BANKU BEHARI GHOSE, 19 C. 623 (F.B.) ... 858

(2) *S.* 59—See REGISTRATION, 18 C. 556.

(3) *S.* 82—*Mortgage—Contribution—Apportionment of the mortgage-debt—Mortgage-decree.*—A brought a suit upon a mortgage bond. Five of the defendants, who had subsequently purchased all the mortgaged properties, contended that under s. 82 of the Transfer of Property Act the mortgage-debt should be apportioned between the various mortgaged properties, and that each defendant should be allowed to pay off his rateable share of the mortgage debt. *Held*, that the intention of s. 82 was not that the lien of the mortgagee should be split, but simply to determine the liabilities of the purchasers *inter se*; and that therefore all the mortgaged properties were liable to satisfaction of the plaintiff's claim. ROGHU NATH PERSHAD v. HARLAL SADHU, 18 C. 320 ... 213

(4) Ss. 88 and 89—See SALE, 18 C. 139.

(5) S. 135—*Transfer of actionable claim.*—The first paragraph of s. 135 of the Transfer of Property Act has no application to a case in which the debtors deny the existence of the claim altogether, and where the purchaser of the claim has to obtain judgment affirming the claim before any satisfaction is made or tendered. Clause (*d*) of that section is not limited to cases where the judgment of a Court affirming the claim has been delivered, or where the claim is made clear by evidence, *before* the sale of the claim. BRAJENDRA NARAIN BAGCHI v. WATSON & CO., 18 C. 510 ... 341

Transfer of Property Amendment Act (III of 1885).

S. 3—See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 C. 623.

Trespasser.

See ARREARS OF RENT, 19 C. 267.

Uncertain Contingency.

See MAHOMEDAN LAW (WAKF), 18 C. 399.

Uncovenanted Service Family Pension Fund.

See STAMP ACT (I OF 1879), 19 C. 499.

Undue Influence. PAGE

See HINDU LAW—GIFT, 18 C. 545.

Universal Legatee.

See PRACTICE, 19 C. 582.

Unlawful Compulsory Labour.

Criminal force—Slavery—Wrongful confinement—Penal Code (Act XLV *of* 1860), ss. 344, 352, 370 *and* 374.—The accused induced the complainants, who he alleged were indebted to him in various sums of money to consent to live on his premises and to work off their debts. The complaints were to and did, in fact, receive no pay, but were fed by the accused his servants. He insisted on their working for him, and punished them by beating them if they did not do so. The complainants in addition alleged that they were prevented, leaving the accused's premises, and that they were locked up at night. On these allegations the accused was convicted by the first Court of offences under ss. 344, 370 and 374 of the Penal Code. On ap peal the convictions under the two former sections were quashed, the evidence as to detention being disbelieved, but that under s. 374 was upheld on the ground that by magnifying the complainants' debts to him and never setting their accounts, the accused had unlawfully compelled them to go on working for him against their will. On a rule to show cause why the conviction should not be quashed. *Held* (by *Petheram, C.J.*, and *Beverley, J*)., that the conviction was erroneous and must be set aside. *Petheram, C.J.*—A person who insists that another, who has consented to serve him, shall perform his work, does not unlawfully compel such person to labour against his will within the meaning of s. 374 of the Penal Code, because it is a thing which such person has agreed to do ; but if he assaults such person for not working to his satisfaction, he commits an offence punishable under s. 352. *Held*, by *Norris, J.*—That upon the facts of the case the complainants never gave their full and free consent to work and labour for the accused, and that the accused therefore did unlawfully compel them to labour against their wills, and that the conviction under s. 374 was right. MADAN MOHAN BISWAS v. QUEEN-EMPRESS, 19 C. 572 ... 824

User.

See FERRIES, 18 C. 652.

Using a forged Document.

See FORGERY, 19 C. 380.

Validity.

(1) Of mortgage security—See INSOLVENCY, 19 C. 223.

(2) Of sale—See EXECUTION OF DECREE, 19 C. 651.

Valuation.

(1) See APPEAL TO PRIVY COUNCIL, 18 C. 378.

(2) See COURT-FEES, 19 C. 272.

Voidable Contract.

See CONTRACT, 18 C. 259.

Voluntary Liquidation.

See COMPANY, 18 C. 31.

Waiver.

See HINDU LAW—INHERITANCE, 18 C. 341.

Widowed Daughter with Dumb Son.

See HINDU LAW—INHERITANCE, 18 C. 327.

Wills.

See ACT I OF 1869 (OUDH ESTATES), 18 C. 1.

Withdrawal of Suit.

See APPEAL—GENERAL, 18 C. 322.

Words and Phrases. PAGE

(1) "Appeal"—See EXECUTION OF DECREE, 18 C. 635.
(2) "Cause of action"—See CIV. PRO. CODE (ACT XIV OF 1882), 19 C. 372.
(3) "Charitable"—See MAHOMEDAN LAW—WAKF, 19 C. 412.
(4) "Courts"—See SONTHAL PERGUNNAHS, 18 C, 133.
(5) "Disaffection"—See DIS-AFFECTION, 19 C. 35
(6) "Dis-approbation"—See DISAFFECTION, 19 C. 35.
(7) "Dishonest"—See FORGERY, 19 C. 380.
(8) "Duly stamped"—See STAMP ACT (I OF 1879), 18 C. 39.
(9) "Express stipulation"—See RIGHT OF OCCUPANCY, 18 C. 349.
(10) "Fraudulent"—See FORGERY, 19 C. 380.
(11) "Joint landlords"—See ACT VIII OF 1885 (TENANCY, BENGAL), 19 C. 593.
(12) "Judgment"—See APPEAL—GENERAL, 18 C. 182.
(13) "Just cause"—See PROBATE, 18 C. 45.
(14) "Mutual credit"—See MUTUAL CREDIT, 19 C. 146.
(15) "Parties to the suit"—See EXECUTION OF DECREE, 19 C. 683.
(16) "Person"—See LIMITATION ACT (XV OF 1877), 18 C. 642.
(17) "Religious"—See MAHOMEDAN LAW—WAKF, 19 C. 412.
(18) "Satisfied on the certificate"—See ACT VIII OF 1885 (TENANCY, BENGAL), 18 C. 271.
(19) "Sufficient plea"—See PUTNI TALUQ, 19 C. 703.
(20) "Sufficient plea"—See SALE, 18 C. 363.
(21) "Suit"—See EXECUTION OF DECREE, 18 C. 635.
(22) "Suit"—See ACT IX OF 1879 (COURT OF WARDS, BENGAL), 18 C. 500.
(23) "What was demarcated by the thakbust map and proceedings of 1839"—See DECREE, 18 C. 108.
(24) "Whenever assets are realised"—See CIV. PRO. CODE (ACT XIV OF 1882), 18 C. 242.
(25) "Within the jurisdiction"—See SMALL CAUSE COURT, 18 C. 372.

Writ of Summons.
See CIV. PRO. CODE (ACT XIV OF 1882), 19 C. 201.

Wrongful Confinement.
See UNLAWFUL COMPULSORY LABOUR, 19 C. 572.

Wrongful Conversion.
See PLEDGE, 19 C. 322.

PRINTED AT THE LAW PRINTING HOUSE, MOUNT ROAD, MADRAS.